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

RE: Developer's Diversified Realty Corporation
Declaratory Rulings #364, #371, and #375 (consolidated)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I. SUMMARY OF DECISION

In this decision, the Environmental Board ("Board") concludes that the leasing of Department Store A in the Berlin Mall to Wal*Mart ("Lease Change") is not connected to the phased repair of the Berlin Mall parking lot and Route 62 access ("Parking Lot and Access Changes"). The Board further concludes that the Lease Change, the Parking Lot and Access Changes, and the Department Store A mezzanine do not require a permit amendment pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250"). Finally, the Board concludes that the Department Store A mezzanine does not require an Act 250 permit amendment under the terms of Condition 36 of Land Use Permit #5W0584-2-EB.

II. BACKGROUND

On May 14, 1998, the District #5 Environmental Commission Coordinator ("Coordinator") issued Jurisdictional Opinion #5-98-8 ("First J.O.") in which he determined that the Lease Change does not require an Act 250 permit amendment.

On June 12, 1998, the Concerned Physicians ("Physicians") filed a petition for declaratory ruling with the Board, appealing the First J.O. ("Declaratory Ruling #364"). The petition for declaratory ruling is filed pursuant to 10 V.S.A. § 6007(c) and Environmental Board Rule ("EBR") 3. The Physicians contend that the Lease Change requires an Act 250 permit.

On July 6, 1998, Richard Brock, Esq. filed a Petition for Party Status on behalf of Central Vermont Hospital ("CVH").

On July 20, 1998, Charles F. Yeiser, Jr., Esq. filed a Petition for Party Status on behalf of Citizens for Vital Communities ("CVC").

On July 22, 1998, Robert Halpert, Esq. entered his appearance on behalf of the Town of Berlin ("Town").

On July 23, 1998, Board Chair Marcy Harding convened a prehearing conference in Declaratory Ruling #364.

On July 23, 1998, Developer's Diversified Realty Corporation ("Developer's Diversified") filed a Preheating Conference Memorandum, including a Petition for

Rulemaking.

On July 23, 1998, the Physicians filed a Petition for Standing.

On July 24, 1998, Chair Harding issued a Preheating Conference Report and Order in Declaratory Ruling #364, granting party status to CVH and setting forth a schedule for filings regarding other preliminary issues. The Preheating Conference Report and Order is incorporated herein by reference.

On July 3 1, 1998, Developer's Diversified filed a Motion to Dismiss Concerned Physicians' Petition for Declaratory Ruling and Memorandum in Support Thereof ("Motion to Dismiss").

On July 31, 1998, CVC filed a Supplemental Party Status Request.

On August 10, 1998, Developer's Diversified filed a Response to the Prehearing Order.

On August 11, 1998, CVC filed a Response to the Petition for Rulemaking.

On August 11, 1998, the Physicians filed the Second Affidavit of Duane Natvig and a Response to the Board's Prehearing Order.

On August 14, 1998, Developer's Diversified filed an Objection to the Admission of the Second Affidavit of Duane Natvig.

On August 18, 1998, the Physicians filed a Response to Developer's Diversified's Objection to Admission of the Second Affidavit of Duane Natvig.

On August 27, 1998, the Coordinator issued a Project Review Sheet ("P.R. Sheet") in which he determined that the Parking Lot and Access Changes do not require an Act 250 permit amendment.

On August 28, 1998, CVC filed a letter requesting the opportunity to submit a supplemental memorandum and requesting postponement of Board deliberations until submittal of such memorandum.

On August 28, 1998, the Physicians filed a Motion to Allow Supplemental Memorandum, Additional Time, and Stay. Also on August 28, 1998, the Physicians filed an Affidavit of Duane Natvig and a Supplemental Response to the Board's Prehearing

Conference Report and Order.

On August 3 1, 1998, Developer's Diversified filed a letter stating that there is no need to postpone the Board's deliberations on the preliminary issues.

On September 8, 1998, the Physicians filed a petition for declaratory ruling with the Board, appealing the PR Sheet ("Declaratory Ruling #371").

On September 10, 1998, the Board issued a Memorandum of Decision, concluding that the Physicians have standing to bring Declaratory Ruling #364 and that CVC has party status in Declaratory Ruling #364, among other preliminary issues.

On September 14, 1998, CVC filed a petition for declaratory ruling with the Board, appealing the P.R. Sheet (formerly defined as "Declaratory Ruling #371"). The Physicians and CVC contend that the Parking Lot and Access Changes require an Act 250 permit. Additionally, the Physicians and CVC contend that the Parking Lot and Access Changes and the Lease Changes are part of the same project. Finally, the Physicians and CVC filed motions to consolidate Declaratory Ruling #371 with Declaratory Ruling #364.

On August 19 and September 8 and 22, 1998, the Board deliberated on several preliminary issues.

On September 24, 1998, the Board issued a Memorandum of Decision, denying Developer's Diversified's request to decide the first steps of the substantial and material change analyses without a hearing and denying the requests set forth by the Physicians and CVC in their August 28, 1998 filings.

On September 25, 1998, Scott Whitted, Esq. entered his appearance in Declaratory Ruling #37 1 on behalf of the Agency of Transportation ("AOT").

On September 28, 1998, Developer's Diversified filed a Prehearing Conference Memorandum in Declaratory Ruling #37 1.

On September 30, 1998, Robert Halpert, Esq. entered his appearance in Declaratory Ruling #371 on behalf of the Town.

On September 30, 1998, Developer's Diversified filed a letter stating that it has no objection to the consolidation of Declaratory Ruling #371 with Declaratory Ruling #364.

On October 2, 1998, Stephen Reynes, Esq. filed a Notice of Appearance and a

Petition for Party Status in Declaratory Ruling #371 on behalf of the Berlin Mall Merchants Committee.

On October 5, 1998, CVH filed a petition for party status in Declaratory Ruling #371.

On October 5, 1998, Chair Harding convened a prehearing conference in Declaratory Ruling #371.

On October 6, 1998, Chair Harding issued a Prehearing Conference Report and Order that consolidated Declaratory Ruling #364 and Declaratory Ruling #37 1. Additionally, the Prehearing Conference Report and Order granted party status to the Berlin Mall Merchants Committee in Declaratory Ruling #371 and set forth the schedule for the consolidated cases, including hearing dates on February 3 and 4, 1999. The Prehearing Conference Report and Order is incorporated herein by reference.

