MEMORANDUM OF DECISION AND ORDER

on Motion to Alter

State of Vermont
Land Use Review Board
District 4 Environmental Commission
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https://act250.vermont.gov/

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SH-2 LLC
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Pam Schirner
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Essex, VT 05452

APPLICATION NUMBER:
4C0329-24,4C0347-6

LAW/REGULATIONS INVOLVED:
10 V.S.A. §§ 6000-6111 (Act 250)

I. Summary

The project is generally described as a 5-lot commercial subdivision on an existing 109.5-acre lot within the existing Saxon Hill Industrial Park. Lot 10 is 6.4 acres, Lot 11 is 6.4 acres, Lot 12 Is 2.3 acres, Lot 13 is 22.9 acres, and Lot 9 is 71.5 acres. The project will include the construction of approximately 4,100 linear feet (LF) of public roadway. The commercial lots will be served by municipal facilities including roads, recreation paths, water supply and wastewater collection. The project also includes the construction of a 33,600 square feet (SF) warehouse on Lot 11 (the Project). The Project is located at 132 Thompson Drive in Essex, Vermont, however the Project involves the construction of a new road off of VT Route 117, to be known as Kimo Drive, that will be used to access the commercial subdivision.

The tracts of land consist of a 16.89 acre parcel (owned by Pam Schirner, a parcel that will contain a stormwater easement and respective stormwater treatment practice), an 86.32 acre parcel (owned by SH-2 LLC, a parcel that is transected by an access easement that will contain Kimo Drive and connect to VT Route 117), and a 109.5 acre parcel (owned by Allen Brook Development, the parcel that will contain the commercial subdivision), collectively referred to as the "Project Tract". The Applicants' legal interest is ownership in fee simple described as follows: Book 925, Page 875 of the land records of the Town of Essex, Vermont and as the subject of a deed to Allen Brook Development; Book 1008, Page 665 of the land records of the Town of Essex, Vermont and as the subject of a deed to SH-2 LLC; and Book 779, Page 45 of the land records of the Town of Essex, Vermont and as the subject of a deed to Pam Schirner.

Pursuant to Act 250 Rule 16, a prehearing conference (PHC) was held on June 18, 2025 for the above-referenced application for the purpose of identifying contested facts and legal issues, discussing party status, and determining a hearing schedule. The Commissioners, the Applicants, and residents of the Project area conducted a site visit prior to the PHC, walking to the site from River Road (State Route 117) up the existing private road to the site, stopping along the way at places to observe conditions pointed out by those on the site visit, and then walking back to the starting place. The PHC was conducted pursuant to Act 250 Rule 16, with

Chair, Thomas A. Little presiding. Pursuant to Act 250 Rule 13(B), the Commission recessed the PHC pending submittal of additional information by the parties as determined in the PHC Recess Order, issued June 23, 2024.

Following the PHC, Commissioner Chris Callahan, who had been present for the PHC, stepped off the Commission for this Project due to future scheduling conflicts. Vice Chair of the Commission, Parker Riehle, replaced Chris Callahan, has reviewed the entire record, and will be participating as a member of the Commission for this Project moving forward.

The Commission reviewed and considered the information submitted in response to the PHC Recess Order and subsequently issued a PHC Report and Order (R&O) on July 11, 2025. The R&O made preliminary party status determinations, established the Criteria the Commission would hear testimony on during the merits hearing, and offered an opportunity for any party to object to these decisions. The Commission received no objections to the R&O.

On July 24, 2025, the Commission (including Commissioner Riehle) held a public hearing on the application at 111 West St. in Essex Junction, VT. At the end of the hearing, the Commission recessed the proceeding pending the submittal of additional information requested by the Commission in order to make the record complete. The Commission also gave the parties an opportunity to respond to information filed by other parties in a notice dated January 22, 2026. After receipt of the requested additional information and the various responses thereto, the Commission adjourned the hearing on Apri 6, 2026 after completing its deliberations.

The Commission found that the Project did not comply with 10 V.S.A § 6086(a)(10) (Act 250 criterion 10, conformance with the Town Plan, of the Town of Essex). Accordingly, on April 7, 2026, the Commission denied the application and issued Findings of Fact, Conclusions of Law, and Order 4C0329-24,4C0347-6.

The Commission received the following timely motions to alter (MTA) pursuant to Act 250 Rule 31(A) for the permit denial of application 4C0329-24,4C0347-6; Findings of Fact, and Conclusions of Law issued on April 7, 2026:

- Allen Brook Development, SH-2 LLC, and Pam Schirner (the Applicants) on April 21, 2026.
- The Town of Essex on April 21, 2026.
- Opponents: Jared Carter and James Dumont, on behalf of represented parties, on April 22, 2026.

Pursuant to Act 250 Rule 31(A), statutory parties or those granted party status had 15 days from the MTAs in which to file a response to the MTAs. The Commission received the following responses to the submitted MTAs:

- Allen Brook Development, SH-2 LLC, and Pam Schirner (the Applicants) on May 8, 2026.
- Opponents: Jared Carter and James Dumont, on behalf of represented parties, on May 8, 2026.

The Commission now addresses the merits of the each of the submitted MTAs.

