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

Re: St. Albans Group and Wal*Mart Stores, Inc.
Application #6F0471-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

TABLE OF CONTENTS

12/23/94
DOCKET #598

TABLE OF CONTENTS (CONTINUED)

TABLE OF CONTENTS (CONTINUED)

I. SUMMARY OF DECISION

This decision pertains to appeals of a land use permit issued for a proposed retail store known as a Wal*Mart store to be located in the Town of St. Albans (the Town).

As is explained below, the Environmental Board denies the application pursuant to Criteria 9(A) (impact of growth) and 9(H) (costs of scattered development). The **Board also states that the Applicants may take specific measures to correct the problems noted by the Board and, under a provision of Act 250, may continue to seek a permit.**

Key findings of the Board include:

a. **On an overall basis, the public costs of the proposed project are projected to outweigh the public benefits, The ratio is projected to be approximately three dollars of public cost for each dollar of public benefit.** By "public costs" and "public benefits," the Board refers to those costs which the proposed project will cause to affected governments or those benefits which will accrue to the governments.

b. Two important findings of the Board concerning the public costs are:

1. **The proposed project is projected to result in a net job loss for the Franklin County region.**

2. The credible evidence is that the proposed project will have an adverse impact on the tax base of the affected municipalities due to competition with existing retail businesses.

c. Based on what has occurred with other Wal*Mart stores, the proposed project is likely to be a magnet for other development in the vicinity.

1. The Applicants contend that such development, so-called "secondary growth," will be an unquantified, but net positive public benefit.

2. This application is for a large project with significant potential to cause secondary growth.

3. **The Board therefore needs specific projections as to the total growth and rate of secondary growth to be caused by the proposed**

project and the anticipated public costs and benefits associated with such growth. The Applicants have not provided this information.

d. The proposed project constitutes scattered development because it is not physically contiguous to the existing settlement of the downtown City of St. Albans.

1. The Exit 20 area in which the proposed project will be located does not constitute an existing settlement because it is not a compact, existing community center with mixed uses including a significant residential component.

2. Rather, the Exit 20 area is one in transition from rural to highway-oriented commercial development, contains few residences, and is ***planned*** for commercial development by the Town of St. Albans. Something which is planned or proposed is not ***existing.***

3. The proposed project will be located more than two miles from the downtown of the City of St. Albans. It will be one large commercial use with approximately 100,000 feet of retail space and 44 acres of improvements or disturbed land, sitting on a tract of land of approximately 107 acres. In contrast, downtown St. Albans consists of slightly less than 44 acres of land, with almost two million square feet of various uses concentrated on this land.

4. No existing land use in the vicinity consists of one, single store of the size of the proposed project. Most of the land uses are much smaller than the proposed project. The larger land uses in the area consist of multiple stores, not one large retail store.

5. While some large land uses proposed for the area have received Act 250 permits, none of these land uses was appealed to the Board. This is the first time that the Board has reviewed whether the Exit 20 area constitutes an existing settlement.

In part because of its decisions regarding Criteria 9(A) and 9(H), the Board also has reached negative conclusions under Criteria 6 (impact on schools) and 7 (local governmental services).

As noted below, a procedure is available in which the Applicants can

correct the deficiencies found by the Board. In a separate section of this decision, the Board highlights two important matters should the Applicants seek to use this procedure to obtain a permit.

First, the Applicants will need to make a sufficient and credible study of secondary growth which the project will cause and the associated public costs and public benefits.

Second, the Applicants will need to propose a mechanism such as a bond or an impact fee which will adequately alleviate the burden on any municipality for which the public costs will outweigh the public benefits. As an example, the Board refers to a contract between the applicant for the so-called Finard-Zamias Mall and the City of Rutland to alleviate the burdens on that City.

In its decision, the Board also makes positive findings for the Applicants under the following criteria: l(A) (headwaters), l(B) (waste disposal), l(E) (streams), l(G) (wetlands), 4 (soil erosion), 5 (traffic), and 9(K) (public investments and facilities). Concerning Criterion 10 (local plan), which is at issue in this appeal, the Board finds that the Town did not have a plan in effect when this application was filed.

In its decision regarding Criteria l(B) and l(E), the Board notes significant concerns which it has regarding draft stormwater procedures used by the State of Vermont Agency of Natural Resources (ANR) in approving stormwater runoff from the proposed project.

II. SUMMARY OF PROCEEDINGS

On December 21, 1993, the District #6 Environmental Commission issued Land Use Permit #6F0471 and supporting Findings of Fact, Conclusions of Law and Order (the Permit). The Permit authorizes the Applicants to construct a 126,090 square foot retail store to be served by municipal water and wastewater services. The project will be located off Route 7 in the Town of St. Albans, Vermont. An Act 250 permit is required pursuant to 10 V.S.A. §§ 6001(3), 6081(a) and Board Rule 2(A)(2) because the proposed project consists of the construction of improvements for commercial purposes on a tract of more than 10 acres.

On January 20, 1994, appeals of the Permit were filed with the Environmental Board pursuant to 10 V.S.A. § 6089(a) by the Franklin/Grand Isle County Citizens for Downtown Preservation (the Citizens) through their attorney,

Francis X. Murray, Esq.; by the Vermont Natural Resources Council (VNRC) through attorney Christopher M. Kilian, Esq.; and by Commons Associates (Commons) and Kellogg Properties, Inc. (Kellogg) through their attorney, Jon Anderson, Esq. Commons and Kellogg later filed a withdrawal of their appeal which the Board granted.

The Citizens believe the District Commission erred with respect to the following criteria of 10 V.S.A. § 6086(a): 1 (water pollution), l(B) (waste disposal), l(E) (streams), l(G) (wetlands), 4 (soil erosion), 5 (traffic), 6 (impact on schools), 7 (local governmental services), 8 (historic sites), 9(A) (impact of growth), 9(H) (costs of scattered development), 9(K) (public investments and facilities), and 10 (conformity with local plan). The District Commission granted the Citizens party status on Criteria 7, 8, 9(A), 9(H), and 9(K) and denied the Citizens party status on the remainder. The Citizens appeal the denial of party status and filed a party status petition along with their appeal.

VNRC believes the District Commission erred with respect to the following criteria of 10 V.S.A. § 6086(a): 8 (historic sites), 9(A), 9(H), 9(K), and 10. VNRC sought and was denied party status on these criteria by the District Commission, and appeals that denial. VNRC filed a party status petition along with its appeal.

On February 2, 1994, the Applicants filed a cross-appeal. In that cross-appeal, the Applicants appeal the District Commission's grant of party status to the Citizens on Criteria 7, 8, 9(A), 9(H), and 9(K).

On March 21, 1994, Acting Chair Steve E. Wright convened a prehearing conference in St. Albans Bay. On March 30, the Acting Chair issued a prehearing conference report, which is incorporated by reference.

After submission of memoranda by the parties and deliberation by the Board, on April 15, 1994 the Board issued a memorandum of decision which is incorporated by reference. This decision addressed party status as well as other preliminary issues.

With regard to party status, in the April 15 decision, the Board granted the Applicants' cross-appeal with respect to party status under Criterion 8 (historic sites) and denied party status (and therefore the right to appeal on the merits) to both the Citizens and VNRC on that criterion. Concerning party status, the Board otherwise denied the Applicants' cross-appeal and granted the appeals of the Citizens and VNRC. This meant that appeal would go forward on the following criteria: 1 (water pollution), 4 (soil erosion), 5 (traffic), 6 (impact on

schools), 7 (local governmental services), 9(A) (impact of growth), 9(H) (costs of scattered development), 9(K) (public investments and facilities), and 10 (conformity with local plan). Concerning Criterion 1, the Board ruled that the issues would be limited to Criteria l(A) (headwaters), l(B) (waste disposal), l(E) (streams), and l(G) (wetlands).

Following motions for reconsideration by the Applicants, the Citizens, and VNRC, and briefing by the parties, the Board issued a further memorandum of decision on May 11, 1994, which is incorporated by reference. In the May 11 decision, the Board did not change the decisions reflected in the April 15 decision regarding party status and the criteria on which appeal would go forward.

During June and July 1994, the parties filed prefiled direct and rebuttal testimony, lists of witnesses and exhibits, and written evidentiary objections. During that time, the Chair determined that State witnesses should be called with respect to the impacts of the proposed project on traffic, wetlands, and soil erosion.

On July 6, 1994, Chair Gibb convened a second prehearing conference with the Applicants, the Town the Citizens, VNRC, and the State of Vermont participating. During that conference, the Chair and the parties reached agreement on appropriate times for presentation of evidence and cross-examination and on an agenda for a site visit. The Chair also made evidentiary rulings which were later stated on the record during the hearings.

The Board convened hearings on July 7, 13, and 14, 1994, with the following parties participating:

The Applicants by Peter M. Collins, Esq.
The Town by William F. Rugg, Esq.
The Citizens by Francis X. Murray, Esq.
VNRC by William E. Roper, Esq.
The State of Vermont by Kurt Janson, Esq. (at the Board's request)

On July 7, the Applicants filed a hearing memorandum.

After taking a site visit, and hearing testimony and closing arguments from the parties, the Board recessed, pursuant to Board Rule 13(B), pending filing of proposed findings of fact and conclusions of law, review of the record, deliberation, and decision. On July 19, the Board, through Counsel, issued a recess memorandum which is incorporated by reference.

During August 1994, the Applicants filed proposed findings of fact, and the Citizens and VNRC filed proposed findings of fact and conclusions of law.

The Board deliberated concerning this matter on August 24, September 14, and October 13, 1994. Parties were notified in advance of the date of each of these deliberations. On October 13, the Board determined that the parties' positions were unclear with regard to the specific fiscal impacts of the proposed project and that it would request that the parties submit charts clarifying their specific contentions. The Board also decided to request clarification from ANR concerning stormwater procedures along with a certified copy of the procedures.

On October 25, 1994, Chair Gibb issued a memorandum to parties stating the Board's need for clarification and giving instructions regarding the submission of charts. The Chair also sent a letter to ANR regarding the stormwater procedures. The Chair's memo and letter of October 25, as well as a clarifying memo issued by Counsel on November 8, are incorporated by reference.

On November 16, the Citizens and VNRC filed a joint set of fiscal impact charts, and the Applicants and the Town each filed an individual set of fiscal impact charts. On November 18, VNRC and the Citizens each filed motions to strike portions of the charts filed by the Applicants and the Town on the basis that those charts went beyond the Board's instructions. VNRC's motion included a request for attorney's fees.

In accordance with the Chair's October 25 memorandum, the Board deliberated further on November 28, 1994. On November 28, in response to the motions by the Citizens and VNRC regarding the charts, the Board unanimously agreed that, mindful of the instructions given to the parties, it would disregard any significant deviations from those instructions. The Board also unanimously voted to deny the request for attorney's fees. **Parties are hereby informed of these decisions.**

For reasons outlined in the Chair's memorandum to parties of November 29, 1994, the Board was not able to reach decision on that date concerning all pending issues. The Chair's November 29 memorandum is incorporated by reference.

The Board deliberated again on December 5, 1994, and parties were informed of the status of the case by memorandum of the Chair issued December 6, 1994.

On December 5, 1994, following a review of the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. 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

Whether the proposed project complies with the following criteria set forth at 10 V.S.A. § 6086(a): l(A) (headwaters), l(B) (waste disposal), l(E) (streams), l(G) (wetlands), 4 (soil erosion), 5 (traffic safety and congestion), 6 (impact on schools), 7 (local governmental services), 9(A) (impact of growth), 9(H) (costs of scattered development), 9(K) (public investments and facilities), and 10 (conformity with local plan).'

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

For the convenience of the reader, the findings of fact and conclusions of law 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 Findings**

1. The proposed project will be located off US Route 7 in the Town of St. Albans (the Town). The St. Albans Drive In Theater is located across US 7 from the site of the proposed project.

2. The Act 250 application for the proposed project initially pertained to an approximately 126,000 square foot retail store. During this appeal, the Applicants revised their proposal to consist of an approximately 100,000 square foot retail store. The Applicants intend to seek approval of the

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'The Applicants have provided evidence and argument concerning Criterion 9(J) (public utility services) but this criterion was not appealed to the Board

additional 26,000 square feet in the future.

3. The proposed project will include 44 acres of improvements or disturbed land, on a tract of land of approximately 107 acres. The proposed project involves one single commercial use, a Wal*Mart store.

