

STATE OF VERMONT
Natural Resources Board
DISTRICT #1 ENVIRONMENTAL COMMISSION

RE: Killington Village Master Plan
SP Land Company, LLC
c/o Steven Selbo, President
P.O. Box 290
Killington, VT 05751

Application #1R0980
**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

I. INTRODUCTION

On February 28, 2012, SP Land Company, LLC filed Act 250 application #1R0980 for a project described as the subdivision approval of 15 lots, the reaffirmation of a previously approved 10 lot subdivision and the review of a new village plan involving a proposal to construct a phased Master Plan development which in total involves approximately 2,300 residential units, a 77,000 square foot skier services building, the creation of 32 new residential lots, the provision of new water sources, and approximately 200,000 square feet of retail space and associated parking and utilities (“the master plan”). Also filed on February 28, 2012, by MTB Killington, LLC, AMSC Killington, LLC and SPII Resort LLC (the “tenants-in-common” or “TICS”)¹ was application #1R0981 for construction approval of a new parking lot for 1,276 vehicles for day-skier parking, realignment of a portion of Killington Road, reconfiguration of the Grand Hotel Parking lot and associated stormwater treatment (“the resort parking project”).

The Commission consolidated the reviews of both applications cited above. A prehearing conference was convened on April 9, 2012 and merits hearings were convened on May 31, 2012. The merits hearing was recessed on June 5th and the Commission issued a Recess Order. The merits hearing involved the final construction review of Phase I of the master plan and the resort parking lot project, both of which seek approval for a ten year construction period. The Phase I full construction review consisted of the re-approval of the previously subdivided lots cited above, two new water systems or sources, 193 housing units in the village core, 32 new residential lots, 31,622 square feet of retail development, a 77,000 square foot skier services building and full construction review of the resort parking lot project. The Commission also considered the issuance of partial findings under Act 250 Rule 21 for the balance of the master plan, for which the applicant indicates there is an approximately 20 to 30 year construction timeframe. Following receipt of the final recess order filings on June 9, 2013, the Commission conducted its deliberations. This application is now ready for decision.

II. THE NATURAL RESOURCES BOARD’S MASTER PERMIT POLICY

The District #1 Environmental Commission’s (“Commission”) review is pursuant to Act 250 Rule 21 and the “Master Permit Policy and Procedure for Partial Findings of Fact”

¹ In the course of these proceedings, ownership of the parking lot project was transferred to Killington/Pico Ski Resort Partners, LLC. Any subsequent reference herein to the “TICS” shall automatically apply to the current owner.

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adopted on February 25, 1998, amended on March 29, 2000 (“Master Permit Policy and Procedure”). The objective of the Master Permit Policy and Procedure, pursuant to Rule 21, is to provide guidance and greater predictability to the applicant and all parties in the review of complex development projects. Pursuant to Rule 21, the applicant may seek permission from the district commission to proceed with review under specific Criteria of the Act in order to gain a greater degree of assurance that future development projects may be approved on a proposed development tract. See *Re Killington Ltd.*, #1R0835-EB, Memorandum of Decision at 5-8 (Vt. Env’tl Bd. Oct. 22, 1999) “Commission can conduct a partial review of a master plan voluntarily submitted by applicant despite fact that applicants are not ready to commence construction on any aspect of the project.”

The Commission notes that the Master Permit Policy and Procedure does not assure approval for the individual development components of a project; those individual development projects are subject to review in future individual permit application proceedings. *In re SP Land Co., et. al. Act 250 Permit Amendment*, Docket No. 257-11-08 Vtec, Decision on Cross-Motions for Summary Judgment and Dismissal at 9 (Vt. Env’tl Ct. Dec. 1, 2009), rev’d on other grounds, 2011 VT 104 (Sept. 22, 2010).

In order for the Commission to issue a permit authorizing construction approval for a certain phase of a master plan, positive findings of fact and conclusions of law must be made under all relevant Criteria for that particular phase. As is the case with respect to the Subdivision and Killington Village Master Plan - Phase I (“Phase I”) of Application #1R0980, a permit may be requested and granted for a smaller portion of the total project (including infrastructure) with partial findings of fact for the remainder of the project (in this Application #1R0980, the balance of the Killington Village Master Plan (“Village Master Plan”) beyond Phase I) under the relevant Criteria requested by the applicant. Consistent with the above policy, these partial findings of fact will provide guidance and greater predictability to the applicant in preparing final plans for the project or for subsequent phases.

In most instances, the initial review of a master plan application will focus on the project’s scale, location and impacts under the so-called “natural resource” Criteria of the Act, including, but not limited to Criteria 1(A), 1(D), 1(E), 1(G), 8, 8(A), 9(B), 9(C), 9(D) and 9(E). As stated in the Master Permit Policy and Procedure, it is generally not possible for a district commission to make final findings of fact and conclusions of law for a phased project under certain Criteria, including Criteria 5, 6, 7, 8, 9(A), 9(K), and 10. Master Permit and Procedure at 2, fn 1. In this case, the Commission deemed it appropriate for the sake of clarity to make certain findings for subsequent phases under Criteria such as 5 and 9K.

Consistent with the Master Permit Policy and Procedure, SP Land Company, LLC (“Applicant”) has sought findings for the balance of the Village Master Plan beyond Phase I for the following Criteria:

Partial Findings: Criteria 1(Air), 2&3 and 8.

Full Findings: 1(D), 1(E), 6, 8(A), 9 (A), 9(B), 9(C), 9(D) & (E), 9(H), and 9(L).

Applicant has not sought partial or full findings under the Master Permit Policy and Procedure for the balance of the Village Master Plan beyond Phase I for the following Criteria: 1(B), 1(C), 4, 5, 7, 9(F), 9 (G), 9 (J), 9(K) and 10.

As to the Criteria for which the Applicant has sought partial findings, the Commission has reviewed the Applicants' submissions and issued Partial Findings and Conclusions. Where the Applicant has sought partial findings but has not provided evidence sufficient to support positive findings, the Commission has stated as such in its decision. Where the Applicant has not sought partial findings under certain Criteria, the Commission has provided guidance in its decision as to the evidence it will require in its review of subsequent phase applications.

III. JURISDICTION

The project constitutes a material change to the permitted facility pursuant to Act 250 Rule 2 (C)(5).

IV. BURDEN OF PROOF

The burden of proof is on an applicant with respect to Criteria 1, 2, 3, 4, 9 and 10, while the burden of proof is on parties opposing the application with respect to Criteria 5, 6, 7, and 8. 10 V.S.A. § 6088. The term "burden of proof" refers to two separate burdens: 1) the burden of production, and 2) the burden of persuasion. The applicant always has the burden of producing sufficient evidence for the commission to make an affirmative finding under all Criteria (i.e. "the burden of production"), while the burden of persuasion shifts to parties in opposition under Criterion 5, 6, 7, 8 and 9(A). See Re: Pratt's Propane, #3R0486-EB, Findings of Fact, Conclusions of Law and Order at 4-5 (Jan. 27, 1987); Re: Town of Stowe, #100035-9-EB, Findings of Fact, Conclusions of Law and Order at 38 (May 22, 1998).

V. FINAL PARTY STATUS RULINGS

Pursuant to 10 V.S.A. § 6085(c)(2) and Act 250 Rule 14(E), the Commission made preliminary determinations concerning party status at the commencement of the hearing on this application. Prior to the completion of deliberations, the Commission re-examined the preliminary party status determinations and found that the parties continue to qualify as discussed and unless modified below.

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Statutory Parties:

1. Applicant SP Land Company, LLC by Peter Van Oot, Esq., David White, Stephanie Hainley, Don Marsh, Jeffrey Nelson, David Fenstermacher, Steven Selbo, Meddie Perry, Mark Kane, Mark Hamlin, Dwight Demay, and David Saladino
2. The Rutland Regional Planning Commission, by Susan Schreiberman.
3. The Two Rivers-Ottawaquechee Regional Planning Commission (TRORPC), by Peter Gregory under Criteria 5, 9K and 10. The applicant objected to the grant of party status to the TRORPC on grounds that the organization was not an adjoiner and that it had failed to establish a case for potential impacts. Exhibit VMP 289. The Commission disagrees and concludes that the entire master plan has the potential for impacts under Criteria 5, 9K and 10 and our preliminary grant will not be disturbed. Moreover, the TRORPC regional plan includes the Town of Bridgewater, a municipality that adjoins the Town of Killington. The objection is overruled.
4. The Killington Selectboard, by Seth Webb, Town Manager, and Jim Haff.
5. The Town of Killington Planning Commission, by Dick Horner and David Rosenblum.
6. The Town of Bridgewater Selectboard, by Nancy Robinson. The applicant objected to the grant of party status to the Town of Bridgewater on grounds similar to their objections for the non-Rutland Regional Planning Commissions. Exhibit VMP 289. The Commission concludes that the Town of Bridgewater may experience adverse impacts from the full master plan build-out and the objection is overruled.
7. The State of Vermont, Agency of Natural Resources by Janine McCrumb and Matt Probasco.
8. The State of Vermont, Agency of Transportation (VTrans), by William Rice, Esq. and Rajnish Gupta under Criteria 5 and 9K.

Adjoining Landowners and Others with a particularized interest in the project pursuant to 10 V.S.A. §§ 6001(23) and 6085(c)(1)(E):

9. MTB Killington, LLC, AMSC Killington, LLC and SPII Resort LLC, as tenants-in-common (“TICS”), by Peter Van Oot, Esq., Stephanie Hainley and Jeff Temple under Criteria 1B, 1E, 23, 4, 5, 8, 9G, 9H and 10.²

² As noted above, ownership of the “TICS” was assumed by Killington/Pico Ski Resort Partners, LLC during this proceeding and party status is automatically assigned to the new owners under this ruling.

10. Steven Durkee, Mountainside Properties, Inc., Mountainside Development, Inc., Fireside Properties, LLC, and Killington Village Properties, Inc., by Dan Hershenson, Esq., Nate Stearns, Esq., and Jennifer Conley, Andre Terrizo, David Raphael, under Criteria 1B, 1D, 1E, 4, 5, 8, 9K and 10. The applicant objected to party status under Criteria 5, 9K and 10 and urged the Commission to narrow the scope of party status under the balance of the enumerated Criteria above. Exhibit VMP 289. The Commission has reviewed the filings, including the response by the Durkee entities (VMP 293b) and concludes that the Durkee entities cited above continue to qualify for full party status under the Criteria enumerated above. Accordingly, the objections are overruled.
11. The Southern Windsor County Regional Planning Commission, by Thomas Kennedy and Jason Rasmussen under Criteria 5 and 9K. The applicant objected to the preliminary grant on grounds that the SWCRPC was not in the Rutland Region and that it had failed to make a case for potential impacts. Exhibit VMP 289. The Commission disagrees. The scope of the entire master plan has the potential for out-of-region impacts under Criteria 5 and 9k and the objection is overruled. The Commission will, however, move the grant from the category of “statutory parties” to the section dealing with those who have a “particularized interest” because the SWCRPC, unlike the TRORPC, does not contain a municipality adjoining the Town of Killington.
12. Mountain Green Condominium Association (“Mountain Green”), by Michael Moriarty under Criteria 1A, 1B, 1C, 1D, 1E, 2-3, 4, 5, and 8. There were no objections.
13. Edgemont Condominium Owner’s Association (“Edgemont”), by M.B. Neisner, Jr. and Steve Finneron, under Criteria 1B, 2-3, 5 and 8. The applicant objected to party status under all Criteria. Exhibit VMP 289. The Commission concludes, based upon the entire scope of the Master Plan, that there is sufficient potential for adverse impacts under the enumerated Criteria upon Edgemont for future phases. Accordingly, the objections are overruled.
14. Highridge Condominium Owner’s Association, by Tom Rock and Carl Lisman, Esq., under Criteria 1B, 1C, 2-3, 4, 5, 8, and 9A. There were no objections.
15. Whiffletree Condominium Association by Whit Montgomery and Bob Montgomery, under Criteria 3, 5, 8 and 9A. There were no objections.
16. Pinnacle Condominium Association, by Jon Readnour, Esq. and Ken Loeiger-Myers under Criteria 1B, 1C, 2-3, 4, 5, 8, 9G and 9K. There were no objections.

17. Charlie Demerest, owner of WaterWheel Trading, a gas station and convenience store located at 4900 Vermont Route 4, neighboring property owner, was granted preliminary party status pursuant to Criterion 3, impact upon water supply. While the applicant urged denial of party status to Mr. Demerest on the basis of the evidence at the hearing (Exhibit VMP 289), the Commission concludes that there may be potential impacts under Criterion 3 for subsequent phases and will therefore preserve Mr. Demerest's party status under this Criterion. The objection is overruled.
18. Whit Montgomery, owner of a commercial property on Killington Road, was granted party status pursuant to Criteria 5 and 8. There were no objections.
19. Sherburne Volunteer Fire Department, by Dave Gouchberg, Patrick McDonnell, and Steve Finer, pursuant to Criterion 7. There were no objections.
20. Rutland County Solid Waste District, by Ed Fowler pending submittal of a written petition. The Commission did not receive a formal petition and the preliminary party status previously granted is hereby denied. The petitioner may renew the request in subsequent phases.
21. Okemo Limited Liability Company, by Theodore S. Reeves, P.E. was preliminarily granted party status under Criteria 8 and 9(K). On August 21, 2013, the Commission received a notice of withdrawal of the party status request from Okemo Limited Liability Company – withdrawing from both the instant case (1R0981) and from the Village Master Plan case (1R0980). Exhibit VMP 295. The request to withdraw is **granted**, and Okemo Limited Liability Company is not a party to either case cited above.

Friends of the Commission

22. The Commission allowed the following persons or entities to participate pursuant to 10 V.S.A. § 6085(c)(2):

Bob Montgomery.
Edwin Fowler.

VI. INTRODUCTION TO THE FINDINGS OF FACT

This application involves three relatively distinct features:

1. Construction Approval for Phase I of the Village including 32 residential home lots, the Valley Wellfield project and the retail and skier buildings outlined above;
2. "Partial Findings" under Rule 21 for subsequent phases of the Master Plan; and

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3. Final findings and conclusions related to historical and proposed subdivision activity.

Accordingly, the findings below are made specific to each of these features and will appear in the following order under the relevant Criteria:

- a) Construction Approval for Phase I of the Killington Village Master Plan – Phase I (“Phase I”) – this phase is inclusive of the 32 residential home lots proposed in Phase I (referred to as “The Ramshead Brook subdivision”) and 7 of the lots subject to the separate “subdivision” section below;
- b) Partial Findings for the balance of the Killington Village Master Plan (“Village Master Plan”); and
- c) Final Approval of the 25 lots referred to as the “Subdivision” portion of the application (“Subdivision”). A considerable portion of the Subdivision section involves legal argument. This section can be found at the last portion of the findings.

Prior to taking evidence with regard to the ten Criteria of 10 V.S.A. § 6086(a), the Commission and all parties agreed that the Applicant, through submission of the application material and supplemental filings, has met the burden of proof with respect to the following Criteria for Phase I and the Subdivision section cited above:

- | | |
|----------------------------------|---------------------------------------|
| 1 - Air Pollution & Dust Control | 9(B) Primary Agricultural Soils |
| 1(A) - Headwaters | 9(C) - Forest and Secondary Ag. Soils |
| 1(F) - Shorelines | 9(D) - Earth Resources |
| 6 - Educational Services | 9(E) - Extraction of Earth Resources |
| 9(A) - Impact of Growth | 9(F) - Energy Conservation |
| | 9(H) - Costs of Scattered Development |
| | 9(J) - Public Utilities |
| | 9(L) - Rural Growth Areas |

Therefore, the application and supplemental filings shall serve as the Findings of Fact on these Criteria for Phase I. The Commission makes other findings both partial and final affirmative findings on other Criteria as detailed below.