On October 26, 1998, CVC filed a Motion to Take Judicial Notice.

On November 24, 1998, Developer's Diversified filed a Response to CVC's Motion to Take Judicial Notice.

On November 19, CVC withdrew its Motion to Take Judicial Notice because CVC had reached a stipulation with Developer's Diversified regarding such motion.

On November 23, 1998, CVC and Developer's Diversified filed a stipulation regarding CVC's Motion to Take Judicial Notice.

On December 8, 1998, the Coordinator issued Jurisdictional Opinion #5-98-24 ("Second J.O.") in response to a request by CVC for a determination of whether the construction and use of a mezzanine in Department Store A of the Berlin Mall constitutes a substantial or material change under EBR 2(G) and 2(P). The Second J.O. declines to rule on CVC's request because it concludes that such request is a component of the issues pending before the Board in consolidated Declaratory Rulings #364 and #37 1.

On December 10, 1998, the Physicians filed a Motion to Expedite, requesting the Board to hold an expedited hearing before February 3 and 4, 1999.

On December 11, 1998, CVC filed a Motion to Expand Inquiry and Motion for Expedited Hearing, requesting the Board to: (i) expand its inquiry to include the issue of whether the use of a -mezzanine in Department Store A of the Berlin Mall is a substantial or material change and (ii) hold an expedited hearing on the mezzanine issue.

On December 14, 1998, Developer's Diversified filed a petition for declaratory ruling, appealing the Second J.O. ("Declaratory Ruling #375").

On December 15, 1998, Chair Harding issued a Chair's Preliminary Ruling, granting the Physicians' Motion to Expedite, denying CVC's Motion to Expand Inquiry and Motion to Expedite, and consolidating Declaratory Rulings #364, #37 1, and #375. The Chair's Preliminary Ruling stated that it would become final unless a written objection to it was filed on or before December 2 1, 1998.

On December 16, 1998, the Berlin Mall Merchants' Committee filed an Objection to the Expedite Motions.

On December 16, 1998, AOT filed a letter stating that it had no objection to the Physicians' Motion to Expedite.

On December 18, 1998, Developer's Diversified filed an Objection to the Chair's Preliminary Ruling.

On December 18, 1998, CVC filed a Motion in Response to Chair's Preliminary Ruling, requesting an addition to the issue framed for Declaratory Ruling #375.

On December 23, 1998, the Board issued a Memorandum of Decision and Scheduling Order, denying the Concerned Physicians' Motion to Expedite and granting CVC's request for an addition to the issue framed for Declaratory Ruling #375.

The parties filed prefiled testimony, lists of witnesses and exhibits, proposed findings of fact and conclusions of law, and evidentiary objections during November and December, 1998 and January, 1999.

On February 1, 1999, Chair Harding convened a second prehearing conference by telephone.

On February 2, 1999, Gerald Tarrant, Esq. withdrew as counsel for the Physicians and Clarke Atwell, Esq. entered his appearance as counsel for the Physicians.

On February 3 and 4, 1999, the Board convened a hearing in the City of Montpelier with the following parties participating: Developer's Diversified by John Ponsetto, Esq., the Physicians by Clarke Atwell, Esq., CVC by Charles Yeiser, Jr., Esq., the Town by Robert Halpert, Jr., Esq., CVH by Richard Brock, Esq., the Berlin Mall Merchants' Committee by Stephen Reynes, Esq., and AOT by Scott Whitted, Esq. After hearing opening arguments, the Board conducted a site visit, placed its site visit observations on the record, and gave the

parties an opportunity to place their own site visit observations on the record. The Board then ruled on the evidentiary objections and heard testimony and arguments from the parties.

The Board conducted deliberative sessions on February 4 and 24, 1999 and March 24, 1999.

This matter is now ready for final decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. See Secretary, Aeency of Natural Resources v. Upper Valley Regional Landfill Cornoration, No. 96-369, slip op. at 13 (Vt. Nov. 7, 1997); Petition of Village of Hardwick Electric Department, 143 Vt. 437,445 (1983).

III. ISSUES

A. Whether the Parking Lot and Access Changes and the Lease Change are part of the same project.

B. If the answer to issue A is in the affirmative, whether the Parking Lot and Access Changes together with the Lease Change constitute either a "substantial change" or a "material change" in the permitted project and therefore require an Act 250 permit amendment pursuant to EBR 34.

C. If the answer to issue A is in the negative, whether the Lease Change alone constitutes either a "substantial change" or a "material change" in the permitted project and therefore requires an Act 250 permit amendment pursuant to EBR 34.

D. If the answer to issue A is in the negative, whether the Parking Lot and Access Changes alone constitute either a "substantial change" or a "material change" in the permitted project and therefore require an Act 250 permit amendment pursuant to EBR 34.

E. If the answer to issue A is in the negative, whether the Parking Lot and Access Changes constitute repair or routine maintenance.

F. Whether the mezzanine in Department Store A of the Berlin Mall constitutes either a "substantial change" or a "material change" in the permitted project and therefore requires an Act 250 permit amendment pursuant to EBR 34.

G. Whether the mezzanine in Department Store A of the Berlin Mall requires an Act 250 permit amendment under the terms of Condition 36 of Land Use Permit #5W0584-2-EB.

IV. FINDINGS OF FACT

1. On September 6, 1984, the District #5 Environmental Commission ("Commission") issued Findings of Fact, Conclusions of Law, and Order #5W0584-2 ("Commission Decision") in which it denied an application for a 168,907 square foot shopping mall in Berlin, Vermont because the project did not comply with 10 V.S.A. § 6086(a)(8), (9)(F), and 9(K) ("Criteria 8,9(F), and 9(K)" respectively). Additionally, the Commission determined that the project did not comply with 10 V.S.A. § 6086(a)(5) ("Criterion 5") but did not deny the application under Criterion 5 pursuant 10 V.S.A. $6087(b).

2. On October 1, 1984, Berlin Associates Limited (now Developer's Diversified) appealed the Commission Decision to the Board.

3. The Notice of Appeal filed by Berlin Associates Limited addressed all ten criteria of Act 250. Prior to the public hearing in the Board appeal, however, the parties reached agreement in respect to all issues identified in the Notice of Appeal except for the traffic safety issues surrounding the Route 62 access to the project site under Criterion 5.