4. The Applicants are the St. Albans Group, which owns the site of the proposed project, and Wal*Mart Stores, Inc., the national retailer which seeks to build a store on the site.

5. The City of St. Albans (the City) is a separate political entity from the Town. The proposed project is located slightly over two miles from the City's downtown.

6. Both the City and the Town are located in Franklin County. Other towns in the Franklin County region (the Region) which will be discussed below are the Towns of Enosburg, Fairfield, Georgia, and Swanton. Enosburg is located in the northeast part of Franklin County, Georgia in the southwest, and Swanton in the northwest. Fairfield is located just east of the Town of St. Albans.

B. **Water Pollution and Soil Erosion**

Findings of Fact

7. St. Albans Bay (the Bay), located in the northeast arm of Lake Champlain near the Towns of St. Albans and Georgia, is approximately 1700 acres in surface area with a drainage area of about 50 square miles located in Franklin County. Land uses in the drainage area are primarily agricultural, forested, and urban. The area is within the Champlain Lowlands, an area of low relief between Lake Champlain and the Green Mountains.

8. The existing elevation of the project site ranges from approximately 335 to **approximately 365 feet. The site is not characterized by steep slopes or** shallow soils. The site is not within a watershed of a public water supply designated by the State of Vermont Department of Health. The site is not within an area supplying a significant amount of recharge water to an aquifer.

9. On September 9, 1993, the Division of Protection, which is within the Department of Environmental Conservation of the State of Vermont

Agency of Natural Resources (ANR), issued Water Supply and Wastewater Disposal Permit #WW-6-0229 (the Wastewater Permit) to applicant St. Albans Group. The Wastewater Permit pertains to the construction of a 154,628 square foot retail store, "known as Wal-Mart," with a 40 seat restaurant, to be located off Route 7 in the Town.

10. In relevant part, the Wastewater Permit approves the proposed project for connection to a wastewater treatment facility owned and operated by the City. The Wastewater Permit allows the project a maximum of 9731 gallons per day.

11. On January 9, 1994, the Wastewater Management Division of ANR's Department of Environmental Conservation issued Discharge Permit #1-1159 (the Discharge Permit) to Wal*Mart Stores, Inc. The Discharge Permit authorizes applicant Wal*Mart Stores, Inc. to discharge stormwater runoff from the access road, parking, and building "associated with Wal-Mart Stores, a retail store located off Route 7 in St. Albans, Vermont."

12. The Discharge Permit describes the manner of discharge as follows:

> Stormwater runoff from the access roadway, parking and building roofing via catch basins and a closed collection system to a sedimentation/detention basin. The basin discharges via a stabilized outlet to an existing grassed drainageway to Stevens Brook.

13. The Bay contains and has for many years contained excessive concentrations of plant nutrients, particularly phosphorous.

14. Excessive amounts of plant nutrients in water promote blooms of algae.

15. Algal blooms may have significant negative impacts on water quality, including decreased water transparency, noxious odors, and a corresponding significant decline in recreational values.

16. Agriculture, which is not regulated by Act 250, is a major contributor of phosphorous and other plant nutrients to the Bay.

17. Another major contributor of plant nutrients to the Bay was the City's wastewater treatment plant. A major upgrade to the City's wastewater treatment plant in 1987 dramatically reduced its contribution to nutrient

loading of the Bay.

18. Federal and state agencies have invested millions of dollars for programs to reduce nutrient loading of the Bay.

19. Nutrient loading has been significantly reduced by these programs but water quality in St. Albans Bay has not been significantly improved.

20. Stevens Brook is a tributary of the Bay and is the most significant tributary in terms of phosphorous loading. The highest concentrations of phosphorous in the Bay have been observed at the inflow of Stevens Brook.

21. The project site currently is a corn field and discharges through stormwater approximately 200 pounds (lbs) of phosphorous per year.

22. On completion, based on a lo-year, 24-hour design storm, the peak flow of stormwater from the proposed project will be less than the pre-development peak flow.

23. On completion, the proposed project will discharge through stormwater approximately 60 lbs. of phosphorous per year. This will reduce the phosphorous to lower than the level in the current discharge from the site which is now a corn field. The phosphorous level will exceed the level which would occur in stormwater flow from the site in its natural state (no development).

24. It may be feasible to design the project so that its contribution of phosphorous to the Brook is closer, or equal, to the phosphorous contribution of the site in its natural state to the Brook.

25. ANR has issued Draft Stormwater Procedures (April 1987) (the Draft Procedures). These procedures do not currently require that projects be designed to achieve the nutrient load levels of the relevant site in its natural state. Several other states have imposed such a requirement.

26. Section 4.21 of the Draft Procedures states:

> The control of stormwater runoff requires the use of detention structures such that the post-development peak flow from the site does not exceed the pre-development peak

flow based on the runoff from a lo-year, 24 hour design storm.

27. The Draft Procedures do not specify any numerical limits for the quantity of nutrients in stormwater discharges from developments.

28. ANR issued the Discharge Permit to the Applicants based on the Draft Procedures.

29. The proposed project will not affect any wetlands which are Class One or Class Two under the Vermont Wetland Rules issued by the Vermont Water Resources Board effective February 23, 1990, as amended September 19, 1990.

30. The Applicants will control soil erosion during and after construction. Their plan is designed according to the Vermont Handbook of Soil Erosion and Sediment Control on Construction Sites (1982) issued by ANR.

31. The principal measures of erosion control include the construction of a sedimentation basin and silt barriers along the toe of the embankments and affected drainage channels. Those devices will check silt and decrease runoff velocities until permanent soil erosion control measures are established. Permanent measures will include loaming, seeding, and mulching of all disturbed areas. Drainage paths with slopes greater than five percent will be stone lined. Drainage paths with slopes between one percent and five percent will be seeded and protected with erosion matting. Drainage paths with slopes that are less than one percent will be seeded and mulched. Topsoil stripped from the project road will be stockpiled on-site and saved for reclaiming disturbed areas. Stockpiles will not exceed 10 feet in height and will be ringed with hay bales to prevent sediment from leaving the area. The Applicants will seed and mulch any unused stockpiles. All parking areas will be paved.

Conclusions of Law

1. Criterion 1(A): Headwaters

10 V.S.A. § 6086(a)(l)(A) requires that, before issuing a permit, the Board must find that the Applicants have demonstrated that, for any areas that qualify as headwaters, the proposed project will comply with any applicable regulations of the Departments of Health and Environmental Conservation regarding reduction

of groundwater or surface quality. The statute provides:

> A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable health and environmental conservation department regulation regarding reduction of the quality of the ground or surface waters flowing through or upon lands which are not devoted to intensive development, and which lands are:
>
> (i) headwaters of watersheds characterized by steep slopes and shallow soils; or
> (ii) drainage areas of 20 square miles or less; or
> (iii) above 1,500 feet elevation; or
> (iv) watersheds of public water supplies designated by the Vermont department of health; or
> (v) areas supplying significant amounts of recharge waters to aquifers.

The proposed project will not affect any headwaters as that term is defined in 10 V.S.A. § 6086(a)(l)(A)(i) through (v), above. Accordingly, the proposed project complies with Criterion l(A).

2. Criterion 1(B) (Waste Disposal)

10 V.S.A. § 6086(a)(l)(B) requires that, prior to issuing a permit, the Board must find that the Applicants have demonstrated that the proposed project will comply with any applicable regulations of the Departments of Health and Environmental Conservation regarding waste disposal and will not involve injection of substances into groundwater or wells. The statute provides:

> A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.

Pursuant to 10 V.S.A. § 6086(d), the Board has by rule provided that various state permits create a rebuttable presumption of compliance with respect to waste disposal.

Seeking to create such a presumption, the Applicants have submitted the Discharge Permit for stormwater runoff and the Wastewater Permit, as found above. Under Rule 19(E)(l), the two permits submitted by the Applicants in this proceeding create a presumption:

> That waste materials and wastewater can be disposed of through installation of wastewater and waste collection, treatment and disposal systems without resulting in undue water pollution.

The Applicants therefore have created a rebuttable presumption of compliance with Criterion l(B).

Once a presumption is established, the burden of proof transfers to those parties claiming non-compliance, in this case, the Citizens. Under Rule 19(F), the Citizens must show either: (a) that the proposed project is likely to result in undue water pollution or (b) that there is technical non-compliance with applicable regulations and such non-compliance will result in or substantially increases the risk of undue water pollution. Rule 19(F) provides, in relevant part:

> If the commission or board concludes, following the completion of its own inquiry or the presentation of the challenging party's witnesses and exhibits, that a preponderance of the evidence shows that undue water pollution ... is likely to result, the commission or board shall rule that the presumption has been rebutted. Technical non-compliance with the applicable health and water resources and environmental engineering department regulations shall be insufficient to rebut the presumption without a showing that the non-compliance will result in, or substantially increases the risk of, undue water pollution .... Upon the rebuttal of the presumption, the applicant shall have the burden of proof under the relevant criteria and the permit or certification shall serve only as evidence of compliance.

The Board applies these authorities, in light of the facts found above, to the contentions of the Citizens.

The Citizens argue that St. Albans Bay is currently experiencing undue water pollution due to nutrient loading, particularly of the element phosphorous.

The Citizens contend that the proposed project will exacerbate this pollution because on completion the project site will continue to contribute

phosphorous to Stevens Brook. The Supreme Court previously has stated that the Board may consider exacerbation of an existing condition in determining compliance with the criteria. In re Pilgrim Partnership, 153 Vt. 594, 596 (1990).

The Citizens argue specifically that the project's continued contribution of phosphorous to the St. Albans Bay will constitute undue water pollution because the Applicants allegedly have not taken all feasible and reasonable measures to reduce the level of phosphorous in the project's stormwater runoff. Specifically, while the Applicants have designed their project to reduce the phosphorous to lower than the level in the ***current*** discharge from the site which is now a corn field, they have not designed their project to achieve the phosphorous level which would occur in stormwater flow from the site in its ***natural state.***

The Applicants contend that they have designed the project in accordance with ANR's Draft Procedures and that the project site will discharge less phosphorous after the project is built than the site does now. The Citizens counter that the Draft Procedures are inadequate to protect the environment and that alternative methods are being developed in other states.

Based on the facts above, the Board concludes that the Citizens' initial contention is correct, and that St. Albans Bay is currently experiencing undue water pollution due to nutrient loading.

The remainder of the Citizens' contentions primarily address the adequacy of the Draft Procedures to protect the environment. The Board concludes that it may properly consider such adequacy because it has a supervisory role over ANR in environmental affairs. In re Hawk Mountain, 149 Vt. 179, 185 (1988). Moreover, under the statute the Board's duty under Criterion 1 is to ensure that developments do not result in undue water pollution.

Exercising its supervisory role, the Board has noted two significant concerns which it has concerning the Draft Procedures.

First, the Draft Procedures do not require or even address a "natural state" design standard, despite the fact that some other states are requiring such a standard. Under some circumstances, the Board believes that a "natural state" design standard may be necessary to protect an aquatic resource. This case presents a prime example. The existing site is in agricultural use and agricultural uses are a major contributor of phosphorous to the Bay. Using such as a benchmark clearly presents little or no real potential of improving the Bay's water quality. Instead, to achieve improvement of the Bay, it may be best if projects

affecting the Bay were designed to achieve a pollutant level equivalent to the site in its natural state.

Second, the Procedures are "Draft." The Board does not believe it appropriate for ANR to base permits on procedures which have never been finalized. As a matter of policy, substantive procedures on which permits are based should be finalized after going through a public hearing process.

While the Board has identified significant concerns regarding the Draft Procedures, the Board recognizes that it would be unfair in this appeal to find the presumption rebutted based on the concerns identified. This is because the Applicants clearly have designed their stormwater discharge system to meet existing regulations and to achieve a lower level of peak flow than the current discharge from the site.

The Board therefore concludes that this application complies with Criterion l(B). The Board cautions that it may not reach such a conclusion with regard to future applications.

3. Criterion 1(E) (Streams)

10 V.S.A. § 6086(a)(l)(E) requires that, before issuing a permit, the Board determine whether the proposed project is on or adjacent to a stream and, if so, whether the proposed project will maintain the natural condition of the stream whenever feasible and will not endanger the health, safety, or welfare of the public or of adjoining landowners. The statute provides:

> A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision of lands on or adjacent to the banks of a stream will, whenever feasible, maintain the natural condition of the stream, and will not endanger the health, safety, or welfare of the public or of adjoining landowners.