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

The Act 250 Criteria most significantly implicated in this case for Phase I and the Subdivision activity are Criteria 1(B) - Waste Disposal; 1(C) - Water Conservation; 1(D) - Floodways; 1(E) - Streams; 1(G) - Wetlands; 2 - Water Supply; 3 - Impact on Existing Water Supplies; 4 - Erosion; 5 - Traffic Safety and Congestion; 7 - Municipal Services; 8 - Aesthetics; 8(A) - Wildlife; ; 9(K) - Public Investments; and 10 - Local and Regional Plans. The findings below will focus on those Criteria both for the full construction review of “Phase I” and for the partial findings on the balance of the master plan. The Criteria implicated in the “Subdivision” review are as stated in that section (nearer the end of this decision). In making the following findings, the Commission has summarized the statutory language of the 10 Criteria of 10 V.S.A. § 6086(a).

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR PHASE I - The “Village” Construction Project

Note: The Phase I full construction review consisted of two new water systems or sources, 193 housing units in the village core, 32 new residential lots, 31,622 square feet of retail development, a 77,000 square foot skier services building, and approval of subdivided lots associated with Phase I.³

SECTION 6086(a)(1)(B) WASTE DISPOSAL:

1. Phase I will consist of distinct features of the Village Core, distinct features of Ramshead Brook (“Ramshead Brook Subdivision”) and two potable water projects – the Snowdon Well Field Project (“SW Project”) and the Valley Well Field Project (“VW Project”). Exhibit VMP 7.
2. Applicant proposes to construct 193 residential units within the Village Core in Phase I, 31,622 square feet of commercial/retail space and an approximately 77,000 square foot replacement skier services building. The two existing skier

³ The Commission consolidated its review of the Village, Ramshead subdivision and historical subdivision with review of application #1R0981 which was submitted for review and approval of a large (1,276 spaces) parking lot by separate owners. The permit and findings for application #1R0981 are issued separately by the Commission.

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services buildings, Snowshed Base Lodge and Ramshead Base Lodge, will be demolished. Exhibit VMP 7.

3. The Ramshead Brook Subdivision will consist of 32 Lots designed to accommodate 9 single-family home Lots and 23 duplex Lots (or 32 single-family homes, at the developer's discretion). This subdivision also includes a parcel consisting of the common area for subdivision (road, etc.) and an outparcel for future development in a separate phase. Exhibit VMP 7.
4. Sewage from the Phase I project, including the Ramshead subdivision, will be treated by the existing Resort WW System (located on abutting property controlled by the Resort) before being piped to the City of Rutland Wastewater Treatment Facility via the Alpine Pipeline. Exhibit VMP 7, VMP 22, VMP 24, VMP 25.
5. The Resort WW System consists of two separate treatment facilities, both of which are operated under the Indirect Discharge Permit No. ID-9-0029. Exhibit VMP 20.
6. Upon completion of construction under the Indirect Discharge Permit, the Resort WW System will have a combined permitted treatment capacity of 450,000 gallons per day ("GPD") and will have approximately 89,880 gallons per day of uncommitted reserve treatment capacity available for Phase I. Exhibit VMP 7.
7. Phase I will require 62,083 GPD of wastewater treatment capacity. Exhibit VMP 7.
8. No hazardous materials will be stored as part of Phase I. Typical household chemicals, cleaning fluids and similar products will be present in quantities typical for homes, condominiums, hotels and small commercial enterprises. Exhibit VMP 7.
9. The ANR Wastewater Management Division issued the Wastewater System and Potable Water Supply Permit WW-1-0334-19 on December 4, 2012 ("WW Permit"), which the Commission accepts as a presumption pursuant to Act 250 Rule 19 that the disposal of wastes from Phase I meets applicable Environmental Protection Rules and will not result in the injection of waste materials or harmful substances into groundwater or wells. Exhibit VMP 260(b).
10. Phase I will include a total of 15.81 acres of new impervious surface and 15.66 of redeveloped impervious surface. Exhibit VMP 7.
11. The DEC Watershed Management Division issued Individual Construction Stormwater Discharge Permit #6774-INDC on May 23, 2013. Exhibit VMP 275.

12. The DEC Watershed Management Division issued Stormwater Discharge Permit #6774-INDS on May 23, 2013. Exhibit VMP 274.
13. Party Steven Durkee argued, in summary, that the WW permit contains too many conditions precedent to construction to qualify for a presumption of compliance under Criterion 1B (“The significant outstanding conditions precedent in the Project’s wastewater and potable water supply permit demonstrates that Applicants have not yet met their burden of proof with respect to Criterion 1(B). There are numerous additional conditions that must be satisfied before a determination can be made that the Project complies with applicable health and environmental conservation department regulations regarding the disposal of wastes. Accordingly, the Commission should decline to issue an affirmative finding under Criterion 1(B) with respect to wastewater.” Exhibit VMP 293) and that the Applicant has inappropriately modeled stormwater runoff from the project site, underestimated the amount of stormwater runoff, undersized the stormwater treatment facilities, and will not comply with the treatment standards in the Vermont Stormwater Management Manual . Exhibits VMP 132, VMP 133, VMP 293 and VMP 263.
14. The Commission required the Applicant to provide the final design plan for the stormwater detention pond and a site plan showing the location on the ground of the toe of the slope of the pond in relation to Roaring Brook. VMP 294. Applicant provided a design plan for the stormwater detention pond and the site plan showing the location on the ground of the toe of the slope of the pond in relation to Roaring Brook. Exhibits VMP 194, VMP 195.
15. Applicant provided a revised Grading Plan (Sheet C-3.04) which shows the field-located top of bank for Roaring Brook, which was used during planning to supplement the aerial topography used as the base for design. Setbacks have been shown between the toe of the proposed slope to the top of the bank. Exhibit VMP 195.
16. Applicant also provided the Detention Basin Berm Section (located on Sheet C-5.01) and testified that prior to construction field topography in the area of the brook and basin will be performed to accurately stake out the limits of the toe of slope and to ensure there will be no unanticipated impacts to the riparian buffer zone adjacent to the Roaring Brook. Exhibit VMP 196.
17. Applicant testified that the height of the embankment of the pond is approximately 12 feet. The Vermont Stormwater Management Manual: Volume II-Technical Guidance recommends a minimum 8-foot top width for pond, which has been provided. The basin design provides for freeboard (separation between the peak elevation and top of berm elevation) for the 100-year storm event to prevent overtopping of the pond. A minimum freeboard height is not required per the Vermont Stormwater Management Manual: Volume I – Stormwater Treatment Standards, and is only referenced in the technical

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guidance of Volume II. The basin design was reviewed by DEC as part of the INDS application and any comments received from DEC was incorporated into the design as deemed appropriate. Exhibit VMP 194.

18. The Applicant submitted a full application for an Individual Operational Stormwater Permit (General Permit 9015) (INDS) to the DEC Watershed Management Division. Exhibit VMP 7.
19. The Applicant submitted a full application for an Individual Construction Discharge Permit (INDC) to the DEC Watershed Management Division. Exhibit VMP 7.
20. The stormwater management system will meet the stormwater treatment requirements of the Vermont Stormwater Management Rule (Chapter 18 of the Environmental Protection Rules for non-impaired, and, where applicable, Chapter 22 for stormwater-impaired waters) and applicable Criteria of the Vermont Stormwater Management Manual (“VSMM”) and will include five discharge locations, with associated stormwater treatment practices (“STPs”) including grass channels, a wet pond, a proprietary treatment device, and retrofit to the existing Snowshed Pond outlet control structure. Exhibit VMP 7.
21. The District Commission required the final stormwater pond design be submitted. VMP 294.
22. In February 2011, the Roaring Brook and the East Branch of Roaring Brook WQRP was submitted to the Water Quality Division of the DEC. This plan was jointly prepared on a voluntary basis by the Applicant and the Resort in order to address longstanding impacts to water quality within the subject waters due to uncontrolled and untreated stormwater runoff from existing impervious surfaces at the Resort. Exhibits VMP 190, VMP 191.
23. On May 29, 2012, Vermont DEC Senior Aquatic Biologist Steve Fiske provided comments and questions on the WQRP to VHB. Exhibit VMP 192.
24. On July 27, 2012, Applicant submitted an Addendum to the 2011 WQRP, which along with the 2011 WQRP constitutes the final WQRP. Exhibit VMP 193.
25. ANR provided the Watershed Management Division final comments regarding the WQRP. Exhibit VMP 260(g).
26. The DEC Watershed Management Division issued Individual Construction Stormwater Discharge Permit #6774-INDC on May 23, 2013. Exhibit VMP 275.
27. The DEC Watershed Management Division issued Stormwater Discharge Permit #6774-INDS on May 23, 2013. Exhibit VMP 274.

28. Applicant submitted updated plans based on the stormwater permitting process Exhibit VMP 274 a-g:
- a. C-1.00 "Legend and General Notes," prepared by VHB, and most recently revised 10/23/2012.
 - b. C-2.00 "Overall Plan," prepared by VHB, and most recently revised 10/23/2012.
 - c. C-2.01-2.04 "Layout and Materials Plan," prepared by VHB, and most recently revised 12/4/2012.
 - d. C-3.01-3.04 "Grading Plan," prepared by VHB, and most recently revised 03/07/2013.
 - e. C-4.01-4.04 "Utility Plan," prepared by VHB, and most recently revised 03/07/2013.
 - f. C-5.01-5.04 "Site Details," prepared by VHB, and most recently revised 12/4/2012.
 - g. RH OA-1 "Ramshead Brook Subdivision," prepared by Marsh Engineering, and most recently revised 5/29/13.
29. Having reviewed the evidence, the Commission concludes that the applicant has, by a preponderance of the evidence, established conformance with Criterion 1B for Phase 1 including water supply, wastewater and stormwater impacts. The certifications and other confirmations required by the Agency of Natural Resources (prior to construction or operation) are not unusual in this regulatory setting. The Commission, like ANR, periodically requires permittees to meet additional requirements prior to construction or operation of the approved facility. Moreover, the Commission concludes that the claims of deficiencies in ANR's review and approval of the stormwater discharge design are unpersuasive. The Agency carefully reviewed the applications over a period of months, responding in detail to public comments. The Commission concludes, in summary, that the presumption of compliance accorded by Rule to the Agency's permits has not been effectively rebutted. In the event that such certifications, confirmations or other requirements implicate any "material changes" to the project as approved herein, the permittee will be obligated, pursuant to Act 250 Rule 34, to return to the Commission with an application to amend the permit accompanying these findings. At that time, parties under this Criterion will have the opportunity to challenge any such changes.

Conclusions of Law:

All conditions of the ANR's Wastewater System and Potable Water Supply Permit, Individual Construction Stormwater Discharge Permit, and the Stormwater Discharge Permit cited above will be incorporated into the Act 250 permit. As conditioned herein, the Commission concludes that Phase I will meet applicable environmental conservation department regulations and will not result in the injection of waste materials or harmful or toxic substances into groundwater or wells.

SECTION 6086(a)(1)(C) WATER CONSERVATION:

30. Applicant has agreed and the Commission will require the use of low-flow plumbing fixtures in any buildings. Exhibit VMP 7
31. Applicant submits that all commercial and residential buildings in the Village Core and Ramshead Brook Subdivision will use low flow water saving fixtures. The skier services buildings and some commercial uses will use recycled wastewater for toilets and urinals. The landscape design within the Village Core is intended to be low maintenance and require only limited watering. Exhibit VMP 181.

Conclusions of Law:

The Project design has considered water conservation, incorporates multiple use or recycling where technically and economically practical, uses the best available technology for water conservation, and provides for continued efficient operation of these systems. The Project complies with Criterion 1(C).

SECTION 6086(a)(1)(D) FLOODWAYS:

32. The Phase I area is not located in a special flood hazard area, according to National Flood Insurance Program maps. Exhibit VMP 7.
33. The Commission required a floodway determination from ANR and the resolution of the issue related to the small Fluvial Erosion Hazard ("FEH") on or near Roaring Brook. VMP 173.
34. ANR requested that the Commission impose a condition that no future additional armoring of the Roaring Brook stream bank is permitted in areas of existing FEH encroachment. Exhibit VMP 245.
35. Applicant agreed to ANR's proposed condition, with the addition of the following: "...except as reviewed and approved by ANR." Exhibit VMP 260(e). The Commission has conditioned the permit accordingly.

Conclusions of Law:

The Commission concludes that Phase I will not restrict or divert the flow of floodwaters, and endanger the health, safety, and welfare of the public or of riparian owners during flooding and will not significantly increase the peak discharge of the river or stream within or downstream from the area of development and endanger the health, safety, or welfare of the public or riparian owners during flooding.

SECTION 6086(a)(1)(E) STREAMS:

36. Streams located within and in close proximity to the proposed project boundaries are mapped and described in detail in the Natural Resources Assessment, prepared by VHB, Inc. Exhibit NR 1.
37. Steven Durkee, through his witness Mr. Torrizo, testified that the project will fail to maintain the natural condition of the streams in the project area because dewatering of the site will lead to a reduction of baseflow conditions in the streams. Exhibit VMP 132. Mr. Torrizo further testified that Appendix 3 "Summary of Delineation Streams" of the Natural Resources Assessment identified some streams as having no requirement for a riparian buffer. Testimony of Torizzo and Exhibit NR 1.
38. The Commission required that the Applicant respond to the "zero buffer" issue and clarify the summary of delineated streams and the proposed buffers. VMP 173.
39. The applicant responded that the initial buffer recommendations contained in the Natural Resources Assessment were prepared prior to design of the proposed project and provided recommendations as to minimum widths at a point along subject stream reaches that would enable the maintenance of protected buffer functions and values. Through the design and review process for Phase I, buffer widths were established which equaled or exceeded these values. With the exception of ephemeral channels of limited function and value, buffer widths of 50 feet have generally been established for all streams, except for limited unavoidable encroachments. All such buffer areas will be maintained in a naturally forested, undisturbed condition, which will contribute to the protection of water quality in adjacent waters. Exhibit VMP 197.
40. A 50-foot design buffer was applied from the field-delineated top of the bank of all perennial streams within the project area, in accordance with the ANR Guidance for Agency Act 250 and Section 248 Comments Regarding Riparian Buffers, December 9, 2005. Exhibit VMP 7.
41. Portions of the proposed Phase I development encroach into the minimum recommended buffer width for Roaring Brook which in this area is 50 feet measured from top of bank. The Agency's Riparian Buffer Guidance document allows for narrower buffers in already developed areas subject to Agency consultation and development of a riparian management plan. Exhibit VMP 130. Accordingly, the Commission required that the Applicant provide the final riparian management plan. VMP 294.
42. A "Riparian Buffer Management Plan," prepared by VHB, was submitted to the Commission on 7/27/12. Exhibit VMP 189.

43. There is an existing culvert located underneath the Ramshead snowfront through which Roaring Brook passes (“Ramshead Culvert”). The Ramshead Culvert is composed of two connected components: a 15-foot wide arch plate which constitutes the lower 225 feet of the culvert and an 84-inch corrugated metal pipe (“CMP”) which constitutes the uppermost 60 feet. Analysis of the culvert by ANR determined that it does not provide for fish or other aquatic organism passage in two areas: 1) at the downstream end of the arch plate due to a perched outfall where it discharges to Roaring Brook (“Area #1”); and 2) within the CMP (“Area #2”). The Applicant proposed the completion of a step pool structure at Area #1 during the construction of Phase I, coincident with the construction of Building 1X-RH. With respect to Area #2, it is located substantially on lands owned by the Resort and replacement of that component of the Ramshead Culvert is subject to the conditions of separate Permit #1R0981. Exhibit VMP 239.
44. The proposed water line crosses Roaring Brook at the location of the Ramshead Brook Subdivision road bridge. Exhibit VMP 7.
45. The proposed water line crosses one small perennial stream just up hill and west of the Valley Well Pump Station. Exhibit VMP 7.
46. Applicant and ANR testified that the natural condition of the streams will be maintained and that no reduction of baseflow in the streams is projected. Testimony of Nelson and McCrumb. The ANR Water Quality Division issued the Stream Alteration Permit #SA-1-0829 originally on August 20, 2012, subsequently amended and restated on September 18, 2012. The final Stream Alteration permit is marked as Exhibit VMP 282.

Conclusions of Law:

By a preponderance of the evidence, and as conditioned herein, the Commission concludes that Phase I 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.