4. On January 23, 1985, the Board issued Land Use Permit #5W0584-2-EB ("Permit") and the associated Findings of Fact, Conclusions of Law, and Order ("Board Decision") to Berlin Associates Limited. The Permit authorizes construction and leasing of a 173,703 square foot enclosed mall/department store in Berlin, Vermont ("Mall")..

5. Department Store A is a building in the Mall.

6. Rich's Department Store, a discount retail store, occupied Department Store A from the time the Mall opened in 1986 until March of 1997.

7. On February 1, 1998, Developer's Diversified and Wal*Mart entered into a lease agreement ("Lease") wherein Developer's Diversified leased Department Store A to Wal*Mart (previously defined as the "Lease Change").

8. Negotiations between Developer's Diversified and Wal*Mart regarding the Lease Change began in the fall of 1997.

9. In general, the products which were available at Rich's are also available at Wal*Mart. Wal*Mart, also a discount retail store, carries more products and more

brands of products than Rich's carried. Wal*Mart carries approximately 70,000 items whereas Rich's carried 15,000-20,000 items.

10. The Lease allows Wal*Mart to use Department Store A for any lawful purpose. Wal*Mart's use will be limited to a retail department store.

11. As part of the Lease Change, Wal*Mart made the following changes to the interior of Department Store A: demolition of old office areas; removal of wire mesh partitions in the storage area as well as removal of finishes, such as carpeting and ceilings, throughout the space; construction of partitions for office areas, public bathrooms, training areas, customer service, layaway and return areas, a pharmacy, and a snack bar; and the provision of lights, power and water to service the above spaces.

12. The interior renovations do not include a garden center or a vision center.

13. Wal*Mart's interior renovation work began on September 8, 1998 and finished on December 7, 1998.

14. As part of the Lease Change, Wal*Mart made the following changes to the exterior of Department Store A:

    a. On the side of Department Store A closest to the Route 62 access, Wal*Mart installed: new double doors; two new ramps (one ramp 6-8 feet long and the other 20 feet long); and four new bollards.

    b. On the back sides of Department Store A, Wal*Mart installed: a new concrete pad and trash compactor at the loading area; a jib hoist on the roof; six new HVAC units on the roof; a new satellite dish on the roof; three new ramps (one ramp 50 feet long and the other two 20-25 feet long); and seven new bollards.

15. The exterior changes set forth in the preceding paragraph are not depicted or specifically authorized by the Permit.

16. On page 3, the Board Decision states:

> Subsequent to the prehearing conference, the Applicant elected to revise its proposal in several respects in an effort to resolve concerns raised by the other parties which resulted in the Commission's adverse decision in respect to Criterion 8. Specifically, the Applicant eliminated its proposal to locate

Outlots B, C, and D within the wetland area east of the parking lot. The parties have designated an area delineated by the 982' elevation line and have agreed that no activity, other than installation of protective plantings, will occur within 25' of the delineated area, 3 V.S.A. Section 809(d) allows this Board to dispose of issues on appeal by way of stipulated agreement. We have reviewed the parties' stipulation dated December 12, 1984, and find that it adequately resolves the concerns which gave rise to the Commission's denial of the application under Criterion 8. We, therefore, conclude that disposition of Criterion 8 issues in the manner now proposed by the Applicant and as stipulated by the parties, is not contrary to the intent or purposes of Act 250 or the Board rules. We will condition the permit now issued accordingly.

17. Condition 26 of the Permit states:

> No tree cutting, excavation or grading shall be conducted in the areas designated Outlots A through D, or the "Non-Building Area," identified on Board Exhibit #9 excepting such activity which is necessary for the installation of the mall structure itself, together with access drives and the parking area. This restriction shall not apply to the installation of the landscaping identified on said Exhibit. No other improvements to, alterations of, or use of these designated areas is permitted without the prior approval of the District #5 Commission by way of Amendment to this permit.

18. Condition 27 of the Permit states:

> There shall be no disturbance of the wetland area located east of the mall parking lot which is encircled by a 982' elevation line depicted on Board Exhibit 12, Sheet 4, nor shall there be any disturbance within a 40' buffer zone beyond elevation 982'. Prior to the commencement of construction, the Permittee shall erect a snow fence marking off and protecting the wetland area and its buffer from all construction activities. Snow fence shall also be erected roughly parallel to and west of Route 62, protecting existing vegetation in the highway right-of-way and vegetation on areas designated Outlots A, C and "Non-Building Area" on Board Exhibit #9. If the existing vegetative screen is disturbed or destroyed during construction such that its effectiveness as a screen is diminished, the Permittee shall plant replacement vegetation, to the District #5 Commission's satisfaction, restoring the effectiveness of the screen. If salt or a similar material is used on the parking area or access roads, snow from those areas shall not be stored in a manner

which would permit melt water to drain into the wetland.

19. There is no evidence that the exterior changes associated with the Lease Change occurred within the areas designated Outlots A through D or the "Non-Building Area" identified in Condition 26 of the Permit.

20. There is no evidence that the exterior changes associated with the Lease Change disturbed the wetland area east of the Mall parking lot or the 40 foot buffer around the wetland identified in Condition 27 of the Permit.

21. The Permit does not restrict the nature and extent of renovations that may be conducted within the interior of Department Store A.

22. In issuing the Permit, the Board did not make findings or conclusions or impose conditions that prohibit any particular retailer or particular type of retailer from being a tenant in the Mall. The Board did not require that each lease of retail space would require Commission approval.

23. The Permit does not contain any conditions restricting the volume of traffic at the Mall.

24. The Mall has two access roads: an access from Fisher Road and an access from Route 62.

25. The pavement of the Mall parking lot and access roads has deteriorated over the years because of inadequate surface and sub-drainage systems.

26. During 1997 and 1998, Developer's Diversified received numerous complaints from customers and retailers about the condition of the parking lot, including complaints about damaged and stuck vehicles and upset shopping carts.

27. During 1997 and 1998, Mall merchants expressed concerns to Developer's Diversified about the condition of the parking lot because it discourages customers from shopping at the Mall. They also complained that Developer's Diversified's failure to repair the facility violates their leases. A Mall merchant threatened to take legal action if the repairs were not made.