For the reasons discussed above under Criterion l(B), the Applicants have created a rebuttable presumption of compliance with Criterion l(E) by submitting the Discharge Permit and the Wastewater Permit.

The Citizens contend that stormwater runoff from the proposed project will cause undue water pollution in Stevens Brook. For the reasons discussed above under Criterion 1(B), and with the same concerns noted, the Board concludes that

the presumption is not rebutted and that the proposed project complies with Criterion l(E).

4. Criterion 1(G) (Wetland Rules)

10 V.S.A. § 6086(a)(l)(G) requires that, before issuing a permit, the Board must find that the Applicants have demonstrated that the proposed project will conform with the Vermont Wetland Rules issued by the Vermont Water Resources Board. The statute provides:

> A permit will be granted whenever it is demonstrated by the applicant, in addition to other criteria, that the development or subdivision will not violate the rules of the water resources board, as adopted under section 905(9) of this title, relating to significant wetlands.

The proposed project will not affect any wetlands which are Class One or Class Two under the Wetland Rules. Those rules state that significant wetlands are those which are Class One or Two. Vermont Wetland Rules § 4.1 (1990). Accordingly, the proposed project will not violate the Wetland Rules.

5. Criterion 4 (Soil Erosion)

10 V.S.A. § 6086(a)(4) requires that, before issuing a permit, the Board must find that the proposed project:

> Will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

Under this criterion, the burden of proof is on the Applicants. 10 V.S.A. § 6088(a). Based on the foregoing findings of fact, the Board concludes that the proposed project complies with Criterion 4.

C. **Fiscal Impacts and Plan Conformity**

Findings of Fact

1. Growth Impacts, Capital Budget, Applicable Plans

32. The Town of St. Albans duly adopted a five-year capital budget on August

28, 1989. As of July 1994, the Town was in the process of adopting a new five-year budget.

33. The current Town Plan was not effective until eight days after the date that the application for this project was filed. No regional plan was in effect on such date.

34. Between 1987 and 1992, full-time resident population of the Town grew from 4,250 to 5,127, or approximately 20 percent. The average annual rate of population growth during those years was approximately four percent. The Town projects that, by the year 2000, its full-time resident population will grow to 6,091, or approximately 18 percent between 1992 and 2000. This would mean an average annual rate of population growth for the Town during those years of approximately two percent.

35. Between 1987 and 1992, full-time resident population of Franklin County grew from 38,054 to 41,601, or approximately nine percent. The average annual rate of population growth during those years was approximately two percent. The Town projects that, by the year 2000, the full-time resident population of Franklin County will grow to 45,349, or approximately nine percent between 1992 and 2000. This would mean an average annual rate of population growth for the County during those years of slightly over one percent.

36. In recent years, the rate of population growth in the Town has been faster than in the City or in the Franklin County region as a whole. The Town projects that this trend will continue at least through the year 2000.

37. In addition to full-time residents, the Town must provide services to a significant number of seasonal homes.

38. The proposed project will, in and of itself, cause little population growth. All but approximately five of the employees hired to work at the proposed project will be hired locally. The Applicants project that the five employees who will move into the Region will add six children, at most, to the Region.

39. The Applicants have provided no credible evidence stating the total amount of commercial and residential development, or the rate of such development, which has occurred in the Town and region during recent years, or which is forecast to occur,

40. The proposed project is a large retail project which is likely to encourage and accelerate the development of other highway-oriented businesses in the area. The Board will refer to the additional development to be caused by the project as "secondary growth."

41. In other New England communities, as well as in other communities across the country, Wal*Mart stores have been a catalyst for secondary growth in the vicinity of the stores. These types of stores are generally highway-oriented development, and typically can include fast-food franchises such as Burger King and Kentucky Fried Chicken, pizza and sandwich shops, gas stations, banks, video rental stores, new shopping centers, and expansion of existing shopping centers.

42. The proposed project is likely to generate substantial secondary growth within the Town. The Applicants have provided no evidence concerning the total amount of such growth or the rate at which such growth will occur.

43. The Applicants have provided no evidence concerning whether secondary growth will encourage population growth in the Town and Region.

44. The Applicants also have provided no specific evidence concerning the anticipated public costs and public benefits caused by the resulting secondary growth.

45. Accelerated development, including but not limited to highway-oriented development, may result in significant public costs to the affected governments. Such development often requires additional services such as highway improvements, sewer, water, fire protection, police, and emergency services.

46. With regard to secondary growth, the Applicants' consultant, RKG Associates, Inc., testified that the proposed project will have an unquantified, but net positive, economic impact on the Town and the Franklin County region. For the reasons stated in the Findings immediately below, this testimony is not credible.

47. There are approximately 1,900 Wal*Mart stores in the United States. There are approximately 23 Wal*Mart stores in New England. The Applicants have provided no study which: (a) applies data concerning the secondary growth impact of these stores to the particular facts of the Town

and the Region and (b) reaches reasonable numerical conclusions concerning the total amount of secondary growth to be caused by the proposed project or the rate of such growth.

48. The Applicants have provided Exhibit A-34, which consists of 11 case studies of Wal*Mart stores in New England. These studies demonstrate that, when Wal*Mart stores are sited in New England, they cause substantial amounts of secondary growth in the immediate vicinity of a Wal*Mart store.

49. Exhibit A-34 is otherwise insufficient because the exhibit does not provide projections of the total growth and rate of growth which the proposed project will cause. The exhibit also is flawed because it lists only public benefits from secondary growth in the form of increased tax revenues and does not consider any public costs.

50. A wealth of data exists concerning the specific characteristics of the existing market in the Town and Region. For example, the Applicants have provided Exhibit A-33, prepared by RKG Associates, entitled "Economic and Fiscal Impact Analysis of the Proposed Wal-Mart Development St. Albans, Vermont." Appendix A of this exhibit, entitled "Statistical Tables," includes lengthy reports containing data on market value of property, population characteristics, household wealth, education, employment, shopping habits, annual sales of existing retail establishments, etc.

51. It is feasible for the Applicants to provide a credible numerical study of the total secondary growth and rate of such growth which the proposed project will cause in the Town and Region, and the associated costs and benefits.

52. RKG also testified that any secondary growth generated by the proposed project will be reviewed under local and state planning laws at the time the specific projects are proposed.

2. Public Costs and Public Benefits

53. The credible evidence is that annual public benefits caused by the proposed project will include, in 1995 dollars, at current tax rates, and under the current formula for state aid to education:

a. Approximately $77,000 in direct property tax revenues from the

proposed project to the Town.

b. Approximately $32,400 in increased state aid to education to the area municipalities, itemized as follows:

i. $1,400 - Town of Enosburg

ii. $5,000 - Town of Swanton

iii. $26,000 - City of St. Albans

54. The credible evidence is that annual public costs caused by the proposed project will include, in 1995 dollars, at current tax rates, and under the current formula for state aid to education:

a. Approximately $61,000 in state aid to education which the Town will lose, starting in 1996.

b. Approximately $11,500, representing the cost to the Town of direct services to the proposed project.

c. Approximately $25,000 in operating costs to the Franklin County Supervisory Union caused by the addition of six students to the school system.

d. As much as approximately $110,000 in lost property tax revenue due to changes in the Grand Lists of the relevant municipalities caused by competition from the proposed project. This amount is itemized as follows:

i. $45,000 - the City.

ii. $58,000 - the Town.

iii. $5,000 - Swanton.

iv. $2,000 - Enosburg.

e. As much as approximately $19,000 in lost property tax revenue due to the effects of job loss in the Region, caused by the proposed project, itemized as follows:

i. $11,000 - the City.

ii. $8,000 - the Town.

f. Approximately $88,000, representing public funds which have been invested in downtown revitalization or preservation of historic buildings. This investment is likely to be lost if the proposed project has the projected negative impact on the City.

55. The credible evidence is that the proposed project will result in a net loss for the Region of 50 jobs in 1995, growing to a loss of approximately 130 jobs in 2004.

56. The credible evidence is that lost property tax revenue due to the effects of job loss in the Region, caused by the proposed project, will rise to approximately $50,000 in 2004.

57. With regard to the City, any losses in tax base due to competition from the proposed project are likely to adversely affect the City's downtown, which is the location for the existing businesses in the City which offer retail goods.

58. A negative impact on the City's downtown is likely to jeopardize the viability of the buildings and structures in the City's historic district, thereby jeopardizing public funds which have been invested in that district.

59. The Applicants propose the formation of a "St. Albans Marketing Association" to invest $225,000 over several years in promoting "St. Albans." The goals and structure of this organization are vague.

60. With respect to the Town, some losses may be off-set, either partially or completely by public benefits and jobs created by secondary growth caused in the Town in the vicinity of the proposed project. The absence of specific information concerning the public costs and public benefits of such growth is discussed elsewhere in this decision.

61. Because secondary growth caused by the project is likely to be built in the vicinity of the project, such growth is unlikely to off-set losses to the City, Enosburg, or Swanton.

62. The Applicants propose that they will pay the costs of all highway

improvements associated with the proposed project. These improvements are delineated below in the Findings of Fact concerning traffic.

63. The Applicants propose that they will pay all costs of extending the City's sewer and water line out to the area of the proposed project, as well as the costs of connecting the proposed project. The Applicants also will finance the City's cost in serving the project by paying an allocation fee and an annual user fee to the City.

64.. In evaluating public costs and benefits associated with the proposed project, RKG Associates provided testimony concerning the estimated sales of the proposed project and the impact of those sales on existing retailers in the Region. RKG based its sales testimony in significant part on the following:

a. An estimate of future sales per square foot for the proposed project of $219, which is well below the national Wal*Mart average in 1993 of $297. RKG Associates was not given actual data on sales per square foot by applicant Wal*Mart Stores, Inc.

b. An estimate of "leakage" recapture by the proposed project in the amount of $5.7 million in 1995. "Leakage" refers to sales of goods presently purchased outside of the Region - primarily in Chittenden County - by consumers who reside in the Region.

c. An estimate that 30 percent of total sales will be made to Canadian residents.

65. In evaluating public costs and benefits associated with the proposed project, Thomas Muller and Elizabeth Humstone, the witnesses for the Citizens and VNRC, provided testimony concerning the estimated sales of the proposed project and the impact of those sales on existing retailers in the Region. Muller and Humstone based their sales testimony in significant part on the following:

a. An estimate for sales per square foot for the proposed project of $316 in 1995 and $400 in 2000. This is based on the 1993 national average for Wal*Mart of $297 per square foot. The estimate also includes adjustment factors based on Wal*Mart's past annual rate of growth, in other markets, in sales per square foot; and on factors based on the size and characteristics of the local market.

b. An estimate of "leakage" recapture in the amount of $2.5 million in 1995.

c. An estimate that 10 percent of total sales will be made to Canadian residents.

66. Many of the goods offered by Chittenden County merchants to Franklin County residents are upscale goods which are not sold now in Franklin County and which will not be sold by the proposed project. Many Franklin County residents commute to work in Chittenden County and will continue to do so. Commuters typically shop in the work area before travelling home. The proposed Wal*Mart is unlikely to change this habit.

67. Canadian tourism is variable (it has recently declined). The market area for the proposed project will include portions of Quebec just over the Canada-Vermont border. Wal*Mart now has stores in Canada which are within the vicinity of the Canada-Vermont border and which cover the same market area as the proposed project.

68. Aside from leakage recapture and tourism, the only remaining source for sales at the proposed Wal*Mart is the existing market for retail goods in Franklin County.

69. Personal income in Franklin County is 85 percent of the Vermont state average.

70. The existing market for the proposed project is relatively undersized. Thus, the dollars available from Franklin County residents to support both a Wal*Mart Store and existing businesses are more scarce than elsewhere.

71. The projected additional six children projected referred to in Finding 38, above, will attend schools managed by the Franklin Central Supervisory Union (the Union). The Union is the central authority managing the schools in the City, the Town, and the Town of Fairfield.

72. The total population of school age children in the Union is approximately 2,882 and has grown an average of 1.3 percent annually for the last 10 years. The total population of school age children in the Town alone is approximately 962 and has grown approximately 4.5 percent per year for the last 10 years.

73. The Union school system is presently overcrowded and therefore does not have the physical capacity to accommodate the projected six additional school children. Such a lack of capacity, coupled with additional pressure caused by projects such as the one proposed, appears likely to generate the need for additional capital expenditures to increase the physical capacity of its school system. Any such increase in physical capacity would be paid by the municipalities who are members of the Union.