SECTION 6086(a)(1)(G) WETLANDS

47. Several Class II and Class III wetlands exist within the Phase I area. Exhibit NR 1.
48. Impacts to Class II wetlands and Class II wetland buffers will occur as a result of the Valley Wellfield (“VW”) Project only. No wetland impacts will occur for the construction of the Village Core or Ramshead Brook Subdivision. Exhibit VMP 7.

49. The DEC Watershed Management Division issued Individual Wetland Permit #RU96-0364, File #2012-077 on November 5, 2012 authorizing impacts to Class II wetlands and Class II wetland buffers associated with the VW Project. Exhibit VMP 260(c).

Conclusions of Law:

Therefore, the Commission concludes that Phase I will not violate the Vermont Wetland Rules relating to significant wetlands.

SECTION 6086(a)(2) AND (3) WATER SUPPLIES⁴

50. Water for the Phase I projects will be provided by the Snowdon Well project ("SW") and water for subsequent phases will be provided by the Valley Wellfield project ("VW"). VMP 7.
51. The Valley Wellfield Project will be constructed during Phase I and is currently owned by Applicant. Exhibit VMP 7.
52. Charles Demarest raised the concern that the Applicants' VW Project could impact the wells on his property. Testimony, Exhibit VMP 108.
53. The ANR Water Supply Division issued Source Permit #S-2389-09.1 on November 16, 2011 for the VW Project well field for 357,120 gallons per day ("GPD") stating that "no adverse interference was identified" with surrounding wells. The Source Evaluation and permitting confirmed that the artesian well supplying Charles Demarest's Water Wheel Trading business is unlikely to be affected by the VW Project. Exhibits VMP 7 and VMP 28.
54. The applicant submitted a Letter of Intent issued by the Vermont Agency of Transportation Utilities and Permits Unit, dated April 20, 2012, stating that the Agency has reviewed Applicants' request to construct a portion of the VW Project water line within the Route 4 State right of way. The actual highway permit application will be processed upon receipt of the Act 250 and local approvals. Exhibit VMP 211.
55. ANR identified that portions of the proposed water line for the VW project were inadvertently sited on State Property. Exhibit VMP 130.
56. Applicant provided revised Sheet VW OA-1 "Killington Village Water System - Valley Well Field Project Overall Plan," prepared by Marsh Engineering, and

⁴ Criterion 2 has to do with the question of whether or not a proposed project will have sufficient water to serve the purposes of the project and Criterion 3 addresses the question of whether or not the project will cause a neighboring supply to fail to meet current demand. Because the issues are closely related, the Commission makes its findings and conclusions on both Criteria here.

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dated 4/6/12 to the Commission on August 22, 2012, showing the water line on private lands only. Exhibit VMP 281.

57. Phase I has an average daily demand of 83,794 GPD in accordance with the demands required by the Water Supply Rule. Exhibit VMP 7.
58. The ANR Water Supply Division issued Source Permit #S-1168-3.3 on December 1, 2011 for the SW Project for a total yield of 192.1 gallons per minute ("gpm"), not to exceed 276,624 GPD. This yield corresponds to an average day demand of 138,312 GPD. The permit indicates that this source will not cause any interference with existing water sources or users. Exhibits VMP 7 and VMP 29.
59. The SW Project is on land owned by the Applicant, but the system is owned by the Resort, with allocation granted to the Applicant. Exhibit VMP 7.
60. Representatives from neighboring condominiums expressed concerns about the impact of the SW Project on their properties. Testimony.
61. The Commission required that the Applicant summarize the data and explain the rationale for a finding of no impact upon the Pinnacle, Mountain Green, and Edgemont condominium association's water supplies. VMP 294.
62. Applicant provided a memo from VHB re: "Criteria 2 and 3: Response to the June 13, 2012 Recess Memorandum and Order," dated July 24, 2012 describing how the SW Project will not cause an unreasonable burden on any existing water supply, in conformance with Criterion 3. Exhibits VMP 173 and VMP 198.
63. The Commission required that the Applicant provide a clearer response to Edgemont and Mountain Green concerns seeking assurance of future availability of or provision for water services to those associations. VMP 294.
64. Applicant provided a memo from Peter Van Oot dated December 18, 2012, re: "Killington Village Master Plan, Act 250 No. 1R0980" that described the water agreement with Mountain Green and stated that there is no water agreement with Edgemont. Exhibit VMP 260(k).
65. The Department of Environmental Conservation Drinking Water and Groundwater Protection Division issued the Permit to Construct #C-2810-12.0, WSID #VT0020376, PIN # RU12-0055, on November 28, 2012. Exhibit VMP 260(d).
66. ANR permits for potable water systems create a rebuttable presumption of conformance with Criterion 2 in Act 250. The Commission finds that the presumption of compliance was not rebutted. The condominium associations

provided no expert witnesses or documentary evidence that the SW project placed the associations at a substantial risk under Criterion 3.

Conclusions of Law:

Therefore, the Commission concludes that there is sufficient water available to meet the needs of Phase I and that the Phase I water sources will not place an unreasonable burden on an existing supply.

SECTION 6086(a)(4) SOIL EROSION

67. Existing conditions within the Phase I boundaries, including topographic contours, can be found on Sheet A0.01 Existing Conditions Plan. Exhibit VMP 53.
68. A site-specific erosion prevention and sediment control plan (“EPSC”) that conforms to the Vermont Standards and Specifications for erosion prevention and sediment control of stormwater runoff during construction for the project was submitted to the DEC Watershed Management Division. The EPSC includes structural and non-structural Best Management Practices (“BMPs”). Exhibit VMP 7.
69. Structural BMPs included within the Phase I area include up-slope diversion of run-off; limits of disturbance barrier fence and flagging; silt fence, with and without reinforcement; grass- and stone-lined swales; stone check dams; temporary sediment basins; and temporary and permanent stabilization with seed, mulch, and/or matting. Exhibit VMP 7.
70. Non-structural BMPs to be implemented within the Phase I area include limiting the amount of concurrent earth disturbance, prompt temporary or permanent stabilization, and routine inspections and reporting. Exhibit VMP-7.
71. Within the Village Core, roadways and parking lots will be stabilized with either paved or gravel surfaces, and all disturbed areas will be landscaped, or planted and mulched. In addition, grassed swales and stone reinforced slopes will be installed where required onsite to prevent erosion. Exhibit VMP 7.
72. Within the Ramshead Brook Subdivision, permanent measures include seeding and matting/mulching of all disturbed soils and the use of stone lined swales to carry runoff to the stormwater collection system. An enclosed storm drain collection system will be installed on and under subdivision roads to collect both road and lot runoff to be conveyed off-site for treatment with the stormwater treatment system to be constructed as part of Application #1R0981. Exhibit VMP 7.

73. Within the SW Project, all disturbed soils will be permanently stabilized with seed and mulch/matting within 14 days of initial disturbance. Following construction, the roadway will be permanently stabilized with roadway gravel. Disturbed areas beyond the limits of the access road, will receive permanent stabilization of grass seed and mulch. Exhibit VMP 7.

If construction activities for Phase I involve earth disturbance past October 15 or begin before April 15, they will comply with the Vermont Erosion Prevention and Sediment Control Field Guide for winter construction conditions. Exhibit VMP 7.

74. Paved roadways and parking areas within Phase I will have sufficient storm drain infrastructure to properly convey, collect, treat, detain, and discharge without causing adverse impacts on downstream property owners or downstream areas. Exhibit VMP 7.
75. The DEC Watershed Management Division issued Individual Construction Stormwater Discharge Permit #6774-INDC on May 23, 2013. Exhibit VMP 275.

Conclusions of Law:

Therefore, the Commission concludes that Phase I 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.

SECTION 6086(a)(5) AND (9K) TRAFFIC SAFETY AND IMPACTS UPON PUBLIC INVESTMENTS⁵

76. For Phase I, the reconfiguration of Killington Road and the construction of internal roads and parking lots for the Village and for the Ramshead Brook subdivision are shown on Sheets C-3.01 through C-3.04 and Sheet RH OA-1. Exhibits VMP 64, VMP 65, VMP 66, VMP 67, VMP 99. Only service parking will be provided for the VW Project and the SW Project. Exhibit VMP 7.
77. Parking for Phase I of the Village Core was designed based on Town of Killington requirements and discussions, as well as ratios for each residential unit. An agreement with the Town of Killington specifies that the total day-skier parking spaces cannot be reduced as a result of Phase I. The Resort has chosen to relocate the day-skier parking as a result of the location of the Village Core. Those parking lots will be located down Killington Road and are addressed in the Resort Parking Project application #1R0981. Exhibit VMP 7.

⁵ Consistent with the format for Criteria 2 and 3 above, the Commission is including its findings and conclusions for Criteria 5 (traffic safety) and 9K (impacts upon public investments like highways and public lands) in a single section due to the similarity of issues raised.

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78. A traffic impact study (“TIS”) of Phase I, dated 12/23/11, was prepared by Resource Systems Group (“RSG”). Exhibit VMP 30 and testimony of Ken Kaliski.
79. After comments were received from VTrans, an updated TIS, dated May 31, 2012, was submitted to the Commission. Exhibit VMP 152.
80. Bus or other mass transit access has been incorporated into the Phase I site design with a skier shuttle drop-off area in the center of the Village Core and a transit drop-off area west of Killington Road and near Building 1XRH. Sidewalks and crosswalks connect these transit stop locations with the Phase I uses and skiing destinations. Exhibit VMP 7.
81. Phase I is anticipated to generate 279 vehicle trips during the peak hour. 105 peak hour trips (38%) are anticipated to be “captured” internal to Phase I. 40 peak hour trips (14%) are anticipated to be generated either by skiers already visiting the Resort or by patrons of nearby hotels. 40 peak hour trips (14%) are anticipated to occur between the Village Core area and origins/destinations along Killington Road. 94 peak hour trips (34%) are projected to extend off-mountain onto US 4 to destinations outside of the Town of Killington. Exhibit VMP 7, VMP 30.
82. According to the TIS, Phase I is not projected to create unreasonable congestion or unsafe conditions in the surrounding area. Exhibits VMP 7 and VMP 30.
83. Steven Durkee, VTrans and the three Regional Planning Commissions (“the RPC’s”) who have participated in this proceeding have offered testimony or other evidence related to traffic. In addition, Mountain Green Condominium Association expressed concerns related to parking. VTrans and the RPCs agreed that Phase I will not require any traffic mitigation. Exhibits VMP 135, 142, 261, 271, 266 and 276.
84. Phase I will not affect railroads or airports. Exhibit VMP 7.
85. Mr. Durkee argued, in summary, that the applicant failed to meet the burden of production or proof on the issue of traffic impacts under Criteria 5 and 9K. For convenience, Mr. Durkee’s arguments are reproduced below (VMP 293):

The Applicants have not produced enough information for the Commission to adequately evaluate whether or not the Project will cause unreasonable congestion or unsafe conditions, with respect to Criterion 5, and/or whether the Project will unreasonably endanger the public investments in area roadways or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to area roadways. The large scale of the Applicants' proposed Phase I project, 225 new housing units, 31,622 square feet of new commercial space, and a 77,000 square foot

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skier center, will create traffic impacts on nearby regions and towns such as Ludlow, Bridgewater, and Woodstock. Yet Applicants have not reviewed or analyzed any regional impacts on roadways, and there is no agreement in place to review these impacts in the future. The Commission initially required that Applicants produce an updated version of Exhibit VMP 167 (Memorandum of Agreement) with the three participating regional planning commissions, but no such Memorandum of Agreement has been produced notwithstanding the fact that a year has passed since the Commission made its request.

As noted in the May 15, 2012 letter from the regional planning commissions ("RPCs"), as far back as 1998 the need for comprehensive traffic management in the so-called ski-corridors for US Routes 4 and 7 and Vermont Routes 100 and 103, which includes the Applicants' proposed project, was widely recognized. Although the RPCs and VTrans have suggested that the Applicants should be allowed to bypass regional modeling for Phase I, no evidence has been presented to indicate that the previously recognized need for region-wide evaluation of large Act 250 projects has changed. Accordingly, before a permit can be issued for Phase I, Applicant should be required to undertake a region-wide impact assessment found necessary over a decade ago. Applicants' traffic report analyzed only peak-hour vehicular impacts, and limited the intersections reviewed to a select few intersections along Killington Road that are anticipated to receive an increase of 75 or more vehicles as a result of Phase I of Applicants' Project.

Consequently, the cumulative and regional impacts of the Project traffic have not been analyzed. Furthermore, while Applicants' traffic study identifies significant crash histories in the vicinity of the U.S. 4, Killington Road, and Route 100 intersections associated with this project, no remedies are proposed by Applicants in any of their traffic studies or post-hearing submittals. Testimony during the hearings indicated that Applicants' consultant is in the process of preparing a redesign for these areas for the Town of Killington to reduce the safety issues identified in the Applicants' traffic study. These redesigns were not presented to the Commission, and no mitigation of the safety issues has been presented by Applicants to meet their burden of production under Criteria 5 or 9(K).

With respect to the Master Plan component of Applicants' application, Applicants have argued that since they are only seeking conceptual approval of the overall project and not construction approval, they should not be required to plan for potential traffic impacts at this time. Applicants are essentially asking the District Commission to allow them to avoid submitting relevant information with regard to Criteria 5 and 9(k), and ignore their responsibility for their traffic generation. This is simply not the manner in which other District Commissions have addressed this issue. Compare the current application, for example, with the Master Plan Land Use Permit granted to Mount Snow Ltd in July 2011 for its proposed multi-phase development. *In re: Mount Snow Ltd., #2W1281, Partial Findings of Fact and Conclusions of Law and Order (Dist. Env. Comm. #2, Jul. 1, 2011)*. Mount Snow did considerably more work to describe the project impacts

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than has been done by SP Land, and Mount Snow still received no affirmative findings on most of the Criteria, including Criteria 5 and 9(K). For example, Mount Snow performed a full traffic analysis based on a complete buildout of the proposed project and projected traffic conditions in the year 2020. *Id.* at 28. Their traffic analysis identified potential areas of congestion and unsafe conditions, and proposed mitigation for future phases. *Id.* at 27-33.

The results of the traffic analysis were used to plan the entire project and to incorporate long-range solutions in every phase, including designing a transit center that could accommodate future growth. *Id.* at 27. Even with the superior level of traffic analysis, Mount Snow did not receive any affirmative findings on Criteria 5 and 9(K). As the District Environmental Commission #2 noted, when a master plan is being considered, one of the purposes of the findings is to put "the Applicant and parties on notice of . . . deficiencies - so that the Applicant and parties may specifically address such issues in future applications." It is unclear why SP Land believes their inability and/or refusal to do any analysis of future traffic impacts of the project entitles them to silence the concerns raised by the RPCs or avoid the type of review and analysis utilized for similar, but smaller, projects.

86. The Commission disagrees that the applicant has failed to meet its burden of production under Criteria 5 and 9K for Phase I. As noted in our findings herein, the applicant prepared a traffic study which tended to indicate that the project would not create unsafe conditions on the Killington Access Road or Route 4. VTrans and three Regional Planning Commissions agreed that the projected traffic generation from Phase I did not warrant further region-wide traffic analysis nor the imposition of mitigation measures beyond the recommendations of the TIS. No other party to the case produced a formal traffic study which would serve to provide the Commission with alternative data. By a preponderance of the evidence, we conclude that the applicant met its burden of production under Criteria 5 (and 9K). The statute then shifts the burden of proof of non-conformance to the party-opponent under Criterion 5.⁶ Mr. Durkee has urged the Commission to require substantial additional analysis of future impacts for a project that remains speculative in nature. Neither the Commission nor the parties can predict with any reliability the timing of construction of Phase I or subsequent Phases. The Commission concludes that it would be inefficient and wasteful to require the expenditure of resources now to evaluate impacts that may occur years or decades from now. We further conclude that additional (and more meaningful) traffic analysis is prudent following completion of Phase I and prior to approval of subsequent phases given the uncertainties of time and the limited scope of information presented in the TIS.

⁶ See Section IV above and its citation to 10 V.S.A. § 6088.