28. The symptoms of the underlying drainage problem with the parking lot are rutting, alligator cracking, block cracking, transverse cracking, longitudinal cracking, and raveling. The condition of the parking lot ranges from very poor in the central

parking lot area to good in the south central parking lot area.

29. Developer's Diversified reconstructed the Fisher Road access in 1996. **Over the** years, with the exception of the reconstruction of the Fisher Road access, Developer's Diversified made minor repairs to the surface of the parking lot. In June of 1997, however, Developer's Diversified determined that the underlying causes of the deteriorating surface pavement must be addressed.

30. On June 19, 1997, Developer's Diversified contacted Civil Engineering Associates ("CEA") to conduct a geotechnical study of the Mall parking lot.

31. On July 2, 1997, CEA submitted an engineering services proposal to Developer's Diversified. Developer's Diversified accepted CEA's proposal on August 28, 1997.

32. CEA began the geotechnical study in August of 1997, completed the initial phase in November of 1997, and completed an expansion of the study in February of 1998.

33. CEA's geotechnical study concluded that the deterioration of the pavement in the Mall parking lot was caused by poor surface drainage and inefficient and inadequate sub-drainage.

34. Roads and parking lots similar to the Mall parking lot normally have a design life of approximately 20 years. The Mall parking lot was constructed in 1985 and has failed to achieve design life because of inadequate drainage.

35. Developer's Diversified authorized CEA to begin the design of the Parking Lot and Access Changes on May 13, 1998.

36. CEA completed engineering and design plans for the Parking Lot and Access Changes on June 11, 1998.

37. CEA invited contractors to bid on the Parking Lot and Access Changes on June 18, 1998. On August 6, 1998, CEA awarded the bid to Capitol Earthmoving, Inc. of Barre, Vermont.

38. Depending on budgetary considerations, the Parking Lot and Access Changes will be completed in either two or three phases. The first phase, including the Route 62 access, the southern one-half of the parking lot, and a portion of the access on the **north side of the Mall, was completed on November 16, 1998. The** second phase, including the remaining northern one-half of the parking lot, will be completed in

either 1999 or it will be divided into a second phase to be completed in 1999 and a third phase to be completed in 2000.

39. The Parking Lot and Access Changes include adding an underdrain system that is three to four feet deeper than the original underdrain system and increasing the thickness of granular base and base materials to provide a recommended thickness of granular materials between native sub-grade and the pavement surface.

40. The Parking Lot and Access Changes incorporate specifications to the parking lot that should have been included in the original design to allow the parking lot to function efficiently and to prevent premature deterioration of the paved surface.

41. The Parking Lot and Access Changes will not increase the height of the existing light poles.

42. The Parking Lot and Access Changes will not change the volume and discharge point of storm water and ground water.

43. The Parking Lot and Access Changes will not increase the size or change the shape of the parking lot; nor will they change the location or increase the number of parking spaces (there was a slight decrease in the number of parking spaces due to the addition of handicapped spaces). The Parking Lot and Access Changes will not increase the capacity of the parking lot to allow a future increase in the number of parking spaces.

44. The Parking Lot and Access Changes will not eliminate the ongoing need for normal maintenance of the parking lot and access roads.

45. The Parking Lot and Access Changes will provide a parking lot in an improved condition as compared to the parking lot that was originally constructed. The Parking Lot and Access changes will allow more efficient drainage of surface water and modify the location of the surface of the parking lot in relationship to the groundwater.

46. The Parking Lot and Access Changes will be completed whether or not Wal*Mart is a tenant in the Mall.

47. The Parking Lot and Access Changes are not depicted or specifically authorized by the Permit.

48. Conditions 26 and 27 of the Permit are the only references to the Mall parking lot in the Permit.

49. There is no evidence that the Parking Lot and Access Changes occurred within the areas designated Outlots A through D or the "Non-Building Area" identified in Condition 26 of the Board Permit.

50. There is no evidence that the Parking Lot and Access Changes disturbed the wetland area east of the Mall parking lot or the 40 foot buffer around the wetland identified in Condition 27 of the Permit.

51. The ground floor area of Department Store A is 66,300 square feet.

52. Department Store A contains a 7,710 square foot mezzanine ("Mezzanine") that was built when the Mall was constructed. Wal*Mart uses the Mezzanine for the storage of merchandise.

53. Condition 1 of the Permit states:

> The project shall be completed as set forth in the Findings of Fact and Conclusions of Law #5W0584-2 except as modified by the Findings of Fact and Conclusions of Law of the Environmental Board in Land Use Permit #5W0584-2-EB, in accordance with the plans and exhibits stamped "Approved" and on file with the District #5 Environmental Commission, and in accordance with the Condition of this permit. No changes shall be made in the project without the written approval of the District #5 Environmental Commission.

54. The Mezzanine is not depicted on any of the plans or exhibits incorporated within the Permit, The plans incorporated within the Permit are conceptual and show no detail of the interior of Department Store A.

55. Condition 36 of the Permit states:

> Any expansion of "Department Store A" beyond 66,300 square feet gross leasable space must receive the prior approval of the District #5 Commission by way of amendment to this permit.

56. The Urban Land Institute's "Shopping Center Development Handbook" (Second Edition) defines Gross Leasable Area ("GLA") as follows:

> GLA is the total floor area designed for the tenant's occupancy and exclusive use -- including basements, mezzanines, or upper floors -- expressed in square feet and measured from the centerline of joint partitions and from outside wall faces. It is the space for which tenants pay rent, including sales areas and integral stock areas.

57. Developer's Diversified does not use the Urban Land Institute's definition of **GLA in** determining the GLA of space rented to its tenants. Rather, Developer's Diversified defines GLA as the square footage of the ground floor space rented to a tenant. The tenant also has the right to possess any existing vertical space within the GLA such as a mezzanine (but the square footage of such vertical space is not included in the calculation of the GLA).

58. Paragraph I.A of the Lease states:

> Lessor, in consideration of the covenants and agreements hereinafter contained, does hereby demise and lease to Lessee a sixty-six thousand three hundred (66,300) square foot building (hereinafter the "Demised Premises") in the Shopping Center to be or being constructed on the real property described in Exhibit A attached hereto and made a part hereof (hereinafter the "Shopping Center"), to have and to hold during the Term (as defined in Paragraph 2 [of the Lease]). The Demised Premises and the Shopping Center are located in the City of Berlin, in Washington County, Vermont.