74. The Applicants have offered no plan to assist the Union in alleviating the adverse impact to be caused by the proposed project.

75. To add physical capacity, a bond vote would be needed. Votes concerning the school budget have failed several times in the City in recent years. The Town recently voted to increase capacity at an elementary school within the Town.

3. Settlement Patterns

76. In Vermont, development historically has been concentrated in small, compact centers surrounded by rural countryside. These centers typically involve a mix of diverse uses: residences, retail shops, services, offices, government, industry, etc. These uses are typically located centrally, and on a scale which allows people to walk from one to the other. Buildings in the centers have mixed uses and front directly on public streets. Offices and apartments are frequently on the second or third floors of the buildings with retail uses and services on the first floor. Combined parking facilities in the centers serve a diversity of uses and developments and are typically centrally located within the center. Street lighting is usually shared. The proximity of the buildings to each other often forces design and signage to be compatible.

77. The City traditionally has been the community center for the St. Albans area and for the Region. It contains a compact downtown with a mix of uses, including commercial, industrial, and residential. People may live and work in the City and the uses are largely within walking distance of each other.

78. The City's downtown contains a significant historic district which is listed on the National Register of Historic Places maintained by the United States Department of the Interior. This historic district consists of over one hundred buildings and structures arranged around Taylor Park. The

vast majority of these buildings and structures is in private use. Over the years, millions of dollars in federal and state funds have been invested to preserve the City's historic district and for downtown revitalization.

79. The City's downtown consists of slightly less than 44 acres of land, with almost two million square feet of various uses concentrated on this land.

80. The area in which the proposed project will be located has been designated for growth by the Town. This area is located near Exit 20 of Interstate 91. The Town has zoned the area for commercial and light industrial uses. The Board will refer to this area as "the Exit 20 area."

81. Uses in the Exit 20 area are not arranged in a compact way but are spread out along the existing highways, discouraging pedestrians.

82. The Exit 20 area is in transition from agricultural to commercial use. Interspersed with cultivated and pasture land, one finds highway-oriented commercial uses such as fast-food restaurants, gas stations, an auto dealership, an appliance store, and others. Each of these uses has its own curbcut, circulation system, and parking lot. The largest is the Highgate Shopping Center, consisting of multiple stores for a total of approximately 200,000 square feet. Most of the other existing commercial uses in the Exit 20 area are much smaller. The area contains few residences.

83. Several major developments are proposed and approved for the Exit 20 area, to be located on some of the land that is presently in open space use such as agriculture. For example, Franklin Park West, also known as the Vermont Technology Park, is proposed to be located in the Exit 20 area. This park will consist of 22 lots when all phases are done, for a total of approximately 150,000 to 200,000 square feet. It will include more total retail space than will the proposed project; the space will be divided into many different stores.

84. The Exit 20 area is a partially developed area which is an emerging commercial zone with highway-oriented development of the type commonly called "strip." It is not a community center in the manner of the traditional Vermont center. It is not a compact mixture of buildings with a largely pedestrian scale. It does not have a significant residential component.

85. Visually and architecturally, the development in the Exit 20 area is different from that of the City's downtown.

86. The City's downtown and the Exit 20 area are connected by Vermont Route 7 but are separated by distance and by intervening, distinct types of uses. Running from downtown out toward the site of the proposed project, the following occur along Route 7: a residential area (.4 miles), a commercial strip (.3 miles), residential and vacant land with scattered commercial uses (.4 miles), and strip commercial and scattered commercial development (1 mile).

87. In the Exit 20 area, the existing agricultural and open spaces uses are much less intensive than the proposed project. Most of the existing commercial uses are much smaller than the project. The existing large uses in the area, such as the Highgate Shopping Center, consist of multiple stores or enterprises, each much smaller than the proposed project, and all located on the same parcel. None of the existing uses consists of a large amount of retail space concentrated in one store and on one lot.

88. "Leapfrog" development is development which occurs in relatively unsettled areas, outside of and not contiguous to settled areas. Such development can greatly accelerate growth. Such development also can use up or exceed the available public facilities in the area and require extensions to the area of existing public facilities and utilities. "Leapfrog" development thus can impose both direct and indirect costs on the host community and on the region.

89. With the construction of a use which is the size and type of the proposed project in an area designated for commercial expansion, the beginnings of a new regional economic center will be created.

Conclusions of Law

This appeal involves several Act 250 criteria having to do with fiscal impacts of the proposed project on local governments. It also has been contended that fiscal impacts of the proposed project will cause the project not to conform to the applicable town plan.

The fiscal criteria on appeal are Criteria 6 (impact on schools), 7 (local governmental services), 9(A) (impact of growth), 9(H) (costs of scattered development), and 9(K) (public investments and facilities) of 10 V.S.A. § 6086(a). The specific text of each of these criteria, along with the Board's decisions concerning them, is set out below, following a general discussion of an issue which applies to all of these criteria.

1. Common Issue: Relevance of Effect on Retail Competition

Economic competition from the proposed project allegedly will affect the tax base of the relevant localities. Questions have been raised regarding the relevance of this allegation to the criteria.

The Board concludes that the impacts of the proposed project on existing retail competition are relevant to the extent that such impacts will in turn affect the finances of local, regional, or state government.

The issue is protection of the tax base. It is clear to the Board that, under the Act 250 criteria listed above, the General Assembly intended that the Board and district commissions consider that part of the economic impact of a development is any reduction in the tax base caused by a proposed development. For example, Criteria 6 and 7, as quoted below, speak in terms of the "ability" of a local government to provide services, which can only be determined by reference to the available tax base. Similarly, Criterion 9(A) speaks of the impact of a project on a town's "financial capacity." See 10 V.S.A. § 6086(a)(6), (7), (9)(A). Also, Criterion 9(H) refers to a project's "indirect" costs. Id. at (9)(H).

Moreover, the common element in each of the fiscal criteria is the protection of government finances from burdens imposed by new development. If a project were to have a negative impact on existing businesses, such a negative impact reasonably could result in a burden on the government because the revenue to the government from the existing businesses, or from the employees of the existing businesses, could be lost or diminished. Therefore, the competitive effect of a project on existing businesses is relevant to the Act 250 criteria. See Vermont Rule of Evidence 401, which is applicable to these proceedings through 3 V.S.A. § 810.

The Board's conclusion is supported by pertinent findings which have been adopted by the legislature. Several of the fiscal criteria on appeal - 9(A) (impact of growth), 9(H) (costs of scattered development), and 9(K) (public investments and facilities) - were added to Act 250 in 1973. 1973 Vt. Laws No. 85 (the 1973 Amendment). When they were added, the legislature adopted specific findings which are printed in the Vermont Statutes following 10 V.S.A. § 6042. Id. It is true that the 1973 amendment specified that these findings are not to be used as criteria in deciding whether or not to issue a land use permit. See 10 V.S.A. § 6086(a)(9). However, the Board properly may look to these findings as a source of legislative intent in determining the meaning of the criteria. Cf. Viskup v. Viskup, 150 Vt. 208, 210 (1988) (the primary purpose of construing statutes is to

effect the intent of the legislature).

The findings which accompanied the 1973 amendment indicate that the Board and district commissions are to consider economic impacts of the type alleged in this case. For example, the findings state:

> (3) PUBLIC AND PRIVATE CAPITAL INVESTMENT
>
> (A) A balance of public and private capital investment determines the economic well-being of a town or region. An area of industrial, recreational, or residential growth requires highways, schools, utilities, and services the cost of which is borne in large part by others. *A settled area, with a full complement of public services, needs continuing private capital investment to create a tax base to pay for the services. Increased demands for and costs of public services, such as schools, road maintenance, and fire and police protection must be considered in relation to available tax revenues and reasonable public and private capital investment. The* location and rate of development must be considered, so that the revenue and capital resources of the town, region or state are not diverted from necessary and reasonably anticipated increased governmental services. Accordingly, conditions may be imposed upon the rate and location of development in order to control its impact upon the community.

1973 Vt. Laws No. *85* § 7(a)(3)(A) (emphasis added).

The principle that Act 250 protects the tax base of the relevant localities was stated as early as 1978, in a decision by the District #4 Commission concerning the so-called "Pyramid Mall" proposal, to which the Applicants have referred us. The District Commission stated, after a similar analysis:

> We conclude from the language contained both in Act 250 (1970 Adj. session) and in Act 85 (1973 session) that the General Assembly intended District Commissions to consider the impact of a proposed development on the available tax base and fiscal capacity to provide governmental services.

Re: Pyramid Co of Burlington, #4C0821, Findings of Fact, Conclusions of Law, and Order at 8 (Oct. 12, 1978).

By stating this conclusion, the Board does not mean to imply that Act 250

protects existing businesses from new competition. As stated by the District #4 Commission in the Pyramid case:

> [W]e wish to make clear that our concern under Act 250's criteria is exclusively with the economic impact of a proposed development on public, not private entities. A proposed development may have a direct and substantial adverse economic impact on one or more existing businesses; however, that impact on competing private entities is irrelevant to our analysis under Act 250 unless it also can be shown that there is a resultant material adverse economic impact on the ability or capacity of a municipality or other governmental entity to provide public services.

Id.

In light of this discussion, the Board will examine each of the fiscal criteria on appeal, starting initially with Criteria 9(A) and 9(H) because these appear to be the most pertinent to this matter.

2. Criterion 9(A) (Impact of Growth)

10 V.S.A. § 6086(a)(9)(A) requires that the Board review the impact that the proposed project will have on the ability of the town and the region to accommodate two separate items: (a) growth that will occur generally, regardless of the proposed project; and (b) growth that will occur specifically because of the proposed project. The statute provides:

> **Impact of growth.** In considering an application, the district commission or the board shall take into consideration the growth in population experienced by the town and region in question and whether or not the proposed development would significantly affect their existing and potential financial capacity to reasonably accommodate both the total growth and the rate of growth otherwise expected for the town and region and the total growth and rate of growth which would result from the development if approved. After considering anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety and welfare, the district commission or the board shall impose conditions which prevent undue burden upon the town and region in accommodating growth caused by the proposed development or subdivision. Notwithstanding section 6088 of this

> title the burden of proof that proposed development will significantly affect existing or potential financial capacity of the town and region to accommodate such growth is upon, any party opposing an application, excepting however, where the town has a duly adopted capital improvement program the burden shall be on the applicant.

The Town of St. Albans has a duly adopted capital improvement program. Therefore the burden of proof in this case is on the Applicants under Criterion 9(A). Based on the language of the criterion, the Applicants must therefore provide and prove all of the following:

(a) The growth in population experienced by the town and region in question.

(b) The ***total*** growth and ***rate*** of growth which is otherwise ***expected*** for the town and region.

(c) The ***total*** growth and ***rate*** of growth for the town and region which will result from the proposed project if approved.

(d) The anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety and welfare.

(e) Based on (a) through (d), that the proposed project will not cause an undue burden on the existing and potential financial capacity of the town and region in accommodating growth caused by the proposed project..

In determining whether the Applicants have met their burden of proof under Criterion 9(A), the Board has had significant difficulty in discerning the Applicants' arguments as to why their application meets this criterion. The Board has turned to the Applicants' proposed findings of fact filed on August 15, 1994. This document states the facts the Applicants believe are relevant to Criterion 9(A) but contains no proposed conclusion of law showing why those facts meet the criterion. In a letter filed on August 19, 1994, the Applicants explained that they had not provided conclusions of law because that would be redundant with a hearing memorandum filed by the Applicants on July 7, 1994. The Board has therefore turned to the hearing memorandum.

The July 7 hearing memorandum, however, contains no argument concerning why the application meets Criterion 9(A). Therefore, the Board is left

with the Applicants' proposed findings as the primary document from which it must discern the Applicants' arguments for meeting Criterion 9(A), with secondary documents being their fiscal impact charts filed on November 16, 1994.

Based on these documents, the Applicants' case under Criterion 9(A) appears to rest exclusively on the following: (a) that the proposed project in and of itself will not generate significant population growth; (b) that future development, caused by the project, will be reviewed "under local and state planning requirements at the time they are proposed;" (c) that the Town supports the project and has designated the project area for commercial growth; (d) that the project allegedly is consistent with the Town's capital plan; and (e) that any secondary development caused by the proposed project will have an unquantified, but net positive, economic impact on the Town and the region.

For two separate and independent reasons, these arguments are insufficient to prove that Criterion 9(A) is met. First, as found above and more fully explained below under Criterion 9(H), the credible evidence is that the anticipated public costs of the proposed project, when calculated without regard to the impact of secondary growth to be caused by the project, will exceed the public benefits? The Board therefore is not persuaded that the proposed project will not cause an undue burden on the ability of the Town and region to accommodate growth.