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87. The Commission required that the Applicant provide the RSG traffic/parking lot planning data that was used to develop the parking and traffic plans, and provide a more detailed description of the proposed shuttle bus parking lot transit plan including how the trip frequency was determined. VMP 173.
88. Applicant provided the data collection for the Snowshed/Ramshead bus & shuttle vehicle observations, parking arrival rates, parking shuttle service demand, capacity & headway calculations, and the shuttle and bus space requirements at Village Core drop-off area. Applicant also explained that a shuttle system will provide service between the parking areas and the Village Green within the Village Core Development Zone. Exhibits VMP 210, VMP 228.
89. Jennifer Conley, on behalf of party Durkee, noted that no growth in traffic was assumed in the Applicants' TIS and stated that although recent trends support this, with an improving economy, there should be a return of some lost recreational trips. Exhibit VMP 214.
90. The Commission required that the Applicant confirm whether or not a 1% growth assumption will be provided for in subsequent traffic studies. VMP 173.
91. Applicant assumed no background growth between 2014 and 2019 instead of applying a negative growth rate to the future year (2019) analysis based on the 2010 VTrans Red Book, historic data from the VTrans permanent count station on Killington Road (P6R054) and from the VTrans permanent count station west of Killington Road on US 4 (P6R005), which indicate negative growth over the last decade (beginning in 2000 prior to the 2008 recession) and project negative growth moving forward. Exhibit VMP 228.
92. Ms. Conley noted concerns that the TIS failed to analyze Phase I and the longer range potential traffic impacts from subsequent phases. The Commission, VTrans and the RPC's share these concerns and the Commission will require additional data and analysis prior to approval of subsequent phases. Ms. Conley further argued that although trips from the residential portion of the site will visit the restaurants in the Village Core and reduce the number of trips impacting the Killington Road (and therefore be "captured" at the Village without effecting the Access Road and beyond), the source for the 40 percent capture rate used in the TIS is not supported by outside studies of other resorts. The TIS should have investigated actual sources of data for similar slope side developments, Ms. Conley argued. Exhibit VMP 214.
93. Applicant argued that Phase I is different from a typical mixed-use development insofar as visitors primarily come to the area to ski, and this project is intended to capture these visitors on-site with restaurants, shops, and condominiums. To address the unique trip generation nature of Phase I, RSG reviewed recent studies on mixed-use trip generation and consulted a 2011 paper published by

the Transportation Research Board entitled Enhancing Internal Capture Estimation for Mixed-Use Developments (NCHRP Report 684), which provides a methodology for estimation of internal capture considering effects of use proximity and includes restaurant, cinema, and hotel land uses in addition to retail, residential, and retail uses, previously studied by ITE. While the reference sites informing this study were not identical in nature to the Phase I, they represent the most recent and comprehensive investigation into mixed-use trip generation and RSG believes provide a reasonable method of estimating internal capture rates for mixed-use developments similar to the captive, vacation-oriented visitors to the proposed Phase I development. Exhibit VMP 228. The Commission finds the applicants' argument more compelling and notes that Ms. Conley acknowledged in VMP 214 that the impact of using a lower capture rate (such as 15%) would be "minimal" for Phase 1 and the real difference in impacts will be felt if subsequent phases are actually constructed and occupied. VMP 214.

94. Ms. Conley further found fault in the TIS for its failure to propose remedies to reduce the incidence of crashes on nearby roads. Exhibit VMP 214. Applicant countered that the Phase I TIS identified two existing High Crash Locations along US 4 within the study area and identified strategies and potential improvements for reducing the crash rate in the future. The applicant averred that Phase I impacts did not warrant specific mitigation on US 4 and none was recommended by VTrans. Exhibit VMP 228.
95. Rajnish Gupta, P.E., VTrans' Traffic Research Manager, agreed that Phase I required no mitigation or further study, but he proposed that additional traffic study and responsibility for mitigation measures would be appropriate for a long-term master plan of this scope. Accordingly, he and the Agency proposed the following requirements in VMP 142 for additional traffic analysis prior to the approval of subsequent phases.

Six months to one year and five years after the Phase I is fully constructed and occupied, a traffic monitoring study will be conducted by the Applicant to ascertain if excessive congestion has occurred at the intersections included in the study. The monitoring study will also include conducting turning movement counts at the US 4 and Killington Road intersection and then analyzing the results for signals, turn-lane warrants, LOS, delay and queue lengths.

Additionally, crash records will be examined to ascertain if highway safety in the study area is negatively impacted. This will be done one year and five years after the development is fully constructed at the same time the above-referenced counts are undertaken.

All results of the above studies are to be submitted to VTrans and the Act 250 District Commission. If, as a result of the above studies, VTrans identifies congestion or safety problems, then VTrans and the developer will determine the appropriate mitigation measures to ameliorate the adverse

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condition and the developer will be responsible for implementing such mitigation measures. If an agreement cannot be reached, the Act 250 District Commission will determine the appropriate mitigation or additional conditions.

The Agency then added:

The following permit condition should be included in Phase I and subsequent phases:

The applicant is to be held responsible for their proportional share (see *In re Pilgrim Partnership*, 153 Vt. 594 (1990)), to mitigate existing adverse traffic and safety conditions along the US Route 4 corridor in Killington. The Town of Killington in partnership with VTrans will develop a methodology to determine applicants' proportional share.

The applicant shall conduct Traffic Impact Study updates including the background traffic generated by previous [sic] phase(s) for each new phase of its development and, subject to approval by VTrans (for state highways) and the Town (for town highways). The applicant will at its own expense construct necessary mitigation to alleviate unreasonable congestion or unsafe highway conditions.

96. In summary, the proposed requirement involves two additional analyses: the first study to be conducted six months to one year after construction completion and opening of the village and the second at the five year point after the Phase I is fully constructed and occupied. The studies would be designed to determine whether or not excessive congestion has occurred at the intersections included in the study and would include conducting turning movement counts at the US 4 and Killington Road intersection and analysis of the results for signals, turn-lane warrants, LOS, delay and queue lengths, and would hold the applicant responsible for sharing a proportional obligation for traffic mitigation measures. Exhibit VMP 142.
97. The three Regional Planning Commissions agreed that the conditions above should be implemented and recommended that for subsequent phases, the applicant should participate in and contribute to a broader regional traffic analysis. Exhibits VMP 271 and 276. The RPC's differed somewhat in their recommendations. The Commission will address those differences below in our findings under Criterion 10 and the Commission hereby incorporates and adopts by reference herein our Findings and Conclusions under Criterion 10.
98. The applicant argued that, as worded, the proposed VTrans conditions make no distinction between future congestion caused by outside factors unrelated to Phase I and the possible impacts of Phase I. As written, this condition could require Applicant to mitigate congestion created by others. Applicant proposed the following alternate condition:

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Six months to one year and five years after full occupancy of Phase I and during the ski season the Applicant will conduct a study to determine the actual trip generation of Phase I and compare this actual trip generation figure with the projections from the Applicants' Traffic Impact Study . If actual trip generation is found to exceed the estimates in the TIS by 20% or more, then the Applicant shall re-analyze the study area intersections using the actual Phase I trip generation rate and report on signal warrants, turn lane warrants, Level of Service, average delays, and queue lengths. Exhibit VMP 235.

99. As noted above, VTrans included in its recommendations that crash records be examined to ascertain if highway safety in the study area is negatively impacted by Phase I development. Exhibit VMP 142. Applicant argued, in summary, that any increase (or decrease) in the crash rates within the study area could be attributed to multiple variables, including weather, heavy ski traffic, other developments in the area, etc. and it would not be possible to distinguish crashes which may be related to Phase I and totally unrelated crash events. Exhibit 235. The Commission disagrees. Crash analysis data is a useful and necessary tool in traffic safety reviews and the Commission will so condition this permit.
100. As noted above, VTrans recommended that the results of the required studies be submitted to VTrans and the Commission and that if, as a result of the studies, VTrans identifies congestion or safety problems, then VTrans and the permittee would develop the appropriate mitigation measures to ameliorate the adverse conditions and the permittee would be responsible for implementing such mitigation measures. In the event that the Agency and the permittee were unable to reach agreement, the parties would have the issue resolved by the District Commission. Exhibit VMP 142.
101. The applicant argued that VTrans' proposed condition makes no distinction between future congestion and safety issues caused by outside factors unrelated to Phase I and the possible impacts of Phase I. This condition could require Applicant to mitigate congestion or safety issues created by others. Applicant proposed the following alternate condition Exhibit VMP 235:

The District Commission retains continuing jurisdiction over traffic issues and reserves the right to convene a status conference upon submittal of Applicants' six-month to one-year and five year studies in order to determine whether further studies and/or mitigating measures are warranted.
102. The Commission finds that the procedure proposed by the Agency is reasonable and that it is more likely than not that the Agency with its expertise will be able to distinguish between adverse impacts reasonably attributable to the permittee and impacts that are not reasonably attributable to the permittee. Moreover, the procedure proposed by the Agency provides a remedy to the

permittee in the event that the permittee concludes that VTrans is unfairly or unreasonably burdening the permittee with traffic safety mitigation measures.

103. As noted in the Final Party Status rulings above, Okemo Mountain Limited requested that the Commission impose an obligation upon the permittee to financially participate in the cost of traffic safety mitigation measures imposed upon Okemo by the District 2 Commission in a prior proceeding. Okemo argued that the resort had previously committed to such a contribution by operation of an agreement between then owner Killington, Ltd. and Okemo that established an agreed-upon protocol for the proportionate sharing of traffic mitigation costs. Exhibit VMP 171c. Okemo acknowledged that, by its terms, the Agreement expired in 2007. Exhibit VMP 171. The Commission concludes that there is insufficient evidence in the record to impose such a requirement on this applicant for the permitting of Phase I. The petitioner may renew their argument when and if subsequent traffic analysis indicates that the Phase I or subsequent phases are having or are likely to have significant adverse impacts upon the petitioner's interests under Criteria 5 or 9K.
104. Having reviewed the arguments, the Commission finds that VTrans' and the Regional Planning Commission proposals are more persuasive. The VTrans proposal for followup traffic analysis, and responsibility for the cost of necessary mitigation measures reasonably attributable to the development, is consistent with the statutory requirements of Criteria 5 and 9K (imposing conditions as necessary to avoid unreasonable congestion or unsafe conditions). The applicants' proposals would tend to link future obligations to data that was assembled circa 2012 and would eliminate the requirement for further analysis or mitigation if traffic generation numbers are exceeded by anything less than 20%.
105. It is beyond dispute that the timing of construction of Phase I and, if approved, any subsequent phases of the master plan, is uncertain. It is also beyond dispute that subsequent phases will add substantial additional traffic to both the local and regional roadways. In order to address these variables, the Commission finds that an analysis of the actual functionality of Phase I traffic and a broader analysis of regional traffic impacts for additional buildout of the Master Plan in subsequent phases is a reasonable approach to achieving and maintaining conformance with Criteria 5 and 9K. The Commission will condition this permit accordingly.

Conclusions of Law With Respect to Traffic Impacts under Criteria 5 and 9K:

With the traffic related conditions assigned herein, the Commission concludes that Phase I will 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, and that Phase I will not materially jeopardize the public's safe access to, use or enjoyment of public highways.

SECTION 6086(a)(9K) – IMPACTS UPON PUBLIC INVESTMENTS OTHER THAN ROADS

106. Mr. Durkee and his expert Mr. Raphael argue that the majority of the ski resort is located on Calvin Coolidge State Forest lands under a long term lease from the State of Vermont and that the project poses a risk of undue adverse impacts upon the public's access to these recreational lands, by virtue of the relocated parking lot, the traffic impacts associated with a project of this scale, and the visual impacts from both the Long Trail and Appalachian Trails. VMP 293. The petitioner further submitted that “the entirety of the Village Master Plan (including Phase I) would be so out of character with its surroundings, and would so dramatically detract from the day skier's experience of the recreational area, that the Project would unreasonably endanger the public investment in Killington as a ski resort.” Exhibit VMP 213.
107. While the Commission agrees with the petitioner that the master planned project is “on or adjacent to a public investment”, the Commission finds that the record propounded by the applicant is sufficient to find conformance with Criterion 9K for Phase I. The construction activities for Phase 1 are largely consistent with existing development. The Commission finds that the public's access to or enjoyment of the public lands and public trails will not be significantly jeopardized by a Phase I development proposed to be located in an area already broadly developed for commercial skiing activities.

Conclusions of Law:

The Commission concludes that Phase I 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.

SECTION 6086(a)(7) – MUNICIPAL SERVICES

108. The Town of Killington signed a Municipal Impact Questionnaire on 12/7/11 indicating that sufficient capacity exists in the Town of Killington for police, fire, and rescue services for Phase I. Exhibit VMP 33.
109. Each homeowners' association will contract with a private solid waste disposal company, due to the limited capacity of the municipal service for that purpose. Exhibit VMP 7.
110. The Sherburne Volunteer Fire Department (dba Killington Fire Rescue) expressed concern regarding there being only one access point serving the K-1

Base Lodge and proposed future phases of the ski village project which will be located southerly of the Ski Services Building and bridge and that it wanted to have assurance that all project roads will be designed so that all emergency vehicles can access all areas of the proposed development. SVFD is particularly concerned with road grades, turning radius and driveway intersections. Exhibit VMP 127. Applicant testified that emergency access is sufficient throughout the development and that the ski bridge width was designed to address this concern. Based upon a preponderance of the evidence, the Commission finds that the ski bridge width and project roadways are sufficient to provide reasonable access for firefighting units.

111. The Sherburne Volunteer Fire Department further urged that all buildings, including single family residential structures, be constructed with fire suppression sprinkler systems. Exhibit VMP 169. The applicant had already proposed that the retail and other non-residential buildings would be sprinklered. The Commission required that the Applicant confirm whether or not the Applicant is willing to accept a permit condition requiring that the residences proposed to be constructed in the Ramshead Brook Subdivision be sprinklered. VMP 173. The applicant objected to a requirement for single-family residences in the Ramshead Brook Subdivision to be sprinklered because each homeowner, their architect and other consultants needs to assess whether their fire suppression needs conform with the rules and Zoning Bylaws of the Town of Killington and the Fire Safety Regulations of the State of Vermont, which do not require sprinklering of single family homes. Exhibit VMP 187. The Town of Killington proffered that the Zoning Bylaws do not currently require single-family residences to be sprinklered for fire protection and the Planning Commission does not believe that the Town has the authority to require single-family residences to be sprinklered and the Killington Planning Commission has never placed a condition on a project that would require a single-family residence to be sprinklered. Exhibit VMP 186. The Commission finds these arguments to be unavailing. The Commission is unaware of any state or local land use law or ordinance which would bar the installation of such fire suppression equipment. The Commission further finds that, given the limitations of an all-volunteer local fire department, the scope of the proposed development, and given the unusual opportunity for a fire to become major prior to detection in homes only sporadically occupied, a requirement to sprinkler all buildings is both reasonable and prudent and the permit will be conditioned accordingly.

Conclusions of Law:

The Commission concludes that Phase I, as conditioned herein, will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services.

SECTION 6086(a)(8) - AESTHETICS, HISTORIC SITES and RARE OR IRREPLACEABLE NATURAL AREAS:

Introduction to the Findings: The Commission uses a two part test established by the Board to determine whether a project meets the requirements of criterion 8 relating to aesthetics. First, it determines whether the project will have an adverse aesthetic effect. Second, it determines whether the adverse effect, if any, is undue. Re: Quechee Lakes Corp., Applications #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-19 (January 13, 1986).

General:

112. The majority of Phase I construction will be the Village Core, which is currently the location of day-skier parking lots and two aging skier-services buildings. The Snowshed and Ramshead lodges will be demolished as part of this project and replaced with newer, more attractive structures. The current arrival at the base of the ski mountain is through a large parking area and largely unadorned with positive aesthetic features. The Ramshead Brook Subdivision is a wooded area, bordered by an un-named tributary to the south and Roaring Brook to the east. Exhibit VMP 7.