59. The Demised Premises in paragraph I.A of the Lease refers to the 66,300 square foot ground floor of Department Store A and to all vertical space within that area.

60. The Mezzanine is vertical space within the 66,300 square foot Demised Premises.

V. CONCLUSIONS OF LAW

A. Scope of Review and Burden of Proof

A petition for declaratory ruling is conducted **de novo to determine the applicability of** any statutory provision or of any rule or order of the Board. 10 V.S.A. § 6007(c) and EBR 3(D). Although the petition may come to the Board as an appeal of a jurisdictional opinion or project review sheet, the issue in a declaratory ruling proceeding is not whether the opinion, or any part thereof, is correct. Thus, facts stated or conclusions drawn in the First J.O., the P.R. Sheet, and the Second J.O. are not considered by the Board. Provided a petition is timely filed, the only issue is the applicability of any statutory provision or of any

rule or order of the Board over the Project.

The burden of proof to demonstrate an exemption from Act 250 jurisdiction is on the person claiming the exemption -- Developer's Diversified in this proceeding. Re: Weston Island Ventures, Declaratory Ruling #169, Findings of Fact, Conclusions of Law, and Order at 5 (June 3, 1985) (citing Bluto v. Employment Security, 135 Vt. 205 (1977)). The burden of proof consists of both the burdens of production and persuasion. Re: Pratt's Propane, #3R0486-EB, Findings of Fact, Conclusions of Law, and Order at 4-6 (Jan. 27, 1987)[EB #311M].

B. Whether the Parking Lot and Access Changes and the Lease Change are part of the same project.

The Board concludes that the Parking Lot and Access Changes and the Lease Change are not part of the same project because there is no convincing evidence of a connection between these changes.

The Parking Lot and Access Changes began before negotiations between Developer's Diversified and Wal*Mart regarding the Lease Change. The Parking Lot and Access Changes began on June 19, 1997 when Developer's Diversified contacted CEA to conduct a geotechnical study of the Mall parking lot. On July 2, 1997, CEA submitted an engineering services proposal to Developer's Diversified. Developer's Diversified accepted CEA's proposal on August 28, 1997. CEA began the geotechnical study in August of 1997, completed the initial phase in November of 1997, and completed an expansion of the study in February of 1998. Based on the study, Developer's Diversified completed the first phase of the Parking Lot and Access Changes on November 16, 1998.

In contrast, the negotiations between Developer's Diversified and Wal*Mart regarding the Lease Change began in the fall of 1997 and continued until February 1, 1998 when Developer's Diversified and Wal*Mart entered into the Lease.

Although there is an overlap between the time during when CEA completed the geotechnical study and the initial negotiations between Developer's Diversified and Wal*Mart, the Board does not find the overlap to be convincing evidence of a connection between the Parking Lot and Access Changes and the Lease Change, especially because the Parking Lot and Access Changes will be completed whether or not Wal*Mart is a tenant in the Mall. Based on the above, the Board concludes that the Parking Lot and Access Changes and the Lease Change are not part of the same project.

C. If the answer to issue A is in the affirmative, whether the Parking Lot and Access Changes together with the Lease Change constitute either a "substantial change" or a "material change" in the permitted project and therefore require an Act 250 permit amendment pursuant to EBR 34.

Since the answer to issue A is in the negative, this issue is moot. Even if the Board had concluded that the Lease Change and the Parking Lot and Access Changes are part of the same project, it would have concluded that such changes, viewed together, do not constitute either a substantial or a material change in the permitted project.

D. If the answer to issue A is in the negative, whether the Lease Change alone constitutes either a "substantial change" or a "material change" in the permitted project and therefore requires an Act 250 permit amendment pursuant to EBR 34.

A permittee must apply for a permit amendment for any "substantial" change or "material" change in a permitted project. EBR 34(A).

1. Substantial Change

"Substantial change" is defined as "any change in a development ... which may result in significant impact with respect to any of the criteria specified in" Act 250. EBR 2(G).

Finding substantial change involves a two step process. First, there must be a "cognizable" (i.e. physical) change to the permitted project. See, e.g., Sugarbush Resort Holdings, Inc., Declaratory Ruling #328, Findings of Fact, Conclusions of Law, and Order (Feb. 27, 1997); Re: David Enman (St. George Property), Declaratory Ruling #326, Findings of Fact, Conclusions of Law, and Order (Dec. 23, 1996); Re: Village of Ludlow, Declaratory Ruling #212, Findings of Fact, Conclusions of Law and Order (Dec. 29, 1989). Second, the change must have the potential to impact significantly on one or more of the ten Act 250 criteria. Id.; EBR 2(G). In considering the issue of substantial change, the Board has stated:

> In deciding whether Act 250 jurisdiction applies . . . , the appropriate consideration is whether the potential for significant impact is raised. This consideration does not require an in-depth review of possible impacts, but simply a determination that significant impacts may occur.

Village of Ludlow, supra, at 9 (quoting Re: City of Montpelier, Declaratory Ruling #190, Findings of Fact, Conclusions of Law, and Order at 7 (Sept. 6, 1988)). See also In re Barlow, 160 Vt. 513, 521-22 (1993) (upholding validity of EBR 2(G) by finding that an

impact can be potential as long as it is significant and affirming Board determination that an increase in the extraction rate and frequency of use of a gravel pit was a substantial change); Re: Taft Corners Associates, Inc., #4C0696-11-EB (Remand), Findings of Fact, Conclusions of Law, and Order (Revised) (May 5, 1995) [EB #532R2] (substantial change found where increase in size of project involving retail and warehouse buildings would, without certain improvements to existing roads, have a potential for significant impact on Criterion 10 (town / regional plan)); Re: Village of Ludlow, supra (substantial change to an existing sewage treatment plant found where new parts were added and others were replaced with parts that were physically different because additional traffic and noise impacted Criteria 1 (air), 5(traffic), and 8(aesthetics)).

a. Cognizable Change

Based on the findings of fact made herein, the Board concludes that the following exterior changes to Department Store A associated with the Lease Change are cognizable physical changes in the project as authorized by the Permit:

1. On the side of Department Store A closest to the Route 62 access, Wal*Mart installed: new double doors, two new ramps, and four new bollards.