Second, the Applicants' arguments do not address all of the elements of the criterion that the Applicants are required to prove.

For example, the Applicants have provided no proposed finding as to the total growth and rate of growth, for the Town and region, which will be caused by the proposed project. Similarly, they have provided no proposed finding as to the total growth and rate of growth, for the Town and region, which will occur without the proposed project.

Moreover, as stated in the Findings, above, the Applicants have provided no evidence which shows, for the so-called secondary growth which will be caused by the project, what the rates of growth or the total growth will be. They also

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[2] ***The Board specifically incorporates only the discussion of public costs and benefits, and permit conditions, set out below under Criterion*** 9(H). ***The "existing settlement" issue under Criterion 9(H) is irrelevant to Criterion 9(A).***

have not provided evidence which shows the projected total growth and rate of growth in commercial and residential development which will occur in the Town and Region regardless of the proposed project.

These omissions are significant in a project of this type. As the Board has found above, the proposed project is likely to encourage and attract substantial secondary growth, specifically other highway-oriented development which is likely to grow up around it in the Town.

Since the proposed project is likely to cause significant growth, the need for specific information concerning the total and rate of that growth is particularly acute. Only if the Board has this information can the Board determine what the anticipated costs will be with respect to the provision of services to this secondary growth such as road construction and maintenance, fire, police, etc. Without the information, the Board also cannot determine if the town and the region have and will have the financial capacity to accommodate, without undue burden, the growth that the project will cause.

The Board believes that it is reasonable to expect the Applicants to provide specific evidence and argument concerning the total growth and rate of growth to be caused by the project. The proposed project is large and possesses significant potential to cause growth in the Town.

Further, there are many Wal*Marts in the country. It should not be too difficult to review a sample of those other Wal*Marts and determine what effect they have had on the total growth and rate of growth for the areas in which they are located. Such information could then be applied to the Town of St. Albans and the Franklin County region to arrive at numerical projections concerning the total secondary growth and rate of such growth that the proposed project will cause in that town and region. Based on these projections, estimates of the anticipated public costs and benefits associated with the growth could, and would have to, be reached.

The Board notes that it has previously concluded, with regard to a power line which was likely to cause growth, that this type of study is feasible, as well as necessary under Criterion 9(A) to obtain a permit. Re: Washington Electric Cooperative, Inc., #5W1036-EB, Findings of Fact, Conclusions of Law and Order at 8-10 (Dec. 19, 1990). In that case, the Board denied an application for failure to provide a reasonable study of growth impacts.[3] As the Board stated in that

[3] *Members Gibb and Lloyd dissented from the Washington* *(continued next page)*

case:

> The Board does not believe that ascertaining the extent of growth impacts would be unduly speculative. Such information has previously been placed before the Board. [Citation omitted.] Obviously there may be variables and unforeseen factors which will prevent an absolute conclusion as to the potential for development as a result of the proposed power line. However, since the standard of proof in Act 250 proceedings is a preponderance of the evidence, the conclusion need only be more likely than not rather than absolute. See In re Muzzy, 141 Vt. 463, 472-73 (1982).

Id. at 9.

In addition, the Applicants' own evidence demonstrates that such studies are feasible. The Applicants have provided Exhibit A-34, which consists of eleven case studies of the competitive impact of Wal*Mart stores. These case studies include some analysis of growth which has sprung up near Wal*Marts in other locations. The record also demonstrates that a wealth of data exists concerning the existing market for the Town and Franklin County region.

Based on the case studies, the Applicants argue that the proposed project will have an unquantified but positive impact on the ability of the Town of St. Albans and the Franklin County region with regard to the costs of development caused by the project. However, the Board has found, above, that the supporting testimony for this argument is not credible.

But even if the testimony were credible, such an argument is insufficient under Criterion 9(A). The Applicants cannot sustain their burden under that criterion based on an allegation of "unquantified" positive impact. The **Board needs specific projections as to the total growth and rate of secondary growth to**

(continued from page 32) Electric decision. Member Opel chaired the District #5 Commission which issued a permit that was appealed to the Board in that case. They state that they believed that the size and scope of that power line were too small to justify requiring a major study of the project's potential growth impact. They believe that such a study is justified in the case at hand because of the large size and scope of the proposed project and its demonstrated potential to cause other commercial growth.

be caused by the proposed project and the anticipated public costs and benefits associated with such growth. The Applicants have not provided this information.

It is also not sufficient to state that the Applicants have provided information on potential population growth to be caused directly by the proposed project. Criterion 9(A) is not limited to population growth. While in one place the criterion uses the term "population growth," throughout the remainder of the criterion the word "growth" is used without qualification. Further, the legislative findings which accompanied the 1973 Amendment, as quoted above, demonstrate that in enacting Criterion 9(A) the General Assembly was concerned with more kinds of growth than population growth.

It further is not sufficient to state that any development which may be caused by the proposed project will be subject to review under state and local plating requirements. Not all growth caused by the proposed project will be subject to Act 250. See 10 V.S.A. §§ 6001, 6081.

Moreover, the statute requires that, before issuing a permit for this project, the Board must evaluate the total growth and rate of growth which this project will cause. In this way the statute ensures that, before the secondary growth occurs, the costs of secondary growth caused by the proposed project will not cause an undue burden on the town and region.

Accordingly, the Applicants have failed to meet their burden of proof under Criterion 9(A). The Board therefore will deny the application pursuant to that criterion.

It may be argued that, under Criterion 9(A), the Board may only impose conditions to prevent undue burdens, rather than deny. But Act 250 expressly forbids denial solely under Criteria 5, 6, and 7. 10 V.S.A. § 6087(b). Moreover, because the Applicants have not provided sufficient information concerning the total and rate of secondary growth to occur to be caused by the proposed project, or the associated anticipated public costs and public benefits, the Board has no basis on which it can determine whether an undue burden under Criterion 9(A) will occur or what conditions could appropriately alleviate any such burden.

3. Criterion 9(H) (Costs of Scattered Development)

10 V.S.A. § 6086(a)(9)(H) requires that, before issuing a permit, the Board must find that the proposed project either is or is not physically contiguous to an existing settlement. If the proposed project is not physically contiguous to such a settlement, then the Board cannot issue a permit unless the public costs of the

project do not outweigh its public benefits. The statute provides:

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

Under 10 V.S.A. § 6088(a), the burden of proof on this criterion is on the Applicants.

a. Existing Settlement

The first issue under Criterion 9(H) is whether the proposed project is physically contiguous to an existing settlement. This involves a determination of whether the area surrounding the site of the proposed project is such settlement.

(1) Definition of "Existing Settlement"

The statute does not define the phrase "existing settlement." To arrive at a definition of the term, the Board has reviewed dictionary definitions of the word "settlement," the intent and purpose of Criterion 9(H), and prior decisions construing the phrase.

The Supreme Court has stated that, in construing a statute, it first looks at the plain meaning of the language used. State v. George, 157 Vt. 580, 586 (1991). To ascertain the plain meaning, it is reasonable to turn to the dictionary.

With regard to the word "existing," dictionaries define the word "exist" as something which presently is. For example, Webster's II New Riverside Dictionary (1988) states that the word means "[t]o have material or spiritual *being* or ***actuality***." (Emphasis added.) Similarly, the Oxford English Dictionary (2d Ed. 1989) defines "exist" as: 'To have place in the domain of reality, have objective *being.*" (Emphasis added.)

Concerning the word "settlement," the dictionaries offer several definitions. The Board has looked at those definitions which apply to land use. Most of the

land use-oriented definitions refer to places in which people *live*. For example, Funk and Wagnall's College Dictionary (1947)[4] includes the following definition of settlement:

> Colonization; an area of country newly occupied by those who intend to live and labor there; a colonized region, village, or town; a regular or settled place of living.

Similarly, the Oxford Universal Dictionary (1933) defines settlement to mean:

> An assemblage of persons settled in a locality; the act of people or colonizing a new country; in the outlying districts of America and the colonies: a village or collection of houses.

Other land use-oriented definitions also indicate that "settlement" connotes a "small community." See Webster's II and the American Heritage Dictionary New College Edition (1979).[5]

In addition to dictionary definitions, the Board has reviewed the legislative statements of intent that pertain to Criterion 9(H) and were contemporaneously passed by the full General Assembly. The Supreme Court has stated that the primary purpose of construing statutes is to effect the intent of the legislature. Viskup, supra, 150 Vt. at 210.

The findings made by the legislature in enacting the 1973 Amendment indicate that the General Assembly sought to preserve the viability of the traditional community centers of Vermont, to channel growth into such centers, to keep growth proportionate to the existing sizes of Vermont's towns and villages unless a locality seeks otherwise, and to ensure that any growth outside of the traditional centers would not have an adverse financial impact on state and local

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[4]*The Board cites this 1947 dictionary, as well as a 1933 dictionary, because Member Samuel Lloyd read the definitions from those dictionaries into the record during the hearings and they were not challenged by any parties.*

'Some of the dictionary definitions indicate that "settlement" can mean a "newly colonized area" Because the General Assembly modified the term "settlement" by the word "existing," the Board believes that it did not intend to include new settlements.

governments. Among those findings is the following:

> (4) PLANNING FOR GROWTH
>
> (A) *Strip development along highways and scattered residential development not related to community centers* cause increased cost of government, congestion of highways, the loss of prime agricultural lands, overtaxing of town roads and services and economic or social decline in the *traditional community center.*
>
> (B) *Provision should be made for the renovation of village and town centers for commercial and industrial development, where feasible, and location of residential and other development off the main highways near the village center* on land which is other than primary agricultural soil.
>
> (C) Planning at all levels should provide for the development and allocation of lands and resources of existing cities, towns, and villages generally *in proportion to their existing sizes* as related to distribution state-wide and a projection of the reasonably expected population increase and economic growth, unless a community, through duly adopted plans, makes the determination that it desires and has the ability to accommodate more rapid growth.
>
> (D) Consistent with all other policies and criteria set forth in this act, development as defined in section 6001 of this chapter in areas which are not natural resources as referred to in paragraph (9) of this section should be permitted at reasonable population densities and reasonable rates of growth, with emphasis on cluster planning and new community planning designed to economize on the costs of roads, utilities and land usage.

1973 Vt. Laws No. 85 § 7(a)(4) (emphasis added). See also id., § 7(a)(3).

Based on these findings, the District #4 Commission, in the prior case to which the Applicants have referred us, concluded that the legislature enacted Criterion 9(H) to encourage development to be located in community centers, while not prohibiting development outside those centers if the public costs of the development will not outweigh the public benefits. The District #4 Commission stated:

> We have had recourse to the legislative findings {Section 7, Act 85 of 1973) in order to determine the meaning of "physically contiguous to an existing settlement." It is our conclusion that the legislature intended to encourage preservation of Vermont's resources, including those of its taxpayers, and to encourage the wise use of resources *by stipulating that development should be related to community centers* while not prohibiting development away from community centers if it could be shown that such development would pay its own way either by generating tax revenue to pay for the extra cost of public facilities or alternatively by providing public benefits, such as increased employment opportunities.

(Emphasis added.)

The Board previously has discussed the traditional Vermont community center. In Re: Waterbury Shopping Village, #5W1068-EB, Findings of Fact, Conclusions of Law, and Order (July 19, 1991), the Board found as follows:

> In Vermont, development historically has been concentrated in small, compact centers surrounded by rural countryside. In these centers, retail shops are typically located near each other, within walking distance. Buildings in the centers often consist of multiple stories and have diverse uses. Offices and apartments are frequently on the second or third floors of the buildings with retail uses and services on the first floor. Combined parking facilities in the centers serve a diversity of uses and developments and are typically centrally located within the center. Street lighting is usually shared. The proximity of the buildings to each other often forces design and signage to be compatible.

Id. at 18, Finding of Fact #77. Based on the testimony presented in the case presently before us, we have included a similar finding, above.

In that case, the Board also stated: "Contiguity to an existing settlement is not shown by the theoretical or potential border of the settlement. It is shown by being next to the actual settled area." Id. at 34.