Noise:

113. During construction of Phase I, typical construction noise is expected, with some occasional blasting for re-grading purposes. Notice will be given to neighboring properties in advance of these limited blasting activities. After construction, the Village Core will generate typical skier- and visitor-related noise. Ramshead Brook Subdivision will generate typical residential neighborhood noise. Exhibit VMP 7.
114. The Commission required that the Applicant provide a proposed blasting plan for construction activities associated with Phase I. VMP 173.
115. Applicant submitted the "Blasting Plan for Killington Village Master Plan-Phase I Village Core Development Zone," prepared by Maine Drilling & Blasting, Inc., dated June 27, 2012. Exhibit VMP 207. The Commission finds that the blasting plan proposes to limit total explosive weights to a level that is unlikely to pose a threat to human health or to the structural integrity of nearby buildings.
116. The Commission required that the Applicant provide proposed maximum noise levels during the construction phase. VMP 173. The Applicant submitted a memo from RSG re: "Killington Village Master Plan - Phase I Construction Impacts," dated July 24, 2012. Applicant anticipated construction to occur from 6 am to 6 pm on weekdays and from 8 am to 4 pm on the weekends. VMP 208.

117. The Commission required that the Applicant provide proposed maximum noise levels at Edgemont & Mountain Green property lines during construction. Exhibit VMP 294. The applicant submitted a letter from Isaac Old of Resource Systems Group, Inc., dated October 30, 2012 re: "Killington Village Master Plan - Phase I Construction Impacts, Act 250 #1R0980" with the modeled sound levels from various construction equipment at Edgemont and Mountain Green condominiums. Exhibit VMP 260(j).
118. The Commission required that Edgemont and Mountain Green Condominium Associations provide proposed construction hours if they differ from those proposed by the Applicant. VMP 294. Edgemont and Mountain Green submitted letters suggesting 7:00 a.m. to 7:00 p.m. construction hours. Exhibits VMP 255, VMP 261. Mountain Green added that a 6:00 a.m. start time for assembly would be acceptable. Exhibit VMP 261.
119. The applicant agreed that 7:00 a.m. to 7:00 p.m. construction hours and 6:00 am to 7:00 am assembly time would be acceptable. Exhibit VMP 264. The Commission will so condition the permit.

Architectural Details:

120. The Village Core architecture was designed to integrate into the existing architectural landscape. This architecture is depicted on Sheets A-3.01 through A-3.07. Exhibits VMP 7, VMP 92, VMP 93, VMP 94, VMP 95, VMP 96, VMP 97, and VMP 98.
121. There are no specific homes presently designed for the Ramshead Brook Subdivision. Homes will be constructed by a future developer or by individual home-owners. The design of these buildings will be held to "Design Guidelines" that suggest consistency with "a vision that builds on the region's natural beauty, rich history and active lifestyle." Exhibit VMP 7. See also VMP 34 and VMP 203. The Commission will require that permit amendments be obtained for the homes as they are designed and proposed for construction to ensure conformance with the guidelines and any Act 250 criteria implicated by changes proposed to the designs contemplated herein.
122. The parking lots for the Village Core are shown on Sheets C-2.01 through C-2.04. Exhibits VMP 60, VMP 61, VMP 62, VMP 63. There was some concern expressed in the filings that skiers would sometimes park or otherwise encroach upon neighboring condominium association's parking areas. The Commission required that Edgemont and Mountain Green provide additional evidence of encroachment or trespass onto condominium parking lots by non-condo association motorists so that future illegal parking may be evaluated and remedied. VMP 294. Edgemont responded in a letter dated October 31, 2012 that they have witnessed trespassers and that the Applicant should monitor these parking lots. Exhibit VMP 255. Applicant responded that sufficient

parking is being provided for the project and that no monitoring of others' parking is necessary or reasonable. Exhibit VMP 264. The Commission notes that substantial new parking is proposed in the proceeding captioned #1R0981. In that proceeding, the Commission notes that new parking is further away from the Lodge and that there is some ongoing risk of encroachment onto Condominium parking. Accordingly, the Commission will, by permit condition, retain jurisdiction under Criteria 5 and 8 and reserve the right to impose additional requirements in the event that parking encroachment is ineffectively prevented by the permittee.

123. The Phase I signage will complement the building color palette and architecture and will range in type and purpose. The palette, styles, and conceptual designs are depicted on the "Master Sign Plan" by Wood & Wood Design. Exhibit VMP 35.
124. Lighting within Phase I provides exterior lighting in specific areas of the site where needed: Killington Road, Interior Circulation Roads, Parking Lots and the Village Core. Within each of these four areas, a lighting design was developed that is appropriate and responds to the uses associated with each area. The illumination levels are low - achieved by using low lamp wattages and low fixture mounting heights. The lighting controls for Phase I will use a combination of photo cells and timers. All fixtures use sharp cut-off luminaires that comply with the International Dark Sky Association standards. Exhibits VMP 7, VMP 36, VMP 85, VMP 86, VMP 87, VMP 88 and VMP 89.
125. The Village Core will have central collection points for trash that have been incorporated into the site plan to minimize visibility. Ramshead Brook Subdivision will have trash collection and individual propane tanks for each unit, similar to that of a typical residential subdivision. Exhibit VMP 7.
126. David Raphael, on behalf of Steven Durkee, argued that, according to the Quechee Analysis, the impact of the Village Master Plan - including Phase I - would be unduly adverse because the developments would be shocking or offensive to the average person and the Applicant has not taken reasonably available mitigation steps to reduce the visual and aesthetic impacts. Mr. Raphael submitted that the Village Master Plan and associated developments are inappropriately sited, scaled and designed, that they insufficiently protect or preserve the natural landscape, and thus would have irreversible detrimental impacts on the aesthetics of the area. Exhibit VMP 213.
127. The applicant responded that Mr. Raphael's Quechee Analysis is flawed because it relies to excess upon consideration of impacts for phases beyond Phase I and that it considered scale in terms of development area while ignoring that the proposed development area is clustered at the base of the mountain and ignoring how the design and built form address scale. The applicant also proffered that Mr. Raphael offered up guidelines it prepared as

de facto standards for conformity, while failing to evaluate whether or not these guidelines are reasonable. The applicant urged the Commission to consider the setting: a base village designed for those who will visit it - building upon the characteristics of other Vermont villages in terms of details, forms and materials and further urged that the project be found consistent with the planned context as articulated in the Killington Town Plan and Regional Plan. Exhibit VMP 226.

128. The applicant submitted that the scale is in keeping with both the planned and existing context, including the existing Grand Hotel and Mountain Green buildings while noting that Phase I will be “substantially or entirely unseen until one is already on applicants’ or the Resort’s lands where a typical viewer will expect resort type development.” Exhibit VMP 226.
129. Landscaping within Phase I focuses on Vermont species to compliment the surrounding landscape. Plant material is proposed to be installed along Killington Road and within the project site to help soften views of parking and service areas, buildings, and utilities at key locations. The method of softening views is achieved by utilizing large deciduous and evergreen trees with an understory of shrubs and perennials, creating layers of plant material. Dense plantings are also being proposed at the key entry locations to the proposed Village Core at the roundabout and the intersection of Road B. Exhibits VMP 7, VMP 77, VMP 78, VMP 79, VMP 80, VMP 81, VMP 82, VMP 83 and VMP 84.
130. Tree cutting restrictions for the Ramshead Brook Subdivision are outlined in the Revised Design Guidelines for Ramshead Brook. Exhibits VMP 7 and VMP 203.
131. The Commission required the applicant to provide a colorized and clear site plan depicting the proposed landscaping plan for the Ramshead Brook Subdivision, a proposed condition clearly denoting the extent of permitted tree removal and the conditions under which trees must be replaced, a copy of the proposed bylaws and the proposed subdivision design review board rules or guidelines. VMP 173 and 294. In response, the applicant proposed the following condition: “In the Ramshead Brook Subdivision, the extent of permitted tree removal and conditions for revegetation/landscaping will be reviewed under Section 2.10 of the Design Guidelines and enforced by the Architectural Review Board maintained under the Village Master Association controlling documents.” Exhibit VMP 202.
132. The applicant also provided the “Killington Village Master Plan Phase I Description of Common Interest Regimes,” dated July 25, 2012 to address the Commission's proposed bylaws request. Exhibit VMP 206.

133. As noted above, the applicant further provided the "Design Guidelines - Ramshead Brook Subdivision, Killington Village Master Plan," prepared by Hart Howerton, amended & restated July 2012. Exhibit VMP 203.
134. The Commission required draft Declarations, bylaws and/or rules for the Ramshead Brook Subdivision. VMP 294. The applicant provided draft "Declaration for [The Village]," dated October 23, 2012. Exhibit VMP 260(i).

Historic Sites and Rare or Irreplaceable Natural Areas:

135. No known pre-contact Native American sites or evidence of historic settlement exist within the limits of the Village Master Plan. Exhibit VMP 37.
136. The Vermont Division for Historic Preservation (DHP) concurred with the determination of the UVM CAP Archeological Resource Assessment dated December 8, 2011, that all components in the current design for the Village Master Plan will have no effect on any historic sites that are listed on or eligible for the State or National Registers of Historic Places. Exhibit VMP 146.
137. No significant rare or irreplaceable natural communities occur within Phase I. Exhibit NR 1.
138. Having reviewed the evidentiary record, the Commission finds that the Phase 1 project has the potential for adverse aesthetic impacts insofar as certain pastoral treed areas will be subsumed by residential development, the designs for which have not been finalized. The Commission further finds that the Phase I project as a whole is in harmony with its surroundings (a developed ski resort basin). Given that there is potential for adverse impacts, the Commission further finds that the Phase I project does not violate any known community standard with regard to aesthetics, it is not "offensive or shocking to the average person" and the applicant has proposed to take reasonably available steps to mitigate adverse aesthetic impacts.

Conclusions of Law:

Based upon a preponderance of the evidence, the Commission concludes that Phase I will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

SECTION 6086(a)(9)(G) - PRIVATE UTILITIES

139. The Commission required the applicant to describe the private utilities involved in Phase I, including the provision of water, sewer and roadway maintenance, and what provision is made or surety provided to protect the municipality in the event that the municipality is required to assume the responsibility for the services or facilities. VMP 173. The applicant stated that water and sewer

requirements for Phase I will be provided under contract with the Resort. A majority of the roads will be private and maintained either by the Resort or a to-be formed Master Association. Exhibit VMP 181.

140. The Phase I water system and sewer pipelines will be privately owned, operated, and maintained. The applicant intends to contract for service with the Resort while pursuing joint ownership and the formation of an association for long-term legal and financial purposes. Exhibit VMP 7.
141. No utilities are intended to be transferred to the Town of Killington. Exhibit VMP 7.
142. Private roads will be maintained by a homeowner's and a master village association yet to be formed. The association will maintain these roads with a revolving or other sinking fund to provide cash for repairs and replacement. Exhibit VMP 7. The Commission will, by permit condition, require that the permittee submit the association(s) road and utility maintenance agreement(s) upon substantial completion of the roadway networks (and before those roadways or utilities are placed into service).
143. The Town of Killington informed the Commission that it provides road maintenance and repairs for all of its Town Roads, including Killington Road and East Mountain Road except for the portions within the Village Master Plan area. The Town understands that the applicant will be responsible for its roads within the Village Master Plan development and that an association (homeowner or master association) or other agreements will be developed and executed for the maintenance of those roads within the development. The Town is comfortable at this time with the applicant providing for their road construction activities and road maintenance service to its residents. The recently adopted Zoning Bylaws provide for the Planning Commission to review and possibly require such a financial surety (Town of Killington Zoning Bylaws, Section 510 (11)). The need for bonding of the construction activities will be reviewed by the Planning Commission at the time Site Plan Review. Exhibit VMP 199.

Conclusions of Law:

The Commission concludes that Project complies with Criterion 9(G).

SECTION 6086(a)(10) - CONFORMANCE WITH TOWN AND REGIONAL PLANS

144. Phase I meets the economic development, land use, transportation, and energy objectives of the Town of Killington Town Plan, as described in the Schedule B. Exhibit VMP 7.

145. Phase I is located in a “High Density Development Area,” according to the Rutland Regional Plan. This area is designated on the map as one of only five “Sub-Regional Centers” in the region. Exhibit VMP 7.
146. The Commission hereby adopts and incorporates our findings above under Criteria 5 and 9K with respect to traffic impacts. As noted in those findings, the Vermont Agency of Transportation and three Regional Planning Commissions agree that additional traffic analysis of the roads and intersections in the TIS are warranted. With only minor modification for clarity, the Commission finds that that this analysis is necessary to establish and maintain conformance with the Regional plans, and the permit will be conditioned accordingly.
147. A second issue arose as to the longer term potential for adverse traffic safety or congestion impacts in the broader cross-regional traffic corridors. All three Regional Commissions agreed that a cooperative traffic analysis of potential corridor impacts and mitigation measures was appropriate.⁷ The Commission agrees. As noted in the introduction, the current version of the Killington Master Plan, if fully built out, would create more than 2,300 new housing units and nearly 200,000 square feet of new retail space – effectively a new Town. As noted by the Okemo ski resort representatives in this case, it has been historically acknowledged that development at Killington – if large enough – can have traffic impacts other than on the Access Road’s intersection with Route 4. While the Commission agrees in principle with the applicant that it should not be held financially responsible to remedy *all* traffic problems in the Regions, the Commission concludes that it is reasonable to require the applicant to participate in the execution of a corridor study and to participate in the fair sharing of the costs of traffic mitigation measures on a basis reasonably linked to actual impacts caused by the development approved herein. The permit will be conditioned accordingly.

Conclusions of Law - Phase I:

As conditioned herein, the Commission concludes that Phase I is in conformance with any duly adopted local or regional plan or capital program under chapter 117 of Title 24.

VIII. PARTIAL FINDINGS FOR THE BALANCE OF THE VILLAGE MASTER PLAN

Introduction: As noted above in this decision, the applicant sought “partial findings” under Rule 21 for subsequent phases of the overall master plan. The intent of the rule is to provide the applicant and the parties with the Commission’s findings with respect to development of Phases II and III, to the extent that sufficient information is

⁷The Rutland Regional Commission ultimately proposed a different condition than agreed upon by the other two Regional Commission, but the requirement for additional corridor study was not changed in any substantive way.

available to make a finding. No construction of those later phases is presently approved but will be the subject of a subsequent Act 250 amendment proceeding if the permittee desires to seek construction approval. The findings below have legal finality for the period that they remain in effect.

- 148. Pursuant to Act 250 Rule 21, the applicant sought partial findings under relevant Criteria for the Village Master Plan beyond Phase I. Exhibit VMP 7. Applicant provided a letter from Peter Van Oot of Downs Rachlin Martin, PLLC, dated December 18, 2012, re: Killington Village Master Plan, Act 250 #1R0980 describing the Master Permit Policy and Procedure and the applicants’ goals in seeking partial findings. Exhibit VMP 260(l). The Commission required that the applicant explain how the Village Master Plan (beyond what is addressed in Phase I) complies with each of the relevant Act 250 Criteria.⁸ VMP 294.
- 149. Applicant proposes a Village Master Plan build-out encompassing approximately 303 acres of land in eight development zones (“Development Zones”) at the base of Killington Mountain in the area of the Killington Resort (“Resort”). Exhibit VMP 7.
- 150. The eight Development Zones and their project housing unit counts are as follows (see VMP 7):

Development Zone	Projected Unit Count
Village Core	654
Ramshead Brook	97
Snowdon Glades	718
Vale	84
Yodeler’s Run	116
Snowshed Woods	338
The Links	140
Killington Club	<u>153</u>
Total Units	2,300

SECTION 6086(a)(1)(B) WASTE DISPOSAL:

- 151. Sewage from the Village Master Plan will be treated by the existing Resort WW System (located on abutting property controlled by the Resort) before being conveyed to the City of Rutland Wastewater Treatment Facility via the Alpine Pipeline. Exhibit VMP 7, VMP 22, VMP 24, VMP 25.

⁸ Act 250 has ten environmental Criteria. In most cases, not all of the ten Criteria are implicated and are therefore effectively “not applicable.” For example, the project does not involve a gravel pit or quarry and therefore Criteria 9 (D) and (E) are not applicable.