2. On the back sides of Department Store A, Wal*Mart installed: a new concrete pad and trash compactor at the loading area, a jib hoist on the roof, six new HVAC units on the roof, a new satellite dish on the roof, three new ramps, and seven new bollards.

Such exterior changes are not depicted or authorized by the Permit. Therefore, they constitute cognizable changes.[1] See Re: Vermont Institute of Natural Science, Declaratory Ruling #352, Findings of Fact, Conclusions of Law, and Order at 29 (Feb. 11, 1999) (installing an underground water line, constructing an outdoor classroom, and creating an outdoor recreation area were physical changes); Re: David Enman (St. George Property), supra (driveway 1000 feet in length was cognizable change to two existing subdivision permits); Re: Clearwater Realty, Declaratory Ruling #318, Findings of Fact, Conclusions of Law, and Order (Sept. 27, 1996) (replacement of fence along a 25-foot right-of-way, cleaning and re-seeding grass drainage swale, placement of 9 x 25 foot gravel strip, and placement of mesh to stabilize bank were cognizable physical changes).

[1] Board Members George Holland, Samuel Lloyd, and Gregory Rainville dissent from the Board's conclusion that the exterior changes to Department Store A associated with the Lease Change are cognizable physical changes in the permitted project.

b. Potential for Significant Impact on Act 250 Criteria

Although the exterior changes to Department Store A associated with the Lease Change are cognizable changes, the Board concludes that such changes do not have the potential to impact significantly on one or more **of the** ten Act 250 criteria. Accordingly, the Lease Change does not constitute a substantial change in the permitted project and does not require an Act 250 permit amendment.

2. Material Change

"Material change" is defined as "any alteration to the project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one or more values sought to be protected by the Act." EBR 2(P).

Finding a material change involves a two step process. First, the Board must decide whether a physical change or a change in use has occurred or will occur. See, e.g., Vermont Institute of Natural Science, supra; Sugarbush Resort Holdings. Inc., supra; Re: David Enman (St. George Property), supra; Re: Mount Mansfield Co., Inc., Declaratory Ruling #296, Findings of Fact, Conclusions of Law, and Order (July 22, 1992). Second, if there is a change, the Board must determine whether the alteration has a significant impact on any finding, conclusion, term, or condition of the Permit and whether the alteration affects one or more of the values protected by Act 250. Id.; EBR 2(P).

a. Physical Change or Change in Use

For the reasons set forth in section V.D. 1 .a above, the Board concludes that the exterior changes to Department Store A associated with the Lease Change are physical changes to the permitted project.

Based on the findings of fact made herein, the Board further concludes that a change in use has not occurred because retail use was contemplated as part of the approved project. In issuing the Permit, the Board did not make findings or conclusions or impose conditions that prohibit any particular retailer or particular type of retailer from being a tenant in the Mall. Furthermore, the Board did not require that each lease of retail space would require Commission approval. In addition, the evidence regarding anticipated increases in the intensity of the use does not reach the threshold necessary to establish a change in use. Therefore, the Lease Change is not a change in use from the activities contemplated by the Permit.

b. Significance of Impact

Because the Board concludes that there have been physical changes to the permitted project, it must next determine whether such changes have a significant impact on any finding, conclusion, term, or condition of the Permit and whether the changes affect one or more of the values protected by Act 250.

The Board concludes that the second prong of the material change test has not been met. The physical changes associated with the Lease Change will not have a significant impact on any finding, conclusion, term, or condition of the Permit. While the exterior physical changes such as the installation of exterior ramps may have slight visual impacts, the Board did not make findings or impose permit conditions under Criterion 8 or any of the other Act 250 criteria that will be significantly impacted by the changes. Additionally, the physical changes associated with the Lease Change will not affect the values protected by Act 250. The values protected by Act 250 are the values protected by the Act 250 criteria. Re: Mount Mansfield Co., Inc. (Summer Concert Series), supra at 15. It is through achieving compliance with those criteria that the public and the environment are protected. Id, While the Physical changes associated with the Lease Change may have slight visual impacts, they will not affect the values protected by Criterion 8 or any of the other Act 250 criteria. Accordingly, the Lease Change does not constitute a material change in the permitted project.

E. If the answer to issue A is in the negative, whether the Parking Lot and Access Changes alone constitute either a "substantial change" or a "material change" in the permitted project and therefore require an Act 250 permit amendment pursuant to EBR 34.

1. Substantial Change

As set forth above, finding substantial change involves a two step process. First, there must be a "cognizable" (i.e. physical) change to the permitted project. Sugarbush Resort Holdines. Inc., Supra. Second, the change must have the potential to impact significantly on one or more of the ten Act 250 criteria. Id.; EBR 2(G).

a. Cognizable Change

Based on the findings of fact made herein, the Board concludes that the Parking Lot and Access Changes are cognizable physical changes in the project as authorized by the Permit. The Parking Lot and Access Changes include the following: adding an underdrain system that is three to four feet deeper than the original underdrain system and increasing the thickness of granular base and base materials to provide a recommended thickness of

granular materials between native sub-grade and the pavement surface. The Parking Lot and Access Changes will provide a parking lot in an improved condition as compared to the parking lot that was originally constructed. This will allow more efficient drainage of surface water and modification of the location of the surface of the parking lot in relationship to the groundwater. Such changes are not depicted or authorized by the Permit. Therefore, they constitute cognizable changes.

Developer's Diversified argues that the Parking Lot and Access Changes are not cognizable changes because they are repair and routine maintenance. A cognizable change under EBR 2(G) does not include repair and routine maintenance. Re: Agency of Transnortation (Route 73), Declaratory Ruling #298, Findings of Fact, Conclusions of Law, and Order at 4 (May 9, 1995). The Board addressed the nature of repair and routine maintenance in Re: Atlantic Cellular Co.. L.P. and Rinkers Inc.. d/b/a Rinkers Communications, Declaratory Ruling #340, Findings of Fact, Conclusions of Law, and Order at 9- 10 (July 11, 1997). In considering whether work on a logging road was repair and routine maintenance (which would be exempt from Act 250 jurisdiction) or was the construction of improvements (which would be development and subject to jurisdiction), the Board stated that

> [r]epair or routine maintenance does not alter an existing development but "***prevents or eradicates alteration to an existing development which has occurred or would otherwise occur over time through normal wear and tear.***" Vermont Agency of Transportation (Rock Ledges), Declaratory Ruling #296, Findings of Fact, Conclusions of Law, and Order (Third Revision) at 10 (Mar. 28, 1997). ...
>
> [The] work on the Malone Road was not an upgrade to the road. Rather it was an effort to correct the effects of the spring runoff and erosion caused by previous logging. [The scope of the road work] ***focused on the original condition of the Malone Road and not on improving the road.***

Atlantic Cellular, supra at 9-10 (emphasis added).