Further, on appeal from the Pyramid decision cited above, the Chittenden County Superior Court stated that one evaluates contiguity to an existing settlement by reviewing whether the proposed project is compatible with the surrounding buildings in terms of size and use. The Court stated:

> The purpose of this criterion is to weigh the additional costs of public services and facilities caused by a non-contiguous or isolated development against the tax revenues and other public benefits brought by the development. This purpose would not be served if "settlement" were narrowly defined to include any grouping of residentiai, commercial or industrial buildings regardless of the size and use of the settlement buildings as compared to the size and use of the proposed development buildings. This is because the level of existing public services and facilities is directly related to the size and use of the buildings in a given area.

In re Pyramid Comnanv of Burlington, Docket No. S59-78CnM, slip op. at 6-7 (Oct. 14, 1980).

Based on the plain meaning of the words, the intent of the Legislature, and prior cases construing Criterion 9(H), the Board concludes that the phrase "existing settlement" as used in that criterion means an extant community center similar to the traditional Vermont center in that it is compact in size and contains a mix of uses, including commercial and industrial uses, and, importantly, a significant residential component. It is a place in which people may live and work and in which the uses largely are within walking distance of each other. The term specifically excludes areas of commercial, highway-oriented uses commonly referred to as "strip development."[6]

The Board further concludes that, to be contiguous to an existing settlement, a proposed project must be within or immediately next to such a settlement and must be compatible with the settlement buildings in terms of size and use.

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[6] *The Applicant argues that, in Re: Finard-Zamias Associates, #1R0661-EB, Findings of Fact, Conclusions of Law and Order at 15 (Nov. 19, 1990), the Board found that a mall to be built next to an existing commercial strip was not scattered development. To the extent that Finard-Zamias supports such a reading, the case is overruled because it is inconsistent with the legislative findings demonstrating the intent of Criterion 9(H) and with the Board's more recent decision in Waterbury Shopping Village, Further, in Finard-Zamias, the Board concluded that the public costs of the mall would not outweigh the public benefits. Id. at 15-16.*

(2) Application of Definition

In this case, the nearest area which is an existing settlement under Criterion 9(H) is the City of St. Albans. The City traditionally has been the community center for the St. Albans area and for the Franklin County Region. It contains a compact downtown with a mix of uses, including commercial, industrial, and residential. People may live and work in the City and the uses are largely within walking distance of each other.

The proposed project will be located more than two miles from the downtown of the City of St, Albans. It will be one large commercial use with approximately 100,000 feet of retail space and 44 acres of improvements or disturbed land, sitting on a tract of land of approximately 107 acres. In contrast, downtown St. Albans consists of slightly less than 44 acres of land, with almost two million square feet of various uses concentrated on this land.

The area in which the proposed project will be located has been designated for growth by the Town of St. Albans, a separate political entity.' This area is located near Exit 20 of Interstate 91. The Town has zoned the area for commercial and light industrial uses.

The Exit 20 area is different from the City's downtown. Uses in the Exit 20 area are not arranged in a compact way but are spread out along the existing highways, discouraging pedestrians.

The area also is in transition from agricultural to commercial use. Interspersed with cultivated and pasture land, one finds highway-oriented commercial uses such as fast-food restaurants, gas stations, an auto dealership, an appliance store, and others. Each of these uses has its own curbcut, circulation system, and parking lot. The largest of these uses is the Highgate Shopping Center, consisting of multiple stores for a total of approximately 200,000 square feet. Most of the other existing commercial uses are in the Exit 20 area much smaller. There are very few residences in the area.

Several major developments are proposed and approved for the Exit 20 area, to be located on some of the land that is presently in open space use such as

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'By noting that the Town and City are separate politically, the Board does not mean to imply that an existing settlement cannot cross a political boundary.

agriculture. For example, Franklin Park West, also known as the Vermont Technology Park, is proposed to be located in the Exit 20 area. This park will consist of 22 lots when all phases are done, for a total of approximately 150,000 to 200,000 square feet. It will include more total retail space than will the proposed project; the space will be divided into many different stores.

The Exit 20 area is not an existing settlement within the meaning of Criterion 9(H). It is not a community center in the manner of the traditional Vermont center. It is not a compact mixture of buildings with a largely pedestrian scale. It does not have a significant residential component.

Instead, the Exit 20 area is a partially developed area which is an emerging commercial zone with highway-oriented development of the type commonly called "strip." It is planned for growth by the Town and several large developments are proposed for it. But such plans and proposals do not convert the area into an *existing* settlement. If something is proposed, then it does not yet exist. Moreover, with any approved proposal, the possibility remains that the prpposal may never be built for financial or other reasons.

The Exit 20 area also is not part of the existing settlement in downtown St. Albans. Visually and architecturally, the development in the two areas is different. In addition, while the two areas are connected by Vermont Route 7, they are separated by distance and by intervening, distinct types of uses. Running from downtown out toward the site of the proposed project, the following occur along Route 7: a residential area (.4 miles), a commercial strip (.3 miles), residential and vacant land with scattered commercial uses (.4 miles), and strip commercial and scattered commercial development (1 mile).

Further, the proposed project is not truly compatible in size and use with the existing uses in the Exit 20 area. The existing agricultural and open spaces uses are much less intensive than the proposed project and most of the existing commercial uses are much smaller than the project. The existing large uses in the area, such as the Highgate Shopping Center, consist of multiple stores or enterprises, each much smaller than the proposed project, located on the same parcel. None of the existing uses consists of a large amount of retail space concentrated in one store and on one lot.

In arguing that the Exit 20 area is an existing settlement, the Applicants have testified that, in approving several large developments that are proposed for the area (as well as the Highgate Shopping Center, which is built), the District #6 Commission found that the area is an existing settlement.

The Board is not bound by the District Commission's prior decisions because the Board is the appellate body with jurisdiction over the District Commission. 10 V.S.A. § 6089(a). The Vermont Supreme Court has previously rejected a similar argument by an applicant. In re Sherman Hollow, #92-363, slip op. at 2 (Vt. June 22, 1993).

None of these prior decisions of the District Commission regarding Criterion 9(H) was appealed to the Board. This is the first time the Board has reviewed whether the Exit 20 area constitutes an existing settlement under that criterion. For the reasons stated above, the Board disagrees with the District Commission. The Board directs that the District Commission must proceed in the future in accordance with the definition of existing settlement stated above.

Based on the foregoing, the Board concludes that the proposed project will not be physically contiguous to an existing settlement within the meaning of Criterion 9(H). Accordingly, the proposed project constitutes scattered development.[8]

b. Weighing of Public Costs and Public Benefits

The Board believes that the basic intent of Criterion 9(H) is to discourage scattered development beyond the boundaries of community centers if such development will damage the ability of the communities to maintain themselves. While the Board should not, and does not here, attempt specifically to guide development, it is fair to say that this criterion, which acts as a discouragement as cited above, is also an encouragement for large-scale development to locate within existing community centers.

Although the legislature clearly expressed a preference that growth occur in the existing community centers, it nonetheless did not seek to freeze or prohibit development outside of those centers. Rather, it sought to ensure that scattered development does not impose public costs which outweigh the public benefits. Therefore, under Criterion 9(H), the Board may issue a permit if it concludes that the public benefits are not outweighed by the public costs. As cited above, the burden of proof is on the Applicants.

[8] *Chair Gibb and members Fortna, Martinez, and Thompson dissent from this conclusion.*

(1) Analysis of Testimony

The parties have presented conflicting testimony as to the public costs and public benefits. On the one hand, the Applicants' experts, RKG Associates, testified that the proposed project will have a net public benefit on the tax base of the Town of St. Albans, a negligible impact on the tax base of the City of St. Albans, and a minor cost to the tax base of other Franklin County towns. They also testified that the proposed project will result in a net gain of jobs for the Franklin County Region.

On the other hand, the experts presented by the Citizens and VNRC, Elizabeth Humstone and Thomas Muller, testified that, if all direct and indirect costs are considered, the proposed project will be a net loss to the tax base of the Town and a significant loss to the tax base of the City and other Franklin County towns. These experts also testified that there will be a net Regional job loss caused by the proposed project. The experts further testified that there will be not only be a quantitative loss to the tax base of the relevant localities but also qualitative costs such as loss of public enjoyment of the City's downtown, of the Vermont settlement pattern, of open space, and of community.

A major part of the RKG Associates' testimony is that the tax bases of the relevant localities will not suffer significantly from the loss of revenue from existing retail stores which will go out of business because of competition from Wal*Mart. This 'is based on their view that there will not be a significant loss of existing businesses from such competition. In contrast, the testimony of Muller and Humstone is that the proposed project will cause a significant number of existing retail businesses in the City, Town, and Franklin County to suffer or go out of business, causing loss of tax revenue to those localities from the businesses, as well as significant job loss and loss of property tax revenue from those who lose their jobs.

The differences in the experts' cost/benefit projections stem from the assumptions each set of experts makes. There are three major assumptions that affect their projections: (a) the annual average sales per square foot for the proposed Wal*Mart; (b) the recapture of "leakage," that is purchases by Franklin County residents presently made in other places such as Chittenden County that would be made at the proposed Wal*Mart; and (c) the percentage of total sales that would be made to Canadian citizens.

The Board finds the testimony of Muller and Humstone to be more credible on all three assumptions than the testimony of RKG Associates. First,

RKG Associates project future sales per square foot of $219, which is well below the national Wal*Mart average in 1993 of $297.

In contrast, Muller and Humstone have prepared an estimate that is based on the 1993 national average for Wal*Mart of $297 per square foot. To project this average into the future, they applied adjustment factors based on Wal*Mart's past annual rate of growth, in other markets, in sales per square foot, and factors based on the size and characteristics of the local market. They project figures for sales per square foot of $316 in 1995 and $400 in 2000.

Second, RKG Associates projects that the proposed Wal*Mart will recapture leakage from the Franklin County market to other markets in the amount of $5.7 million in 1995, while Muller and Humstone project that such leakage will be $2.5 million. The Board believes that the lower figure is more credible because it, unlike the higher figure, takes into account two factors. First, many of the goods offered by Chittenden County to Franklin County residents are upscale goods which are not sold now in Franklin County and which will not be sold by the proposed project. Second, many Franklin County residents commute to work in Chittenden County and will continue to do so. Commuters typically shop in the work area before travelling home. The proposed Wal*Mart is unlikely to change this habit.

Third, RKG Associates projects that the percentage of total sales that will be made to Canadian residents will be 30 percent while Muller and Humstone project 10 percent. The Board believes the lower figure to be more credible because Canadian tourism is variable (it has recently declined) and because Wal*Mart now has stores in Canada which are within the vicinity of the Canada-Vermont border and which cover the market area. The Board is not persuaded that Canadians who can shop at a Wal*Mart near their homes will come to Vermont to shop at a Wal*Mart.

The Board's evaluation of the assumptions made by the two teams of experts results in an expectation that the sales of the proposed Wal*Mart will be much higher than the figure projected by the Applicants. It also means that the Board expects the percentage of those sales which go to Canadian residents, or which are "recapture" sales, will be much lower than the Applicants' projections.

Aside from leakage recapture and tourism, the only remaining source for sales at the proposed Wal*Mart is the existing market for retail goods in Franklin County. If a much smaller percentage of the Wal*Mart sales is going to come from recapture of sales to other markets or from Canadian sales, then a much

greater percentage will have to come from the existing market.

Moreover, the existing market for the proposed project is relatively undersized because personal income in Franklin County is 85 percent of the Vermont state average. The dollars available from Franklin County residents to support both a Wal*Mart and existing businesses are more scarce than elsewhere.

All of this means that many more existing businesses will suffer or go out of business from competition with the proposed Wal*Mart, and therefore many more jobs will be lost, than projected by the Applicants. The loss of such businesses and jobs is likely therefore to have a much more negative effect on the tax base of the Franklin County towns than the Applicants project. Accordingly, the public costs of the proposed Wal*Mart are likely to be much higher than the Applicants estimate.

Based on this analysis, the Board has weighed the overall public costs and benefits of the proposed project as follows (in 1995 dollars):

(2) Determination of Benefits

The benefits will consist of approximately $77,000 in property tax revenues to the Town and approximately $32,400 in increased state aid to education to the City of St. Albans and the Towns of Enosburg and Swanton. The total annual benefit is approximately $109,000 in 1995 dollars.

With regard to benefits from state aid to education, the Board notes that the Applicants' fiscal impact chart states a "net" benefit of approximately $20,000. However, this net benefit is achieved by off-setting the property tax revenue by an estimated amount of loss to the Town of state aid to education. The Board has already included the gross figure for property tax revenue as a benefit. Therefore, to include the $20,000 net benefit double-counts the property tax revenue. Instead of doing this, the Board will include the gross figure for loss of state aid to education on the cost side, below.