152. The Resort WW System consists of two separate treatment facilities, both of which are operated under the Indirect Discharge Permit No. ID-9-0029. Exhibit VMP 20.
153. A portion of the Resort's pipeline connection to the Alpine Pipeline is damaged and is scheduled to be repaired/replaced by the Resort, per the conditions of Land Use permit #1R0971. Exhibit VMP 21, VMP 23.
154. Potable Water Supply and Wastewater System permits will be sought for each phase of development. Exhibit VMP 7.
155. The Village Master Plan will consist of retail and residential uses and will not involve any manufacturing or industrial processes. Exhibit VMP 7.
156. No hazardous materials will be stored within the Village Master Plan area. Typical household chemicals, cleaning fluids and similar products will be present in quantities typical for homes, condominiums, hotels and small commercial enterprises. Exhibit VMP 7.
157. During the hearing, the applicant and the representative for the Vermont Department of Environmental Conservation ("DEC") Watershed Management Division testified that stormwater management for Phase I and subsequent phases will be evaluated independently as the Village Master Plan evolves. Testimony.
158. In February 2011, the Roaring Brook and the East Branch of Roaring Brook Water Quality Remediation Plan ("WQRP") was submitted to the Water Quality Division of the DEC. This plan was jointly prepared by the Applicant and the Resort in order to address longstanding impacts to water quality within the subject waters due to historically uncontrolled and untreated stormwater runoff from existing impervious surfaces at the Resort. Exhibit VMP 190, VMP 191.
159. On May 29, 2012, Vermont DEC Senior Aquatic Biologist Steve Fiske provided comments and questions on the WQRP to the applicants' consultant VHB. Exhibit VMP 192. On July, 27, 2012, Applicant submitted an Addendum to the 2011 WQRP, which along with the 2011 WQRP constitutes the final WQRP. Exhibit VMP 193. The Agency of Natural Resources provided the Watershed Management Division final comments regarding the WQRP. Exhibit VMP 260(g).

Conclusions of Law:

The Commission is unable to find full conformance with this Criterion for subsequent phases without additional evidence. The Applicant must demonstrate at the time of application for each future phase of the Village Master Plan that such phase will meet

applicable environmental conservation department regulations and will not result in the injection of waste materials or harmful or toxic substances into groundwater or wells.

SECTION 6086(a)(1)(C) - WATER CONSERVATION:

160. The Village Master Plan will involve substantial consumption of potable water. Exhibit VMP 7. Future phases of development will incorporate water conservation methods as appropriate.

Conclusions of Law:

The Commission is unable to find full conformance with this Criterion for subsequent phases without additional evidence. The Applicant must demonstrate at the time of application for each future phase of the Village Master Plan that such phase considers water conservation, incorporates multiple use or recycling where technically and economically practical, utilizes the best available technology for such applications, and provides for continued efficient operation of these systems.

SECTION 6086(a)(1)(D) - FLOODWAYS:

161. The Village Master Plan area, beyond Phase I, is not located in any special flood hazard areas according to current NFIP maps. Exhibit VMP 7.
162. ANR stated they could not support full findings under Criterion 1D for the entire Village Master Plan area at this time because there is insufficient detail provided to effectively evaluate this Criterion for future phases of the Village Master Plan. More specifically, ANR would need to have construction level detail on proposed buildings and infrastructure in and around surface waters and geomorphologic data for those same waters. Exhibit VMP 130.

Conclusions of Law:

The Commission is unable to find full conformance at this time. The Applicant must demonstrate at the time of application for each future phase of the Village Master Plan that such phase will not restrict or divert the flow of floodwaters, and endanger the health, safety, and welfare of the public or of riparian owners during flooding and will not significantly increase the peak discharge of the river or stream within or downstream from the area of development and endanger the health, safety, or welfare of the public or riparian owners during flooding.

SECTION 6086(a)(1)(E) - STREAMS:

163. Streams located within and in close proximity to the proposed project boundaries are mapped and described in detail in the Natural Resources Assessment, prepared by VHB, Inc. Exhibit NR 1.

164. The Village Master Plan does not involve the construction of a permanent dam or withdrawal of water. Exhibit VMP 7.
165. Future phases of development will seek Stream Alteration Permits and address stream impacts, as applicable. Exhibit VMP 7.
166. Steven Durkee submitted that Appendix 3 "Summary of Delineation Streams" of the Natural Resources Assessment identified some streams as requiring no riparian buffer. Testimony, Exhibit NR 1. The Commission required that the Applicant respond to the Appendix 3 Natural Resources Report "zero buffer" issue and clarify the summary of delineated streams and the proposed buffers. VMP 173. Applicant submitted that the initial buffer recommendations contained in the Natural Resources Assessment were prepared prior to design of the proposed project and provided recommendations as to minimum widths at a point along subject stream reaches that would enable the maintenance of protected buffer functions and values. Through the design and review process, buffer widths were established which equaled or exceeded these values. With the exception of ephemeral channels of limited function and value, buffer widths of 50 feet have generally been established for all streams, except for limited unavoidable encroachments. All such buffer areas will be maintained in a naturally forested, undisturbed condition, which will contribute to the protection of water quality in adjacent waters. Exhibit VMP 197.

Conclusions of Law:

The Commission is unable to find full conformance with this Criterion for subsequent phases without additional evidence. The Applicant must demonstrate at the time of application for each future phase of the Village Master Plan that such phase 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.

SECTION 6086(a)(1)(G) WETLANDS:

167. Wetlands and potential impacts to wetlands will be evaluated with each future phase. Exhibit VMP 7.

Conclusions of Law - Village Master Plan:

The Commission is unable to find full conformance at this time. The Applicant must demonstrate at the time of application for each future phase of the Village Master Plan that such phase will not violate the rules of the Water Resources Panel relating to significant wetlands.

SECTION 6086(a)(2 & 3) WATER AVAILABILITY AND IMPACT ON EXISTING WATER SUPPLY:

168. Subsequent phases of the Village Master Plan will have an average daily demand of 357,120 GPD in accordance with the demands required by the Water Supply Rule. Exhibit VMP 7.
169. Water for the Village Master Plan beyond Phase I will be supplied by the Valley Well Field (“VW”) Project. Exhibit VMP 7.
170. The ANR Water Supply Division issued Source Permit #S-2389-09.1 on November 16, 2011 for the Valley Well Field for well capacity of 496 gpm, not to exceed 714,240 GPD. This approved yield corresponds to an Average Day Demand of 357,120 GPD. The permit states that this source will not adversely impact existing water sources or users. Exhibit VMP 7 and VMP 28.
171. The VW Project is owned by Applicant. Exhibit VMP 7.
172. Charles Demarest asserted that the two wells in the VW Project that the Applicant states can conceptually supply 1000 gpm for future phases of development have not been proven to flow anything more than 496 gpm, could draw river water into the test wells, and could impact the wells on his property. Testimony, Exhibit VMP 133.
173. Applicants’ witness Meddie Perry testified that the Demarest well was monitored during the VW Project well pump test and no impact on his well was observed, and that at this time Applicant is only seeking approval for the VW Project for the existing tested well capacity of 496 gpm. Testimony.

Conclusions of Law:

The Commission is unable to find full conformance with this Criterion for subsequent phases without additional evidence. Although there was evidence proffered that sufficient water will be available to meet the needs of the Village Master Plan up to 357,120 GPD and that the Village Master Plan water sources will not place an unreasonable burden on an existing supply, final review of conformance with Criteria 2 and 3 will require the review of any Water Supply and Wastewater Disposal Permits required by the Agency of Natural Resources for subsequent phases.

SECTION 6086(a)(4) SOIL EROSION AND THE CAPACITY OF THE LAND TO HOLD WATER:

174. Slopes within the Village Master Plan area are highly variable and potential impacts will be dependent on the specific design of the project. Topographic mapping for the full Village Master Plan build-out will be addressed for each phase. Exhibit VMP 7.

175. A site-specific Erosion Prevention and Sediment Control plan (“EPSC”) for each phase will be submitted for approval through the Stormwater Permit process. Exhibit VMP 7.

Conclusions of Law:

The Commission is unable to find full conformance with this Criterion for subsequent phases without additional evidence. The Applicant must demonstrate at the time of application for each future phase of the Village Master Plan that such phase 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.

SECTION 6086(a)(5) TRANSPORTATION and SECTION 6086(a)(9)(K) PUBLIC INVESTMENTS:

176. Applicant did not seek final affirmative findings under Criterion 5 for the Village Master Plan. Exhibit VMP 7.
177. Road configurations, access, parking, and transit access for the full Village Master Plan will be designed and addressed for each phase. General concepts for these access points have been identified and each phase will incorporate connectivity with internal and surrounding uses. Exhibit VMP 7.
178. Traffic impacts within the Village Master Plan will be evaluated for each phase of development, in cooperation with the Vermont Agency of Transportation (“VTrans”). Exhibit VMP 7.
179. The Village Master Plan will not affect railroads or airports. Exhibit VMP 7.
180. Steven Durkee, through his witness Ms. Conley, argued that the Traffic Impact Study (“TIS”) only analyzed a small portion of the Village Master Plan and that a TIS that reviews the entire Village Master Plan project must be completed. Exhibit VMP 133.
181. The applicant testified that the scope of the TIS was determined in consultation with VTrans officials and with an understanding that if and when future phases of development that may have material traffic impacts move forward, the Applicant will prepare updated studies. Exhibit VMP 228.
182. As noted under the Phase I findings for Criteria 5 and 9K, the Commission finds that a requirement to conduct a detailed corridor traffic study at the present time (or near future) would be an unreasonable exercise in speculation. As noted in those findings above, more detailed (and current) traffic analyses will be performed at such times as the Phase I project is completed and prior to submittal of applications for subsequent phases.

183. VTrans submitted that for Phase I and subsequent phases, the Applicant should be held responsible for their proportional share of costs to mitigate existing adverse traffic and safety conditions along the US Route 4 corridor in the Town of Killington and that the Town of Killington in partnership with VTrans will develop a methodology to determine Applicants' proportional share. VTrans further submits that for subsequent phases, the Applicant should conduct TIS updates including the background traffic generated by previous phase(s) for each new phase of its development and, subject to approval by VTrans (for state highways) and the Town (for town highways). The Applicant should at its own expense construct necessary mitigation to alleviate unreasonable congestion or unsafe highway conditions. Exhibit VMP 142.
184. Applicant submitted that as there are no data and findings relative to the Village Master Plan to justify the conditions proposed by VTrans, these would be more appropriate as guidance. Accordingly, Applicant proposed that the Commission provide the following guidance under Criterion 5 - Exhibits VMP 181, VMP 182, VMP 183:
- The District Commission provides notice that as part of any application(s) for future phases it will expect Applicant to prepare and submit Traffic Impact Studies (TISs) that include background traffic generated by previous phase(s) for each new phase of its development. The District Commission advises Applicant to submit such TISs to VTrans for its review and comment. The District Commission further advises Applicant to attempt to reach agreement with VTrans on traffic mitigation indicated in the TISs as necessary, if any, and Applicants' proportionate share of the cost of such traffic mitigation. If Applicant and VTrans are unable to reach agreement on appropriate mitigation and/or on Applicants' proportionate share of the cost thereof, if any, the District Commission shall decide.
185. Several parties – Rutland Regional Planning Commission ("RRPC"), TRORPC, SWCRPC and VTrans urged the Commission to require additional traffic impact evaluation following construction and prior to approval of subsequent phases. See Exhibits VMP 266, VMP 268, VMP 270, VMP 271, VMP 272, VMP 276, VMP 280, VMP 287, VMP 288.
186. The Applicant, pursuant to the Master Permit Policy, did not seek final affirmative findings under Criterion 5 for subsequent phases (after Phase I) of the Village Master Plan. The Act 250 Master Permit Policy states "...it is generally not possible for a district commission to make final findings of fact and conclusions of law for a phased project under certain Criteria, including Criteria 5, 6, 7, 8, 9(A), 9(K), and 10, until a final decision is issued for a particular phase or for the entire project based upon the review of a complete application." Exhibit VMP 287. The Commission has, for the sake of clarity, issued certain partial findings as noted above.

Conclusions of Law - Village Master Plan:

As noted above, the Applicant did not seek final affirmative findings under Criterion 5 for the Village Master Plan. The Commission herein provides the following guidance for future phase applications that may have significant traffic impacts:

In its subsequent applications for additional phases of the Village Master Plan, the Applicant should consider the cumulative trips generated by previous phases constructed within the previous 10 years to determine the scope of the traffic impact studies (this could include the Killington Road, US4, VT 100 and VT103 corridors from Killington to I-91 and I-89). Studies should count existing trips (as per VTrans standards) and should address impacts of the proposed phase on the identified areas of the corridor.

Criterion 9K (Impact upon Public Investments other than roads)

187. The Snowdon Glades and Yodeler's Run Development Zones abut the Calvin Coolidge State Forest lands currently under a long-term lease to the Resort. The leased land is subject to conditions outlined within the Ski Area Lease between the State and the Resort as well as other state and local regulations. Exhibit VMP 7.
188. Development within the Village Master Plan will not interfere with the public's use of the Calvin Coolidge State Forest lands.
189. David Raphael, on behalf of Steven Durkee, submitted that the Village Master Plan would be so out of character with its surroundings, and so dramatically detract from the day skier's experience of the recreational area, that the project would unreasonably endanger the public investment in Killington as a ski resort. Exhibit VMP 213.
190. Applicant submits that the Village Master Plan will "fit" and therefore not be out of context with its surroundings so as to unreasonably endanger the public investment in Killington as a ski resort. Exhibits VMP 226.

Conclusions of Law - 9K Impacts Other Than Traffic-Related:

The Commission is unable to find full conformance with this Criterion for subsequent phases without additional evidence. Whether the final designs for Phases II and III will 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 will have to be answered when the final designs for those phase are submitted for review.

SECTION 6086(a)(7) MUNICIPAL SERVICES:

191. Municipal services capacity will need to be assessed for each phase of development. Exhibit VMP 7.

Conclusions of Law - Village Master Plan:

The Commission is unable to find full conformance with this Criterion for subsequent phases without additional evidence. The Applicant must demonstrate at the time of application for each future phase of the Village Master Plan that such phase will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services.

SECTION 6086(a)(8) AESTHETICS, SCENIC BEAUTY, HISTORIC SITES, NATURAL AREAS, AND NECESSARY WILDLIFE HABITAT AND ENDANGERED SPECIES:

192. Many of the Commission's findings under this Criterion which the Commission made above for Phase I remain relevant and those findings are incorporated by reference herein.
193. The applicant proffered that the Village Master Plan is intended to create a compact and walkable Vermont mountain village near the existing base lodge areas, surrounded mostly by open space and residential neighborhoods. Exhibit VMP 7.
194. In the full build-out of the Village Master Plan, noise is expected to be consistent with existing skier- and visitor-related activities. Exhibit VMP 7.
195. David Raphael, on behalf of Steven Durkee, submitted that the Village Master Plan would "...result in an adverse impact on the aesthetics and scenic beauty of the area under the Quechee Analysis, due to the extensive loss of open space, a scale of development that is incompatible with its surroundings, and the high visibility of the village core, housing subdivisions, and new parking lot". Mr. Raphael also stated that an aesthetic assessment was difficult without winter photographs and simulations of what the build-out would look like. If the applicant seeks to build subsequent phases, the Commission will require winter visual impact evidence, such as winter photos and simulated views, in order to evaluate significant new potential visual impact during winter months. He further asserted that the Village Master Plan would be unduly adverse because the developments would be shocking or offensive to the average person and the Applicant has not taken reasonably available mitigation steps to reduce the visual and aesthetic impacts. Mr. Raphael submitted that the Village Master Plan and associated developments are inappropriately sited, scaled and designed, insufficiently protect or preserve the natural landscape, and thus

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- would have irreversible detrimental impacts on the aesthetics of the area. Exhibit VMP 213.
196. Raphael's analysis and conclusions relied heavily on his assertions that the Village Master Plan will be 1) highly visible, 2) sprawling and 3) too large scale. Exhibit VMP 226.
 197. Applicant submitted that the Village Master Plan, even upon full buildout, will not be highly visible until one arrives on either Resort land or the Applicants' land and quotes Raphael's own statement that "off-site visibility of the project would be limited". Exhibit VMP 226.
 198. Applicant further provided evidence that the entire land controlled by the Resort and the Applicant totals 6,400 acres, while the Village Master Plan proposes to develop 303 acres adjacent to the existing bases areas of K-1, Ramshead and Snowshed. Exhibit VMP 226.
 199. Regarding scale, Applicant submitted information indicating that the Resort has more skier visits than Okemo, Sugarbush or Stowe which were used by Raphael in his analysis for comparison to suggest the Village Master Plan is too large. Applicant submitted that the Resort's skier visits are more than three times that of Stowe. Exhibit VMP 226.
 200. Parking, buildings, signage, lighting, utilities, and landscaping will be designed and addressed for each phase of development. Exhibit VMP 7.
 201. A maintenance building within the Snowdon Glades Development Zone is more than 50 years old. This building and potential impacts will be addressed in future phases. Exhibit VMP 7.
 202. Impacts to any buildings, structures, or historic features over 50 years old will be addressed with each phase of development. Exhibit VMP 7.
 203. No known pre-contact Native American sites or evidence of historic settlement exist within the limits of the Village Master Plan. Exhibit VMP 37.
 204. The Division for Historic Preservation ("DHP") concurs with determination of the UVM CAP Archeological Resource Assessment dated December 8, 2011 and concludes that all components in the current design for the Village Master Plan, Land Use Permit Application #1R0980, will have no effect on any historic sites that are listed on or eligible for the State or National Registers of Historic Places. Exhibit VMP 146.
 205. Wetland impacts (if necessary) will need to be assessed with each phase. Exhibit VMP 7.