The Board has concluded that the following activities are not repair and routine maintenance: an upgrade from an existing communications tower to a structurally stronger new tower capable of supporting additional antennae, Re: Nextel Communications of the Mid-Atlantic d/b/a Nextel Communications, Declaratory Ruling #362, Findings of Fact, Conclusions of Law, and Order at 19-22 (Nov. 18, 1998); the altering of a median and side rock ledges along Interstates 89 and 9 1, Re: Vermont Agency of Transnortation (Rock Ledges), Declaratory Ruling #296, Findings of Fact, Conclusions of Law, and Order (3rd Revision) at 11 (Mar. 28, 1997); new pavement, guardrail placement, and elimination or

decrease in pulloffs, Re: Agency of Transportation (Route 73), Declaratory Ruling #298, Findings of Fact, Conclusions of Law, and Order at 4 (May 9, 1995); an upgrade to an historic condition, Re: Town of Wilminnton, Declaratory Ruling #258, Findings of Fact, Conclusions of Law, and Order at 12- 13 (June 30, 1992); and replacing leach fields with a different sewage disposal system at a correctional facility, Re: Windsor Correctional Facility, Declaratory Ruling #15 1, Findings of Fact, Conclusions of Law, and Order at 6 (May 9, 1984).

In contrast, the Board has determined that the following constitute repair and routine maintenance: work on a road to correct the effects of spring runoff and erosion caused by previous logging, Atlantic Cellular, supra at 10; and restoring a washed out road to its original condition, including filling with a bulldozer and backblading the road to create a clear travel surface, Re: Productions Ltd., Declaratory Ruling #168 (Apr. 10, 1985).

In Town of Wilmington, the board concluded that the upgrade of an historic condition -- which included removal and replacement of a road, blasting and widening of an intersection, reshaping of a curve, and other activities -- was not repair or routine maintenance. In reaching this conclusion, the Board stated: "It may well be that one purpose of the road improvements is to make future maintenance easier. Nonetheless, an upgrade to facilitate later maintenance is still an upgrade. The upgrade itself is not maintenance." Town of Wilmington, supra at 13 (emphasis added).

The Board concludes that the Parking Lot and Access Changes are not repair and routine maintenance. Such changes are an upgrade from a parking lot with inadequate surface and sub-drainage systems to a parking lot with more efficient drainage systems. The Parking Lot and Access Changes incorporate specifications to the parking lot that should have been included in the original design to allow the parking lot to function efficiently and prevent premature deterioration of the paved surface. Such changes will provide a parking lot in an improved condition as compared to the parking lot that was originally constructed. Therefore, the Parking Lot and Access Changes are an upgrade to the original condition of the Mall parking lot and are not repair and routine maintenance. Accordingly, the Parking Lot and Access Changes are cognizable changes.

b. Potential for Significant Impact on Act 250 Criteria

Although the Parking Lot and Access Changes are cognizable changes, the Board concludes that such changes do not have the potential to impact significantly on one or more of the ten Act 250 criteria. The Parking Lot and Access Changes will not change the volume and discharge point of storm water and ground water, increase the height of the existing light poles, increase the size or change the shape of the parking lot, change the location or

increase the number of parking spaces, or increase the capacity of the parking lot. Accordingly, the Parking Lot and Access Changes do not constitute a substantial change in the permitted project and do not require an Act 250 permit amendment.

2. Material Change

As set forth above, finding a material change involves a two step process. First, the Board must decide whether a physical change or a change in use has occurred or will occur. Sugarbush Resort Holdings, Inc., Supra. Second, if there is a change, the Board must determine whether the alteration has a significant impact on any finding, conclusion, term, or condition of the Permit and whether the alteration affects one or more of the values protected by Act 250. Id.; EBR 2(P).

a. Physical Change or Change in Use

For the reasons set forth in section V.E. 1 .a above, the Board concludes that the Parking Lot and Access Changes are physical changes to the permitted project. Based on the findings of fact made herein, the Board further concludes that the Parking Lot and Access Changes are not a change in use because the parking lot will be used in the same manner as was contemplated when the project was approved.

b. Significance of Impact

Because the Board concludes that the Parking Lot and Access Changes are physical changes to the permitted project, it must next determine whether such changes have a significant impact on any finding, conclusion, term, or condition of the Permit and whether the changes affect one or more of the values protected by Act 250. The Board concludes that the second prong of the material change test has not been met. The Parking Lot and Access Changes will not have a significant impact on any finding, conclusion, term, or condition of the Permit. Conditions 26 and 27 of the Permit are the only references to the Mall parking lot in the Permit. There is no evidence that the Parking Lot and Access Changes occurred within the areas prohibited by Condition 26. Additionally, there is no evidence that the Parking Lot and Access Changes disturbed the wetland area east of the **Mall parking lot or the** 40 foot buffer around the wetland, both protected under Condition 27.

The physical changes associated with the Parking Lot and Access Changes will not affect the values protected by Act 250. The values protected by Act 250 are the values protected by the Act 250 criteria because it is through achieving compliance with those criteria that the public and the environment are protected. Re: Mount Mansfield Co., Inc.

(Summer Concert Series), supra at 15. The Parking Lot and Access Changes will not affect the Act 250 criteria. The Parking Lot and Access Changes will not change the volume and discharge point of storm water and ground water, increase the height of the existing light poles, increase the size or change the shape of the parking lot, increase the number of parking spaces, or increase the capacity of the parking lot to allow a future increase in the number of parking spaces. Accordingly, the Parking Lot and Access Changes do not constitute a material change in the permitted project and do not require an Act 250 permit amendment.

F. If the answer to issue A is in the negative, whether the Parking Lot and Access Changes constitute repair or routine maintenance.