Another benefit listed by the Applicants is not counted because it is too speculative. This is a sum of $225,000 to be spent over several years by a "St. Albans Marketing Association" that the Applicants plan to form. The structure and goals of this, organization, as well as the uses to which the funds will be put, are too vague to provide the Board with a reasonable assurance that this money will in fact lead to public benefit.

Other benefits listed by the Applicants in their fiscal impact charts are not counted because they are not listed accurately. For example, the Applicants give in their charts (as well as in the proposed findings) aggregate amounts for construction costs for improvements to the highways, for construction costs for sewer and water connections, fcr a fee for the sewer and water allocation, and for a sewer and water user fee. The Applicants have not annualized these benefits so that they can be compared with other annualized benefits and costs. The Applicants list no "costs" associated with these items.

These items are in fact a net benefit, or a net cost, of zero. The actual testimony is that the Applicants, rather than the State or the Town, will pay all costs for the necessary highway improvements. Similarly, the payments and fees associated with sewer and water hook-ups are intended to finance the City's costs. These payments cannot be claimed as an unqualified benefit. They simply off-set the public costs associated with the highway improvements, and the sewer and water extensions and service.

(3) Determination of Costs

The annual costs to governments caused by the proposed project will include, in 1995 dollars:

(a) approximately $61,000 in state aid to education which the Town will lose;

(b) approximately $25,000 in operating costs caused by the addition of six students to the school system;

(c) as much as approximately $110,000, representing lost revenue to the relevant municipalities due to changes in the Grand Lists caused by competition from the proposed project;

(d) as much as approximately $19,000, representing lost revenue because of job loss in the region;

(e) approximately $11,500, representing the cost to the Town of direct services to the proposed project; and

(f) approximately $88,000, representing the public funds which have been invested in the City's historic downtown. This investment is likely to be lost if the proposed project has the projected negative impact on the City.

The annual total for these costs is approximately $315,000 in 1995 dollars. As compared to the annual total for benefits, *the* ratio *is approximately three dollars of public wst for each dollar of public benefit.*

With regard to cost figure for state aid to education, the Board notes that all parties have used a different figure in their fiscal impact charts. The Board understands that some parties are giving 1995 figures and that the $61,000 cost will not actually occur until 1996.[9] However, the Board believes that it is appropriate to include the $61,000 cost figure because it is the Town's testimony that such an impact will occur and because the proposed project (if built) will exist beyond 1995. Therefore, without the $61,000 figure, any cost analysis for the project would be misleading.

Concerning the figure for operating costs for additional students in the school system, the Board notes that VNRC used a figure of $14,504 in its fiscal impact chart. This, however, is a net figure, which the Board cannot use without double-counting the benefits listed above. The Board therefore has used the gross figure.

With respect to the lost revenue due to vacancies caused by competition from the proposed project or jobs lost from the proposed project, the Board stresses that the figures given above represent decreases in the tax base for the relevant localities. The Board understands that the municipalities may raise their tax rates to compensate.

Concerning the lost revenue caused by competition or job loss, the Board has based its figures on the evidence provided by Muller and Hurnstone because it has found their testimony to be more credible." The Board notes that the

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[9] *Other parties have given net figures which the Board cannot use without double-counting the benefits.*

"Concerning job loss specifically, the Board has used a net job loss figure because the Board is persuaded that more jobs will be lost than will be gained. Further, despite the Board's instructions, no patty has supplied the underlying gross figures in their fiscal impact charts. Because the Board has used a net figure, the Board has not included a gross job creation figure on the "'benefit" side.

costs to area governments from job loss are projected to rise to $50,000 annually by 2004.

(4) Missing Information

The Board has concluded above, under Criterion 9(A), that it does not have sufficient information to determine whether secondary development to be caused by the proposed project will or will not place an undue burden on the affected municipalities.

Such information is necessary not only to reach a positive finding under Criterion 9(A), but is also necessary to reach a positive finding under Criterion 9(H), which addresses both direct and *indirect* costs. The Board previously has denied an application under Criterion 9(H) for failure to provide information of this type. Re: New England Land Associates, #5W1046-EB-R, Findings of Fact, Conclusions of Law, and Order at 27 (Jan. 7, 1992).

(5) Conclusion and Consideration of Permit Conditions

Based on the foregoing, the Board is not persuaded that the public costs of the proposed project do not outweigh the public benefits. The proposed project therefore does not comply with Criterion 9(H). This is specifically based on the following separate and independent grounds:

(a) Without considering secondary growth which the project will generate, the credible evidence is that, on an annual basis expressed in 1995 dollars, the project's overall public costs will substantially outweigh the annual public benefits, ***with the annual ratio being approximately three to one.*** This is a substantial effect on the relevant towns and on the Region, and is a detriment to the general welfare. As mandated in Criterion 9(H), this calculation includes consideration of employment opportunities, with the credible evidence being that the proposed project will cause a net job loss in Franklin County.

(b) The proposed project will result in growth in the nearby vicinity, and the Applicants have provided insufficient evidence as to the total amount or rate of such growth, or the public costs and benefits which such growth will cause.

Because the Board has reached these conclusions, it has not given any consideration to the allegations made by the Citizens and VNRC of "qualitative" costs that they claim are relevant under Criterion 9(H).

Since the Board has concluded that the Applicants have not met their burden to prove that the public costs will not outweigh the public benefits, the Board has considered whether a feasible permit condition exists that can be issued to ensure that the proposed project will meet Criterion 9(H).

Under 10 V.S.A. § 6086(c), the Board may impose such conditions as are appropriate to the Act 250 criteria and are within the proper exercise of the police power, including the filing of bonds to ensure compliance. Based on this section, the Board has previously concluded that it may impose impact fees. Re: Clarence and Norma Hurteau, #6F0369-EB, Memorandum of Decision (March 25, 1988).

The Board therefore has considered the possibility of requiring the Applicants to pay a yearly impact fee to the affected municipalities, or to post a bond out of which the affected municipalities could draw funds to replace revenue losses caused by the proposed project. However, because of the absence of information concerning the public costs and benefits associated with the secondary growth discussed above, and because the present record contains little focus on such remedies by the parties, the Board is not persuaded that it can arrive at an amount for an impact fee or a bond with sufficient precision to ensure that the impacts of the proposed project will actually be ameliorated. Accordingly, the Board will not issue a permit condition under Criterion 9(H) and will deny the project under that criterion.

3. Criterion 6 (Impact on Schools\

10 V.S.A. § 6086(a)(6) requires that, before issuing a permit, the Board must find that the proposed project "[w]ill not cause an unreasonable burden on the ability of a municipality to provide educational services."

The burden of proof is on the opponents under this criterion, but the Applicant must provide sufficient information for the Board to make affirmative findings. 10 V.S.A. § 6088(b); Re: Killington, Ltd. and International Paper Realty Corp., #1R0584-EB-1, Findings of Fact and Conclusions of Law and Order (Revised) at 21 (Sep. 21, 1990).

The Board is persuaded by the calculation that, at current tax rates, the proposed project will generate approximately $77,000 in annual property taxes to the Town of St. Albans. Approximately 79 percent of this, or approximately $61,000, will go to fund the provision of educational services by the Town.

The Board also is persuaded that, under the current formula, the proposed project will cause the Town to lose approximately $61,000 in annual aid for educational services provided by the State of Vermont.

The Board further is persuaded by the Applicants' prediction that the proposed project will add approximately six children to the school system, increasing annual operating costs by approximately $25,000. Thus the proposed project, in and of itself, will add this cost to the municipalities which fund the Union.

In addition, the Union school system presently does not have the physical capacity to accommodate the projected six additional school children. Such a lack of capacity, coupled with additional pressure caused by projects such as the one proposed, appears likely to generate the need for additional capital expenditures to increase the physical capacity of its school system.

Any such increase in physical capacity would require bonding which would be paid off through the school budget. Therefore, the proposed project, by contributing to the need to expand the school system's physical capacity, will exacerbate an existing adverse condition. Pilgrim Partnershin, supra, 153 Vt. at 596.

The Applicants have offered no plan to assist the Union in alleviating the adverse impact to be caused by the proposed project. While the Town has approved a bond vote to expand at one school, the Town is only one member of the Union. Moreover, votes concerning the school budget have failed several times in the City.

The Board understands that the projected addition of six children to the school system may appear minor and that the proposed project probably is not the only contributor to the capacity problem. However, the cumulative effect of approving projects under the current circumstances would be to cause a significant burden unless each applicant is required to contribute to the solution.

The Board also notes that it has found above that the proposed project will result in a net job loss in the Region. It is possible that such job loss could cause

people to move away in a search for jobs. If so, such migration could result in an off-setting decline in the student population. However, the record does not contain sufficient information to support such a finding.

Separate and apart from any direct burden that the proposed project will create, the Board has reached negative conclusions above with regard to Criterion 9(A) and 9(H). These conclusions bear on the compliance of the proposed project with Criterion 6. Specifically, if, as concluded above, insufficient information has been provided concerning the impact of secondary growth on the area governments, then the Board cannot reach a conclusion concerning how such growth may affect the ability of those governments to provide educational services. Similarly, if, as concluded above, competition from the proposed project is likely to have a negative impact on the tax base of the relevant municipalities, then such an impact may adversely affect the provision of educational services by the relevant municipalities.

Based on the foregoing, the Board is unable to conclude that the Applicants have met their burden of production to provide sufficient information to support a positive finding under Criterion 6. Further, the Board is unable to fashion a reasonable permit condition to alleviate the burden to be caused by the proposed project. Accordingly, the Board reaches a negative conclusion with regard to the compliance of the proposed project with Criterion 6.

In making this determination, the Board is mindful of 10 V.S.A. $6087(b), which provides:

> A permit may not be denied *solely* for the reasons set forth in subdivisions (5), (6) and (7) of section 6086(a) of this title. However, reasonable conditions and requirements allowable in section 6086(c) of this title may be attached to alleviate the burdens created.

(Emphasis added,)

If the Board did not find, as it does elsewhere in this decision, that the application must be denied under other criteria, the Board would consider re-opening the hearing to take evidence regarding permit conditions under Criterion 6 designed to mitigate the burden created on the relevant educational systems.

However, the Board concludes below that this application must be denied under Criteria 9(A) and 9(H). The Board therefore believes it is appropriate,

under Section 6087(b), to reach a negative conclusion as to Criterion 6. Should the Applicants seek to address the deficiencies found by the Board in a further proceeding as authorized by 10 V.S.A. § 6087(c) (Reconsideration under Section 6087(c), below), a further hearing on permit conditions under Criterion 6 may occur as part of that proceeding.

4. Criterion 7 (Local Governmental Services)

10 V.S.A. § 6086(a)(7) requires that, before issuing a permit, the Board must find that the proposed project "[w]ill not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services." The burdens of production and proof under this criterion are the same as under Criterion 6.

Criterion 7 addresses the ability to provide services of the local "governments" - plural. Therefore, the Board has reviewed the individual burden that the proposed project will place on each of the allegedly affected municipalities: the City of St. Albans, the Town of St. Albans, the Town of Swanton, and the Town of Enosburg.

Based on the foregoing findings of fact, and the 'conclusions under Criteria 6, 9(A), and 9(H) (Section IV.B.3.b. only), above, the Board concludes that the Applicants have not met their burden of production to provide sufficient information to support a positive finding under Criterion 7 with regard to the City, the Town, Swanton, or Enosburg.

Accordingly, the Board reaches a negative conclusion under this criterion. The Board incorporates by reference the discussion regarding 10 V.S.A. § 6087 contained in the section concerning Criterion 6, above.

5. Criterion 9(K) (Public Investments and Facilities\

Criterion 9(K) protects the public or quasi-public investment in "governmental and public utility facilities, services, and lands." The criterion also protects the function, safety and efficiency of such facilities, services, and lands, as well as the public use or enjoyment of them and access to them. 10 V.S.A. § 6086(a)(9)(K) specifically provides:

> A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, 'highways, airports, waste

> disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.

The central issues raised in this proceeding under Criterion 9(K) are: (a) whether the proposed project will unreasonably endanger the public or quasi-public investment in the City's historic district. and (b) whether the traffic impacts of the proposed project will materially jeopardize or interfere with the function, safety, or efficiency of Route 7. Traffic impacts of the proposed project under Criterion 9(K) are discussed below in the Traffic section and not here.