206. No significant rare or irreplaceable natural communities occur within the Village Master Plan. Exhibit NR 1.
207. Having reviewed the evidence to date, the Commission finds that the development of Phases II and III will have certain adverse aesthetic impacts for the same reasons that the Commission articulated under Criterion 8 for Phase I. Namely, the loss of open spaces cited by Mr. Raphael and some of the noise and other adverse impacts commonly associated by converting open space to relatively dense development.

Conclusions of Law - Village Master Plan:

The Commission is unable to find full conformance with this Criterion for subsequent phases without additional evidence. The applicant has presented a case that the Village Master Planned locations, densities and scale are appropriate. Given that the details of Phases I and II remain unknown, however, the Applicant must provide detailed plans and exhibits at the time of application for each future phase of the Village Master Plan to demonstrate that each such phase will not have an undue adverse effect on the scenic or natural beauty of the area or aesthetics. The Commission further concludes that the Village Master Plan will have no adverse impact on historic sites that are listed or eligible for the State or National Registers of Historic Places or on any significant rare or irreplaceable natural communities.

SECTION 6086(a)(9)(A) - IMPACT OF GROWTH:

208. The applicants' economic analysis for Phase I was unchallenged. See Exhibit VMP 31.
209. The Rutland Regional Planning Commission's reference to the need for affordable housing was well-intentioned but untimely. Exhibit VMP 276. As noted in our conclusions, the applicant will be obligated to provide an updated economic analysis which will address the issue in the review of subsequent phases. The Regional Commission may participate on that issue at that time.

Conclusions of Law:

The Commission is unable to find full conformance with this Criterion for subsequent phases without additional evidence. The Applicant must provide an updated economic analysis in any application for approval of Phases II and III.

SECTION 6086(a)(9)(B) PRIMARY AGRICULTURAL SOILS:

210. The Applicant, through submission of the application material and supplemental filings, has met the burden of production and proof under Criterion 9(B) and thus, the application and supplemental filings shall serve as the Findings of Fact on this Criterion.

Conclusions of Law - Village Master Plan:

The Commission concludes that the Village Master Plan will not result in any reduction in the agricultural potential of primary agricultural soils.

SECTION 6086(a)(9)(G) PRIVATE UTILITY SERVICES:

211. The legal, financial, and maintenance responsibility for private utilities within the Village Master Plan will be addressed with each phase. Exhibit VMP 7.

Conclusions of Law:

The Commission is unable to find full conformance with this Criterion for subsequent phases without additional evidence. The Applicant must address in each application for subsequent phases that utilize private utilities how the municipality will be protected in the event it is obligated to assume responsibility for the services or facilities provided by the private utility.

SECTION 6086(a)(10) CONFORMANCE WITH THE LOCAL AND REGIONAL PLANS:

212. The traffic related concerns of the Regional Planning Commissions with respect to longer range traffic impacts were addressed under Criteria 5 and 9K above , and those findings are incorporated herein by reference.
213. The build-out of this project is consistent with the Town Plan's objectives for economic development and land use as well as transportation and energy objectives. Exhibit VMP 7, VMP 49.
214. The Village Master Plan is intended to keep the Town of Killington viable as a recreational and livable community by providing more commercial and residential options for Resort visitors and year-round residents. Keeping the Resort competitive with other ski communities is vital to maintaining economic stability within the Town and region. Exhibit VMP 7 and VMP 49.
215. The Village Master Plan concentrates the commercial and retail uses and integrates community spaces with the safe and efficient flow of vehicles and pedestrians throughout the site. The neighborhoods planned for future phases (beyond Ramshead Brook Subdivision) will be appropriately clustered and developed in a manner that promotes connectivity to existing ski operations and the Village Core. Exhibit VMP 7 and VMP 49.

216. The Village Master Plan is consistent with the original vision for Killington Village – a densely-developed, central village in the areas of the existing base lodges (Village Core & Snowdon Glades) in accessible and visible areas to provide a sense of arrival for visitors to the Resort and a greeting to the region's recreational hub. A few dense, mixed-use buildings at the Snowdon Quad Lift and the low-density residential developments surrounding the Village Core are intended to integrate with the landscape. Visibility has been minimized through strategic use of the topography and orientation of building envelopes. Future phases of the development will have similar considerations. Exhibit VMP 7 and VMP 49.
217. Planning for the Village Master Plan development emphasizes ease and safety of transportation for vehicles, pedestrians, and multi-modal users of the Resort. Exhibit VMP 7, VMP 49.
218. The Village Master Plan will enhance the existing conditions at the project site, provide for more public facilities, improve circulation, maintain open spaces, and protect the natural resources. Exhibit VMP 7, VMP 49.
219. By providing more varied residential options and expanding the range of commercial and recreational uses at the Resort, year-round residency will likely increase. Exhibit VMP 7 and VMP 49.
220. Highly efficient building materials and heating systems will be used throughout construction to be consistent with the Town's energy objectives. Exhibit VMP 7 and VMP 49.
221. Located in the Ski Village and Ski Village II zoning districts, the Village Master Plan will be an "innovative development of a new pedestrian orientated village area containing a variety of mixed residential, commercial, retail, and recreational uses." The clustered nature of the Village Core and the less intense development of future residential areas away from the Village Core directly reflect the recommendations of land use intensity. Exhibit VMP 7 and VMP 49.
222. The Village Master Plan is located in a "High Density Development Area," according to the Rutland Regional Plan. This area is designated on the map as one of only five "Sub-Regional Centers" in the region. The Village Master Plan is designed as a compact development supporting the existing mix of uses at the Resort and in the immediate area. Exhibit VMP 7 and VMP 50.

Conclusions of Law - Village Master Plan:

The Commission is unable to find full conformance with this Criterion for subsequent phases without additional evidence. The Applicant must demonstrate that each phase

of the Village Master Plan is in conformance with any duly adopted local or regional plan or capital program in effect at the time a complete application is filed.

IX. FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR THE SUBDIVIDED LOTS

Introduction: In addition to the full construction approval review of Phase I of the master plan, and review for partial findings of Phases II and III of the master plan, the applicant sought approval of the subdivision of lots on the project tracts. Party Durkee challenged the sufficiency of the evidence provided by the applicant. VMP 293a. For reasons outlined below, the Commission finds the evidence sufficient to approve the lots described herein.

223. The Applicant acquired twenty-nine (29) parcels of land between 2004 and 2008. Exhibit VMP 185. Of the twenty-nine (29) lots, ten (10) lots were approved in 2004 as Act 250-subdivided Lots by Administrative Amendment #1R0835-1. Administrative Amendment #1R0835-1 was not appealed and is therefore final. Exhibit VMP 185.
224. Two (2) land lots (Sport Hill and Valley Well Field) were acquired as previously subdivided Lots, and do not require further approval under Act 250. Two (2) other land lots (Pico East and Pico West) were approved as Act 250 subdivided Lots by Administrative Amendment #1R0265-20, dated May 9, 2008. Administrative Amendment #1R0265-20 was not appealed and is therefore final. Exhibit VMP 185.
225. Of the remaining parcels, fifteen (15) in total were created by Deed in 2008 and approved as Act 250 subdivided Lots by Administrative Amendment #1R0835-3, dated May 9, 2008. This decision was appealed to the Vermont Supreme Court, which reversed and remanded the matter to the Environmental Court. The Supreme Court found that Act 250 Rule 34(D) can only apply to an Act 250 permit issued under 10 V.S.A. § 6086(a) and cannot apply to a master plan with partial findings of fact and conclusions. Therefore, the amendment was ruled null and void and these fifteen (15) Lots required re-approval as subdivided Lots. Exhibit VMP 185.
226. In this application the Applicant seeks re-approval of the fifteen (15) Lots that were approved in Administrative Amendment #1R0835-3. These fifteen (15) Lots are characterized by the applicant as eleven (11) Boundary Adjustments and four (4) Stand-Alone Lots. The eleven (11) Boundary Adjustments are contiguous with Applicants' original ten (10) Lots from 2004. These Boundary Adjustments are required to fulfill the Village Master Plan outlined in Applicants' application. The remaining four (4) Lots are Stand-Alone Lots that will be held for future development or sale. Exhibit VMP 185.

227. For administrative clarity, the Applicant also seeks to reaffirm the subdivision of the ten (10) Lots approved in Administrative Amendment in #1R0835-1 in combination with the above-referenced eleven (11) Boundary Adjustments and four (4) Stand-Alone Lots. The requested Lots subject to this subdivision approval are identical to what was approved in Administrative Amendments #1R0835-1 and #1R0835-3 in 2004 and 2008, respectively. Exhibit VMP 185.
228. The tables below summarize the twenty-five (25) Lots and approvals sought by the Applicant for the “subdivision” component of the application:

Table 1: Summary of Proposed Lots for Subdivision				
Parcel Name	Parcel Number	Project Component	Area (acres)	Subdivision Approval Sought
Killington Village	V1	Phase I	23.87	Boundary Adjustment
Killington Village	V2	Phase I	1.50	Boundary Adjustment
Ramshead Brook	BA1	Phase I	2.71	Boundary Adjustment
Ramshead Brook	BA2	Phase I	1.41	Boundary Adjustment
Snowdon Glades	SG2	Village Master Plan	2.45	Boundary Adjustment
Snowdon Glades	SG3	Village Master Plan	6.97	Boundary Adjustment
Yodeler’s Run	Y2	Village Master Plan	5.18	Boundary Adjustment
Vale	--	Village Master Plan	13.24	Boundary Adjustment
Killington Club	C2	Village Master Plan	5.34	Boundary Adjustment
Killington Club	C3	Village Master Plan	1.24	Boundary Adjustment
The Links	16	Village Master Plan	25.76	Boundary Adjustment
Foster’s Notch	--	Stand Alone Lot	37.17	Stand-Alone Lot
Bear Peak North	--	Stand Alone Lot	63.32	Stand-Alone Lot
Bear Peak South	--	Stand Alone Lot	113.45	Stand-Alone Lot
East Mountain Parcel	--	Stand Alone Lot	64.42	Stand-Alone Lot

For administrative clarity, the Application also seeks reaffirmation of the following 10 lots owned by the Applicant shown in Table 2:

Table 2: Summary of Reaffirmation of Prior Subdivision				
Parcel Name	Parcel Number	Project Component	Area (acres)	Subdivision Approval Sought
Village Core	8A/8B	Phase I	16.16	Approval Reaffirmation
Ramshead Brook	5B4	Phase I	30.11	Approval Reaffirmation
Ramshead Brook	5BN	Phase I	10.46	Approval Reaffirmation
Snowdon Glades	1B	Village Master Plan	50.96	Approval Reaffirmation
Yodeler's Run	3	Village Master Plan	21.87	Approval Reaffirmation
Snowshed Woods	17-20	Village Master Plan	66.10	Approval Reaffirmation
Killington Club	8D	Village Master Plan	2.94	Approval Reaffirmation
Killington Club	29	Village Master Plan	4.40	Approval Reaffirmation
The Links	14	Village Master Plan	10.40	Approval Reaffirmation
Cherry Knoll	--	Stand Alone Lot	256.29	Approval Reaffirmation

The locations of the lots are shown on Exhibits VMP 11 and VMP 12.

229. In summary, the Applicant seeks new approval of the subdivision of 15 Lots created by Deed in 2008 and the reaffirmation of the 10 subdivided Lots approved in 2004. Exhibit VMP 7.
230. For the purpose of this application, the Applicant has further categorized the 25 lots for which it seeks subdivision approval as follows:
- Phase I Lots (7 Lots)
 Village Master Plan Lots (13 Lots)
 Stand Alone Lots (5 Lots)
231. The compliance of the Phase I Lots with the relevant Act 250 Criteria is addressed below.

232. Compliance of the remaining Village Master Plan Lots and the Stand Alone Lots with the subdivision-only Criteria set forth *In re Jurisdictional Opinion #6-007: Wright Parcel Act 250 Subdivision McBride Parcel Act 250 Subdivision (Appeals of Willey)* and consistent with the former Environmental Board's holding in *Re: New England Land Associates (New England Land Associates)* is set forth in the Findings of Fact below and in the memorandum of Vanasse Hangen Brustlin, Inc. ("VHB") re Analysis of Subdivision Impact on Certain Act 250 Criteria ("VHB Natural Resources Assessment") filed as Exhibits VMP 185 and VMP 244.
233. The Commission required that for each of the 15 lots allowed by the Land Use Permit amendment voided by the Supreme Court's decision in *In re SP Land Co., LLC, Act 250 Land Use Permit Amendment, 2011 VT 104*, state whether the actual or proposed conveyance of each lot either (1) was intended to facilitate the development proposed in the present Village Master Plan beyond what is addressed in Phase I or (2) has substantially facilitated the development proposed in the present Village Master Plan beyond what is addressed in Phase I - and if the answer was no, to explain why the 2007 conveyance from Killington Ltd. to the TICs was conditioned on the TICs applying for permission to create the 15 lots. VMP 294 dated October 2, 2012. Applicant provided a letter from Peter Van Oot, Esq., dated December 18, 2012, re: Killington Village Master Plan, Act 250 #1R0980 describing the subdivision purposes. Exhibit VMP 260(I).

Findings And Conclusions of Law Under the Relevant Criteria:

SECTION 6086(a)(1)(B) WASTE DISPOSAL

234. Sewage from the twenty Lots that are within the Village Master Plan will be treated by the existing Killington Resort Wastewater Treatment System ("Resort WW System"). A Water Supply/Wastewater Disposal Permit or deferral has been provided for each Lot. Exhibits VMP 7and VMP 19.
235. No development is proposed on the five Stand Alone Lots. A Water Supply/Wastewater Disposal deferral has been provided for each Lot. Exhibits VMP 7and, VMP 19.
236. The subdivision of Lots will not involve the creation of new impervious surface and will not alter the flow of stormwater runoff. Exhibit VMP 7.
237. The Water Quality Remediation Plan ("WQRP") developed to address stormwater impairment of Roaring Brook and the East Branch of Roaring Brook establishes conceptual stormwater basins to manage existing and additional stormwater runoff from the Applicants' proposed subdivided Lots within the impaired watershed. The establishment of subdivision lines will not impact the flow of stormwater runoff from these lots, or interfere with the planning and

design of necessary stormwater management infrastructure, or completion of DEC stormwater permitting for future development on these lots. Exhibit VMP 244.

Conclusions of Law:

The Commission concludes that the Subdivision meets applicable environmental conservation department regulations and will not result in the injection of waste materials or harmful or toxic substances into groundwater or wells.