As stated in section V.E.l .a above, the Parking Lot and Access Changes do not constitute repair and routine maintenance.

G. Whether the Mezzanine constitutes either a "substantial change" or a "material change" in the permitted project and therefore requires an Act 250 permit amendment pursuant to EBR 34.

1. Substantial Change

As set forth above, finding substantial change involves a two step process. First, there must be a "cognizable" (i.e. physical) change to the permitted project Sugarbush Resort Holdings. Inc., supra. Second, the change must have the potential to impact significantly on pne or more of the ten Act 250 criteria. Id.; EBR 2(G).

a. Cognizable Change

Based on the findings of fact made herein, the Board concludes that the Mezzanine is not a cognizable change in the project as authorized by the Permit. The plans associated with the Permit are conceptual and show no detail of the interior of Department Store A. Additionally, the Mezzanine was part of the original construction of Department Store A, unlike the exterior changes associated with the Lease Change in section V.D. 1 .a above. Accordingly, the Mezzanine is not a cognizable change to that approved by the Permit.

Because the Board concludes that the Mezzanine is not a cognizable change, it is not necessary to proceed to the second step of the substantial change analysis. Therefore, the Board concludes that the Mezzanine is not a substantial change to the permitted project.

2. Material Change

a. Physical Change or Change in Use

For the reasons set forth in section V.G. 1 .a above, the Board concludes that the Mezzanine is not a physical change to the permitted project.

Based on the findings of fact made herein, the Board further concludes that the Mezzanine does not constitute a change in use because Department Store A will be used in the same manner as was contemplated when the project was approved. Therefore, the Mezzanine is not a change in use to that contemplated by the Permit.

Because the Board concludes that the Mezzanine is not a physical change or a change in use, it is not necessary to proceed to the second step of the material change analysis. Therefore, the Board concludes that the Mezzanine is not a material change to the permitted project.

H. Whether the Mezzanine requires an Act 250 permit amendment under the terms of Condition 36 of Land Use Permit #5W0584-2.

Condition 36 of the Permit states:

> Any expansion of "Department Store A" beyond 66,300 square feet gross leasable space must receive the prior approval of the District #5 Commission by way of amendment to this permit.

The parties dispute the meaning of the words "gross leasable space" in Condition 36. CVC argues that the Board should use the following definition of "gross leasable area" set forth in the Urban Land Institute's Shopping Center Handbook:

> GLA is the total floor area designed for the tenant's occupancy and exclusive use -- including basements, mezzanines, or upper floors -- expressed in square feet and measured from the centerline of joint partitions and from outside wall faces. It is the space for which tenants pay rent, including sales areas and integral stock areas.

Because the area of the ground floor of Department Store A is 66,300 square feet and the area of the Mezzanine is 7,710 square feet, CVC argues that the GLA of Department Store A is 74,010 square feet (66,300 square feet plus 7,710 square feet). Therefore, CVC argues that the Mezzanine is an expansion of Department Store A beyond 66,300 square feet of gross leasable space which requires Commission approval through an amendment to the Permit.

In response, Developer's Diversified argues that it does not use the Urban Land Institute's definition of GLA in determining the GLA of space rented to its tenants. Rather, Developer's Diversified defines GLA as the square footage of the ground floor space rented to a tenant, Under this definition, the tenant also has the right to possess any existing vertical space within the GLA such as a mezzanine (but the square footage of such vertical space is not included in the calculation of the GLA). Because the area of the ground floor of Department Store A is 66,300 square feet, Developer's Diversified argues that the GLA of Department Store A is 66,300 square feet and that the Mezzanine is vertical space within the GLA that Wal*Mart has the right to possess (but the square footage of the Mezzanine is not included in the calculation of the GLA).

The Board concludes that the *Mezzanine does not require an Act 250 permit amendment under the terms of Condition 36. Condition 36 requires a permit amendment for an expansion of Department Store A beyond 66,300 square feet of "gross leasable space." The parties, however, have provided the Board with definitions of GLA and arguments that the GLA of Department Store A has or'has not increased. The Board is not convinced that gross leasable space and GLA are the same measurement. Additionally, even if gross leasable space and GLA are the same measurement, the Board concludes that the GLA of Department Store A has not expanded beyond 66,300 square feet. Paragraph I.A of the Lease states:

> Lessor, in consideration of the covenants and agreements hereinafter contained, does hereby demise and lease to Lessee a sixty-six ***thousand three hundred (66,300) square foot building*** (hereinafter the "Demised Premises") in the Shopping Center to be or being constructed on the real property described in Exhibit A attached hereto and made a part hereof (hereinafter the "Shopping Center"), to have and to hold during the Term (as defined in Paragraph 2). The Demised Premises and the Shopping Center are located in the City of Berlin, in Washington County, Vermont.

(Emphasis added). The area of the Mezzanine is not included in the Demised Premises as set forth in the Lease. Rather, the Demised Premises is the 66,300 square foot ground floor area of Department Store A. Therefore, the GLA of Department Store A has not increased beyond 66,300 square feet and the Mezzanine does not require an Act 250 permit amendment under the terms of Condition 36.

VI. ORDER

1. The Parking Lot and Access Changes and the Lease Change are not part of the same project.

2. The Lease Change does not constitute either a "substantial change" or a "material change" in the permitted project and, therefore, does not require an Act 250 permit amendment pursuant to EBR 34.

3. The Parking Lot and Access Changes do not constitute either a "substantial change" or a "material change" in the permitted project and therefore do not require an Act 250 permit amendment pursuant to EBR 34.

4. The Parking Lot and Access Changes do not constitute repair or routine maintenance.

5. The Mezzanine in Department Store A of the Berlin Mall does not constitute either a "substantial change" or a "material change" in the permitted project and therefore does not require an Act 250 permit amendment pursuant to EBR 34.

6. The Mezzanine in Department Store A of the Berlin Mall does not require an Act 250 permit amendment under the terms of Condition 36 of Land Use Permit #5W0584-2-EB.

7. Jurisdiction is returned to the District #5 Environmental Commission.

Dated at Montpelier, Vermont this 25th day of March, 1999.

ENVIRONMENTAL BOARD

Marcy Harding

Marcy Harding, Chair
George Holland
Samuel Lloyd
William Martinez
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Jill Broderick, Esq., Alternate
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