With respect the City's historic district, the Board is not prepared to conclude, based on the record in this case, that the buildings and structures in the district qualify as "governmental or public utility facilities, services, or lands" within the meaning of the statute.

In this regard, the contention made by the Citizens and VNRC appears to be that the buildings and structures qualify because public funds have been invested in them. Public funds, however, potentially may be invested in many private structures or enterprises.

It is true that Criterion 9(K) includes, in its examples of "governmental or public utility facility, service, or land," potentially private enterprises such as universities or hospitals. Based on the evidence presented, the Board is not persuaded that the City's historic district is analogous to the examples given in Criterion 9(K). The Board notes that the loss of public funds invested in the district, caused by negative impacts of the proposed project on the City's downtown, is relevant under other criteria such as Criterion 9(H).

Based on the foregoing findings of fact, the Board concludes that the proposed project complies with Criterion 9(K) with respect to endangerment of public or quasi-public investment in governmental or public utility facilities, services, or lands.

6. Criterion 10 (Local Plan)

Before issuing a permit, 10 V.S.A. § 6086(a)(10) requires that the Board must find that the proposed project "[i]s in conformity with any duly adopted local or regional plan or capital program under chapter 117 of Title 24." Under Criterion 10, the only issue raised on appeal has been the conformity of the proposed project with the plan of the Town of St. Albans. However, no town plan was in effect on the date that the application for this project was filed. Smith v. Winhall Planning Commission, 140 Vt. 178, 181-82 (1981).

C. Traffic

Findings of Fact

90. Vehicular access to the proposed project will be through a single curbcut off US 7. The curbcut will be located approximately 1200 feet north of the intersection of US 7 and Vt 207. The project driveway will consist of two incoming and two exiting lanes. The Applicants do not propose a separate access for emergency vehicles.

91. The number of trips to be generated by the proposed project is approximately 563 vehicles per hour during the week day afternoon peak hour.

92. The Applicants propose that the following improvements to affected intersections will be made at the Applicants' expense:

a. A traffic signal will be put in place at the intersection of US 7 and Vt 207.

b. The entrance to the drive-in theater will be moved to line up directly across US 7 from the project entrance.

c. An additional lane will be constructed on US 7 to provide left turn lanes to accomplish the following movements:

i. southbound into the drive-in theater;

ii. northbound into the site of the proposed project; and

iii. southbound onto Vt 207.

93. Following the improvements listed immediately above, all turning movements but one at the affected intersections will be maintained at Level of Service (LOS) C or better until the year 2000. The remaining turning movement will be at LOS D. The proposed project will not be the only contributor to the LOS D movement; the LOS D prediction is based in part on the build-out of other large projects which have received approval.

94. Without the improvements proposed by the Applicants, the proposed project would cause many of the turning movements at affected intersections to worsen considerably. With the addition of traffic from the proposed project to existing traffic levels, and without the proposed traffic improvements, several of those turning movements would be at LOS D, E, or F.

95. "LOS" is a measure of traffic congestion done on an A to F scale, with A being the best rating, and F being the worst. Expressed in terms of delay per average vehicle, these ratings mean: A, less than five seconds; B, five to 15 seconds; C, 15 to 25 seconds; D, 25 to 40 seconds; E, 40 to 60 seconds; and F, greater than 60 seconds.

96. In rural areas, LOS C or better is considered an acceptable LOS. In urban areas, LOS D or better is acceptable.

97. The Applicants have proposed no measures to alleviate traffic impacts other than adding signals or pavement. There has been no consideration of remediation measures such as a van service for shoppers, or other measures which do not involve additional pavement.

98. Sight distances at the intersection of the project entrance with US 7 will exceed 1000 feet, which is more than the recommended safety standard.

Conclusions of Law

10 V.S.A. § 6086(a)(S) requires that, before issuing a permit, the Board must find that the proposed project "[w]ill not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed." The burdens of production and proof under Criterion 5 are the same as those discussed under Criterion 6, above.

In addition, 10 V.S.A. § 6086(a)(9)(K), quoted above, requires in relevant part that, before issuing a permit, the Board must find that the proposed project will not "materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to," any public facilities, services or lands. The criterion states that such facilities or lands include highways. The burden of proof is on the Applicants. 10 V.S.A. § 6088(a). The Board has previously stated that traffic impacts may be considered under Criterion 9(K) and that an application may be denied for traffic impacts under this criterion if they rise to the level of "material" jeopardy or interference. Re: Swain Development Corp. and Philip Mans, #3W0445-2-EB, Findings of Fact, Conclusions of Law, and Order at 33-34 (Aug. 10, 1990).

There are two major areas of concern under traffic: safety and congestion.

Based on the foregoing findings of fact, the Board concludes that only one potential traffic safety problem will be caused by the proposed project. This problem is also a congestion concern. Specifically, there is a lack of a separate access for emergency vehicles to the project, which means that such vehicles must negotiate the project entrance during the afternoon peak hour when 563 other trips are projected for that entrance. If the Board were issuing a permit, the Board would include a condition requiring the Applicants to submit an adequate plan to the Board to construct a separate, dirt road emergency vehicle access which can be blocked off when not being used by such vehicles.

With regard to traffic congestion generally, because of traffic improvements which the Applicants will build, all but one of the affected intersections will be at level of service (LOS) C or better. The proposed project therefore will comply will Criteria 5 and 9(K) for all intersections at LOS C or better.

One of the intersections will be at LOS D. LOS C is the standard for rural areas and LOS D for urban areas. The Applicants contend that an LOS D is acceptable in this case because the area of the proposed project is more similar to an urban area than a rural area and is a designated area within the Town for commercial growth.

The Board disagrees that LOS D is acceptable within the area of the proposed project. This area is not an urban area in the manner of downtown Burlington or downtown St. Albans City. In such a compact area, an LOS D is acceptable because such an area is expected to receive a high concentration of traffic. But the area surrounding the proposed project presently has a significant rural component and is one in which commercial growth is planned to be spread

out along the highways. In such an area, LOS C should be the standard. To rule otherwise would be to encourage the spread of urban congestion levels along the highways of rural Vermont. The Board therefore believes that, in areas outside compact urban centers, congestion levels are unreasonable if they go below LOS C.

Although the Board finds LOS D to be unreasonable congestion under Criterion 5, the Board does not believe that such a level is sufficient grounds for denial under Criterion 9(K) because such an LOS does not reach the point of being a "material" interference or jeopardy with the affected highways.

Therefore, if the Board were issuing a permit, it would issue a permit condition stating that, prior to construction, the Applicants must provide the Board with a plan adequate to meet LOS C at all affected intersections. The Board would further specify in such a condition that such a plan must be based on remediation measures which do not involve the construction of additional pavement. Such measures could include van service for shoppers or similar items. Only if the Applicants were able to demonstrate, in such plan, that non-paving remediation measures were not feasible would the Board allow consideration of additional paving.

The Board would require the use of remediation measures which do not require additional pavement because it does not believe that the first response to congestion problems should always be. to pave. Such a response is likely to cause more road construction than is actually needed and would not be in keeping with the rural nature of Vermont.

Since the Board is denying this application on other grounds, the required plan to ensure that all affected intersections meet LOS C would be appropriate as part of an application for reconsideration under 10 V.S.A. § 6087(c) and Rule 31(B), which is discussed generally immediately below.

V. RECONSIDERATION UNDER SECTION 6087(c)

As stated above, the Board has concluded that this application must be denied under Criteria 9(A) and 9(H) and that negative conclusions are reached under Criteria 6 and 7.

The fact that the Board is denying this application does not mean that no permit will ever be issued for the proposed project. Under Act 250, a procedure exists which allows the Applicants to file with the District Commission, within six

months, an application for reconsideration. In such an application, the Applicants will have to demonstrate that they have corrected the deficiencies found above by the Board with regard to Criteria 9(A) and 9(H) as well as Criteria 6 and 7. 10 V.S.A. § 6087(c) provides:

> A denial of a permit shall contain the specific reasons for denial. A person may, within 6 months, apply for reconsideration of his permit which application shall include an affidavit to the district commission and all parties of record that the deficiencies have been corrected. The district commission shall hold a new hearing upon 25 days notice to the parties. The hearing shall be held within 40 days of receipt of the request for reconsideration.

Interpreting and implementing this provision, the Board has promulgated Rule 31(B), which requires that applications to correct deficiencies in denials be made to the appropriate district commission, specifies procedures for such proceedings, and states that any positive findings already made with respect to the underlying project are entitled to a presumption of validity. The Board previously has ruled that, to be eligible for the procedure under 10 V.S.A. § 6087(c) and Rule 31(B), an applicant must correct the deficiencies in the prior denial, which consist of the specific findings of noncompliance with some or all of the Act 250 criteria. Re: Sherman Hollow. Inc., #4C0422-5R-1-EB, Findings of Fact, Conclusions of Law and Order (Revised) at 18-19 (June 19, 1992); affirmed on other grounds, In re Sherman Hollow, supra.

Because this alternative is available to the Applicants, the Board has been specific above with regard to the deficiencies in this application. To provide' increased clarity, the Board will highlight, below, certain items that should be addressed in a reconsideration proceeding under Section 6087(c) and Rule 31(B). The Board cautions the Applicants and other parties that this list below is not intended to be exhaustive or exclusive, that all deficiencies enumerated in this decision must be remedied, and that the evidence in any reconsideration proceeding must demonstrate that the proposed project complies with Criteria 9(A) and 9(H) as well as Criteria 6 and 7. Also, the plan discussed under Criterion 5 should be submitted as part of any proceeding under Section 6087(c).

The Board highlights the following measures with regard to correcting the deficiencies in this application:

a. Provide a credible study which quantifies the impacts of the secondary growth which the proposed project will cause in its vicinity. Such a study

should apply the experience of Wal*Mart stores in New England specifically, and in the rest of the country generally, to the local market. Such a study must include projections of the anticipated public costs and public benefits associated with this secondary growth and must address the ability of the Town and Region to accommodate the secondary growth.

b. Propose a permit condition which will reasonably alleviate the burden caused by any public costs of the proposed project for any affected municipality for which the public costs outweigh the public benefits. Such proposal could be in the form of an impact fee or a bond. The proposal could be in the form of an adequate contract with the affected municipality. There is precedent for such a contract. Specifically, in the case of the so-called Finard-Zamias Mall proposed for the Town of Rutland, the applicant reached a contract with the City of Rutland containing terms for alleviating the burden on the City. This contract formed the basis of positive findings by the Board under Criteria 6, 7, 9(A), and 9(H). Finard-Zamias, supra at 15 -16.

By highlighting the possibility of an application to correct the deficiencies, the Board does not mean to imply that such a proceeding would involve relitigation of the matters settled in this decision. Because the statute and rule require correcting the deficiencies, such a proceeding will involve accepting the Board's decision and meeting its terms. This means that an application under Section 6087(c) and Rule 31(B) is not, for example, a vehicle for relitigating issues such as the need for information on secondary growth or whether the project area constitutes an existing settlement.

VI. ORDER

1. Based on the foregoing findings of fact, and conclusions of law under Criteria 9(A) (impact of growth) and 9(H) (costs of scattered development), this application is denied. Land Use Permit #6F0471 is void.

2. The Applicants have not met their burden of production with respect to demonstrating compliance with Criteria 6 (impact on schools) and 7 (local governmental services).

3. Based on the foregoing findings of fact and conclusions of law, including any conditions noted therein, this application complies with Criteria l(A) (headwaters), l(B) (waste disposal), l(E) (streams), l(G) (wetlands), 4 (soil erosion), 5 (traffic), and 9(K) (public investments and facilities).

Dated at Montpelier, Vermont this 23rd day of December, 1994.

ENVIRONMENTAL BOARD

Arthur Gibb, Chair*
Rebecca Day
Lixi Fortna*
Samuel Lloyd
William Martinez*
Robert Opel
Robert Page
Steve E. Wright
Anthony Thompson*

Chair Gibb and members Fortna, Martinez, and Thompson dissent from the Board's conclusion that the area in which the proposed project would be located is not an "existing settlement." They would conclude that the area is such a settlement. However, they concur with the conclusion under Criterion 9(H) that the Board is not persuaded that the public costs will not outweigh the public benefits. They also concur with the Board's decision that no feasible permit condition can be issued under Criterion 9(H) and that therefore the proposed project must be denied under that criterion (assuming the majority's conclusion that the area is not an existing settlement). They further concur with the remainder of this decision, including but not limited to denial under Criterion 9(A)