SECTION 6086(a)(1)(D) FLOODWAYS:

238. There are no mapped FEMA floodways or floodway fringes in the Town of Killington which involve these lots. However, ANR has established a fluvial erosion hazard (“FEH”) zone along Roaring Brook in the vicinity of the following subdivision lots: Vale and V1, and in the vicinity of the following reaffirmation lots: 5B4 and 5BN. Exhibit VMP 244.
239. Map 1 of the VHB Natural Resources Assessment shows the location of this FEH zone in the context of the adjacent lots. Since all of these lots with the exception of Vale are part of Phase I, the Findings above for Phase I under Criterion 1D are incorporated herein by reference. Exhibits VMP 244 and NR 1.
240. With respect to the Vale Lot, the proposed creation of the lot will not result in any condition that would affect the health, safety and welfare of the public or of riparian owners during flooding. Exhibit VMP 244.

Conclusions of Law:

The Commission concludes that the Subdivision will not restrict or divert the flow of floodwaters, and endanger the health, safety, and welfare of the public or of riparian owners during flooding and will not significantly increase the peak discharge of the river or stream within or downstream from the area of development and endanger the health, safety, or welfare of the public or riparian owners during flooding.

SECTION 6086(a)(1)(E) STREAMS:

241. Streams located within and in close proximity to the Village Master Plan Lots are mapped and described in detail in the Natural Resources Assessment, prepared by VHB, Inc. Exhibit NR 1.
242. The subdivision of Lots will not require a Stream Alteration Permit. Exhibit VMP 7.
243. The subdivision of Lots will not involve the construction of a permanent dam or withdrawal of water. Exhibit VMP 7.

244. The streams potentially impacted by the Lots included in the Subdivision application have been field-mapped and characterized by VHB. The results of these investigations are presented on VHB Natural Resources Assessment Map 1. Exhibit VMP 244. For parcels where field mapping of streams has not previously been performed by VHB, available GIS-based stream data from the Vermont Center for Geographic Information (“VCGI”) has been included on the mapping presented on VHB Natural Resources Assessment Map 1. Exhibit VMP 244.
245. The proposed establishment of subdivision lines or reaffirmation of prior lines will not result in any impact to streams or stream banks. Exhibit VMP 244.

Conclusions of Law - Subdivision:

The Commission concludes that the subdivision of Lots will not interfere with the natural condition of the stream and will not endanger the health, safety, or welfare of the public or of adjoining landowners.

SECTION 6086(a)(1)(G) WETLANDS:

246. The wetlands potentially impacted by the Lots included in the Subdivision application have been field-mapped and characterized by VHB. The results of these investigations are presented on VHB Natural Resources Assessment Map 1. Exhibits VMP 244, NR 1. For parcels where field mapping of wetlands has not previously been performed by VHB, available GIS-based wetlands data from the VCGI has been included on the mapping presented on VHB Natural Resources Assessment Map 1. Exhibit VMP 244.
247. The proposed establishment of subdivision lines or reaffirmation of prior lines will not result in any impact to jurisdictional wetlands. Exhibit VMP 244.

Conclusions of Law:

The Commission concludes that the subdivision of Lots will not violate the rules of the Water Resources Panel relating to significant wetlands.

SECTION 6086(a)(2) and (3) WATER SUPPLIES AND EFFECTS ON EXISTING WATER SUPPLIES

248. As described above, some lots are proposed for development and the majority of lots are not proposed to be developed at this time. A Water Supply/Wastewater Disposal Permit or deferral has been provided for each Lot as required. Exhibit VMP 7, VMP 19.

249. No development is proposed on the five Stand Alone Lots. A Water Supply/Wastewater Disposal deferral has been provided for each Lot. Exhibit VMP 7, VMP 19.
250. Water for Phase I will be supplied by the Snowdon Well Project. Exhibit VMP 7.
251. The Valley Well Project will be constructed during Phase I and is currently owned by Applicant. Exhibit VMP 7. Water for the Village Master Plan beyond Phase I will be supplied by the VW Project. Exhibit VMP 7.

Conclusions of Law:

Sufficient water will be available for the reasonably foreseeable needs of the subdivided Lots and the Subdivision itself will not cause an unreasonable burden on existing water supplies.

SECTION 6086(a)(8)(A) CRITICAL WILDLIFE HABITAT

252. The Applicant has provided wildlife habitat mapping prepared by Pioneer Environmental Services, Inc. ("Pioneer") as well as publically available VCGI information on wildlife habitat and threatened/endangered species. The most recent and comprehensive documentation is provided through the 2006 Revised Wildlife Management Plan prepared by Pioneer. The relevant features from this report are depicted on VHB Natural Resources Assessment Map 1. Exhibit NR 1.
253. All of the Subdivision Lots are mapped as black bear seasonal habitat. However, within the Village Master Plan parcels, a 1996 MOU between the Resort and ANR establishes that none of the designated development areas within the Village Master Plan areas are considered necessary wildlife habitat. No other mapping of wildlife habitat is present within the remaining subject parcels.
254. With respect to rare or endangered species, VHB conducted a detailed assessment including field investigation within the Phase I parcels. The results of this investigation are presented in the Natural Resources Assessment and document that no rare, threatened or endangered species, significant natural communities, or potential rare or irreplaceable natural areas. Exhibit NR 1.

Conclusions of Law:

Therefore, the Commission concludes that the Subdivision will not destroy or significantly imperil necessary wildlife habitat or any endangered species.

SECTION 6086(a)(9)(B) PRIMARY AGRICULTURAL SOILS

255. Within the Lots to be subdivided, there are no soils mapped as primary agricultural soils. Exhibit VMP 7.

Conclusions of Law:

Therefore, the Commission concludes that the Subdivision will not result in any reduction in the agricultural potential of primary agricultural soils.

SECTION 6086(a)(9)(D) AND (E) – EARTH EXTRACTION

256. The Lots to be subdivided are not located in or near an area with known mineral or earth resources, or with high potential for mineral extraction. Exhibit VMP 243.

Conclusions of Law:

Therefore, the Commission concludes that the Subdivision will not involve the extraction or processing of mineral and earth resources, or prevent or significantly interfere with the subsequent extraction or processing of mineral or earth resources.

SECTION 6086(a)(10) – CONFORMANCE WITH THE TOWN AND REGIONAL PLANS

257. The subdivision of the Lots is necessary for the development of the Village Master Plan, which meets the economic development, land use, transportation, and energy objectives of the Killington Town Plan. Exhibits VMP 7 and VMP 49.

258. The subdivision of Lots for the Village Master Plan is located in a "High Density Development Area" of the Rutland Regional Plan. This area is designated one of only five "Sub-Regional Centers" in the region. Exhibits VMP 7 and VMP 50.

259. The Applicant has received Subdivision approval of the Lots from the Town of Killington under Zoning Permits Nos. 08-030, 08-031 and 08-035. Exhibit VMP 260(l).

Conclusions of Law:

The Commission concludes that the Subdivision of Lots is in conformance with any duly adopted local or regional plan or capital program under chapter 117 of Title 24. As noted above, Mr. Durkee argued that the application failed to meet the legal requirements for approval of the subdivided lots (or those proposed for subdivision). Our conclusions of law on this subject follow.

X. CONCLUSIONS OF LAW WITH RESPECT TO PARTY DURKEE'S OPPOSITION TO THE SUBDIVISION OF LOTS

Act 250 review of subdivision activity implicates different Act 250 environmental Criteria depending upon location and upon the details of the construction plan (if any) proposed on subdivided lots. When no specific construction is proposed on the lots, the review is reasonably and necessarily circumscribed and a subsequent review is made of specific construction plans in a permit amendment. Such is the case here. The applicant is seeking approval of 25 subdivided lots only 7 of which are involved in full Phase I approval. This circumstance raises the question of what level of evidence is required to meet the applicants' burden of production and proof under the statute. The Vermont Environmental Division (referred to by many as the "Environmental Court") specifically addressed the issue of what level of evidence can be deemed sufficient for a subdivision involving lots upon which nothing is proposed (at the present time) for construction. *In re Jurisdictional Opinion #6-007: Wright Parcel Act 250 Subdivision McBride Parcel Act 250 Subdivision (Appeals of Willey)* Docket Nos. 55-4-10 Vtec and 56-4-10 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment (Vt. Env'tl Div. Feb. 23, 2011) (Wright, J.).⁹

In reviewing the completeness of the application before the Court in the *de novo* appeal in *Appeals of Wiley*, the Court held that:

An Act 250 permit application for a subdivision of land, as contrasted with one for the construction of a project on the land, must nevertheless provide enough information for the District Commission to determine whether resources on the land must be assessed or analyzed under the Act 250 Criteria for the project property as a whole, before the boundary lines are approved for the subdivision. That is, the Applicant must provide enough information about the property and its resources and characteristics to allow the District Commission to determine, for that particular subdivision, which resources or characteristics could be affected by the division or fragmentation of the land itself. *See Re: New England Land Associates*, No. 5W1046-EB-R, Revised Findings of Fact, Conclusions of Law, and Order, at 19–20 (Vt. Env'tl. Bd. Jan. 7, 1992). Such information is necessary for the District Commission to decide under the Act 250 Criteria whether to approve the lot lines proposed for the subdivision. Such information is necessary for the present proposal regardless of which Act 250 Criteria might require

⁹ The Supreme Court's decision in the appeal of the earlier subdivision permit, *In re SP Land*, does not provide any guidance as to what is required with respect to an Act 250 application seeking approval for the mere subdivision of land. Thus, the Court's decision does not address the substance of *New England Land Associates*, or the Environmental Division's recent decision in *Appeals of Willey*. As a consequence, the *Appeals of Willey* decision, which specifically references and incorporates the *New England Land Associates* decision, remains the most authoritative statement as to what information must be submitted – and what Criteria must be addressed – when seeking Act 250 approval of a subdivision alone.

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review for any specific proposals made in the future by purchasers of the proposed lots.

Appeals of Willey at 5-6.

The Court concluded that it is necessary for the Commission to determine which Act 250 Criteria could potentially be affected by the proposed drawing of lot lines and sale of the lots separate from one another, without regard to what those lots might be used for by their purchasers. See *id.* at 6. The Court further held that is not sufficient to state that certain of the Act 250 Criteria are not implicated by proposed lot lines simply because no construction or earth disturbance is proposed by the subdivision application. *Id.* Rather the application must simply provide the information to allow the lot lines to be evaluated for their effect or absence of effect on the applicable resources. *Id.* The Court then proceeded to identify those sections of an Act 250 subdivision application in that case that implicated specific Criteria for potential impacts under those Criteria; i.e., those Act 250 Criteria which the subdivision application should address to be complete and allow the Commission to issue an Act 250 subdivision permit where no construction is contemplated by the application. The identified Act 250 Criteria and information required by the Court in that case is summarized below. See *id.* at 7-9. The Criteria not summarized below required no supplemental information. See *id.* at 7.

Criterion 1(B) Waste Disposal, subsection (a) as to sewage disposal; and
Criteria 2 and 3 as to Water Supply:

Where no sewage disposal or new water supply is proposed by the subdivision, the application should clarify whether that applicant has obtained state potable water supply and wastewater disposal system permits and whether the number of lots will affect the process. Alternatively, an applicant may verify that they propose no sewage disposal or new water supply for the subdivision.

Criterion 1(B) Waste Disposal; subsection (e) as to stormwater:

Even though the drawing of lot lines does not change the disposal of stormwater runoff from the site, the application nevertheless must answer how stormwater flows on the site as a whole and how it will be disposed after the subdivision. That is, the application must show how the separate ownership of the lots and the placement of the lot lines will or will not affect the flow of stormwater runoff from the other lots.

Criterion 1(D) Floodways:

As with stormwater, although no construction is proposed, the application must demonstrate, how the separate ownership of the subject lots and the placement of the lot lines will – or will not – affect the health, safety, and welfare of the public or of riparian owners during flooding.

Criterion 1(E) Streams:

The application should address whether the proposed subdivision– that is, the location of the lot lines – would not disturb any stream or stream bank.

Criterion 1(G) Wetlands:

The application should address whether the proposed subdivision contains jurisdictional wetlands and, presumably, whether the location of any lot lines would impinge on jurisdictional wetlands.

Criterion 8(A) Wildlife and Endangered Species:

The application should address whether the project tract includes any necessary wildlife habitat or endangered species and whether the layout of the lot lines, in and of itself, could have an effect on those resources.

Criterion 9(B) Primary Agricultural Soils:

The application should address whether the subdivision contains primary agricultural soils, and whether primary agricultural soils will be affected by the proposed lot lines. See 10 V.S.A. § 6001(15) (defining primary agricultural soils), § 6086(a)(9)(B) (establishing standards for review of projects located on primary agricultural soils), § 6093 (describing appropriate mitigation for projects located on primary agricultural soils). See, e.g., *In re Village Assocs. Act 250 Land Use Permit*, 2010 VT 42A, ¶¶ 9-15, 23 (applying Act 250 Criterion 9(B)); *In re Brosseau/ Wedgewood Act 250 PRD Application*, Docket No. 260-11-08 Vtec, slip op.at 5–10 (Dec. 8, 2010) (Wright, J.).

Criteria 9(D) and (E) Earth Resources:

The application should address whether there are any mineral or earth resources on the site with a high potential for extraction, even if no such resources are present on site, or if they are present but the potential for their extraction is not high.

Criterion 10 Local and Regional Plans:

If local approvals or permits have been obtained, the status of such approvals should be addressed in the application.

In the instant case, the Commission concludes that under the *Wiley* precedent, the applicant was obligated to establish conformance with the following Criteria: Criterion 1(B) Waste Disposal, as to sewage disposal and stormwater; Criteria 2 and 3 Water Supply; Criterion 1(D) Floodways; Criterion 1(E) Streams; Criterion 1(G) Wetlands; Criterion 8(A) Wildlife and Endangered Species; Criterion 9(B) Primary Agricultural Soils; Criteria 9(D) and (E) Earth Resources; and Criterion 10 Local and Regional Plans, sufficient for the Commission to determine whether impacts may occur under those Criteria from the mere act of subdividing the property, even if no construction is contemplated or occurs in the future.

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The Commission further concludes that the Applicant has met its burden of production and proof under the In re Willey case protocol for a complete subdivision application as contrasted with one for the construction of a project on the land for the remaining Village Master Plan Lots (13 Lots) and Stand Alone Lots (5 Lots) for which it seeks Subdivision affirmation and re-approval as supported by the Subdivision Findings of Fact set forth above; and that the Applicant has met its burden of production and proof for subdivision approval of the Phase I Lots as supported by the Subdivision, Village Master Plan and Phase I Findings of Fact set forth above.

In summary, the Commission concludes that, as a matter of law, the applicant has propounded evidence sufficient to establish conformance with the applicable Act 250 environmental Criteria of the subdivision of lots described herein. Accordingly, Mr. Durkee's legal objections with respect to the subdivision contained in Exhibit VMP 293a are **overruled**.

XI. SUMMARY CONCLUSION OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes that the Phase I Project, if completed and maintained as represented in the application and other representations of the Applicant, and in accordance with in the findings and conclusions of this decision and the conditions of Land Use Permit #1R0980, will comply with the Act 250 Criteria. 10 V.S.A. § 6086(a).

XII. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, Land Use Permit #1R0980 is hereby issued.

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DATED at Rutland, Vermont, this seventh day of October, 2013.

By /s/ Herbert G. Ogden
Herbert G. Ogden – Acting Chair
District #1 Environmental Commission

Commissioners Participating in this Decision:
Amanda Beraldi
Edward Weissman¹⁰

wtb

Any party may file a motion to alter with the District Commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A).

Any appeal of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (VRECP). The appellant must file with the Notice of Appeal the entry fee required by 32 V.S.A. § 1431 and the 5% surcharge required by 32 V.S.A. § 1434a(a), which is \$262.50.

The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Center Building, Montpelier, VT 05620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

Decisions on minor applications may be appealed only if a hearing was held by the district commission. Please note that there are certain limitations on the right to appeal. See 10 V.S.A. § 8504(k).

For additional information on filing appeals, see the Court's website at: <http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 828-1660. The Court's mailing address is: Superior Court, Environmental Division, 2418 Airport Road, Suite 1, Barre, VT 05641-8701.

¹⁰ Mr. Weissman was assigned by Natural Resources Board Chair Ronald Shems to hear this case in the absence of regular Commissioner Michael J. Henry.