Motion to Alter

Act 250 Rule 31(A)(1) states: "All requested alterations must be based on a proposed reconsideration of the existing record. New arguments are not allowed, with the exception of arguments in response to permit conditions or allegedly improper use of procedures, provided that the party seeking the alteration reasonably could not have known of the conditions or procedures prior to decision. New evidence may not be submitted unless the District Commission, acting on a motion to alter, determines that it will accept new evidence."

Allen Brook Development, SH-2 LLC, and Pam Schirner (the Applicants)

Applicants Claim 1: "[T]he Commission relied on a finding in the Town Approval that was mistakenly retained from a prior draft and was intended to be deleted from the final Town Approval."

Commission Response: First, the Commission did not rely on the Town Approval in deciding that the Project did not satisfy Criterion 10; the Commission specifically observed that there was a "lack of ambiguity in the Town Plan's steep slope language" that prohibits development on steep slopes.

Second, Applicants cannot rely on the "Staff Notes" and "3/20 Hearing" exhibits provided in its motion because it is not allowed to introduce new evidence in an MTA. See Act 250 Rule 31(A)(1), quoted above. Moreover, even if the Commission accepted them, the exhibits do not compel a new result. As explained in response to the Applicants' third claim below, the Commission correctly determined that the Town Plan is not ambiguous and therefore there is no need or authority to resort to outside evidence to interpret the Plan's provisions. In making this determination the Commission relied on the following two Vermont Supreme Court decisions.:

> There are two inquiries that the Board must make in its evaluation of whether a project conforms to a Town Plan. The Board asks two separate questions: Is the language in the town plan mandatory or does it merely provide guidance? And, are the town plan's provisions specific or ambiguous?" *Re: Times and Seasons, LLC and Hubert K. Benoit,* #3W0839-2-EB (Altered), FCO at 58 (11/4/05), *aff'd in part, rev'd in part*, *In re Appeal of Times & Seasons, LLC*, 2008 VT 7 (Vt. S. Ct.).
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> And:
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> "Moreover, the regional plan specifically provided that "[o]n slopes greater than 20%, residential development should not be permitted." [*In re Green Peak Ests*., 154 Vt. 363, 368, 577 A.2d 676, 679 (1990).] The Board found that this specific provision of the regional plan was consistent with the more general provisions of the town plan that established an objective of keeping the 'rugged and poorly accessible mountain and forest areas free from development.' Id. Because at least half of the proposed subdivision was to be located on a slope exceeding 20 percent, the Board found that the development did not conform with the regional plan. We affirmed, holding that 'the Board's commonsense interpretation of the plan's policy on this point is consistent with the overall approach to use of the region's intermediate uplands.' Id. at 369, 577 A.2d at 679." *In re Kisiel*, 172 Vt. 124, 772 A.2d 135, 138 (2000) (discussing *In re Green Peak Estates*, 154 Vt. 363, 577 A.2d 676 (1990)).

Applicants Claim 2: "[T]he steep slopes on the Project site consist of man-made slopes from prior development which the Town does not regulate under its steep slope ordinance"

Commission Response: This claim is controverted by Finding of Fact 75: "The Project involves development on slopes that are 20% grade and steeper. The amount of these slopes is material. Some development is proposed on slopes that were created when the existing haul road was constructed, **and some development on naturally occurring slopes**. 4C0329-24,4C0347-6 Hearing Recording, Part 2." (emphasis added).

Applicants Claim 3: "[T]he steep slope provisions in the Town Plan are not enforceable because they are vague and ambiguous."

Commission Response: Applicants argue that "[t]he Town's steep slope provisions [in the Town Plan] do not provide any guidance on how the DRB should interpret or analyze steep slopes . . . . By the Town's own admission, the steep slope provision is vague and ambiguous and has led to inconsistent results. In response, the Town Planning Commission has been working on ordinance revisions which are intended to address the vague and ambiguous steep slope standard."

This is an argument that the Town Plan is ambiguous because the Zoning ordinance is vague. Here, the Commission found that Plan was not ambiguous. Therefore, there is no need to resort to the zoning ordinance to interpret the plan; whether all parties admit or agree that the ordinance is ambiguous is irrelevant. This is supported by the Town Plan at page 64, which states, without vagueness or ambiguity:

"Suitability of slopes for construction

- 0–3%: Suitable for almost all types of construction but may require drainage improvements
- 3–10%: Most desirable for construction due to minimal restrictions
- 10–15%: Suitable for low density housing on large lots with some consideration for erosion control and stormwater runoff.
- 15–20%: Construction becomes expensive, and erosion and runoff problems are likely; slopes are unsuitable for most septic systems. Construction is discouraged.
- 20% and steeper: Construction shall be avoided due to the likelihood of environmental damage."

The Commission notes that "15-20%" in the fourth bullet covers slopes starting at 15% but not reaching 20%" under conventional English usage. Simply put, this is not ambiguous or vague.

In the Conclusions of Law for Criterion 10, the Commission stated the following:

"Both the Town and the Applicants have stated that the application proposes development on slopes of 20% or steeper. The Town Plan uses a scale of 15-20% or 20% and steeper, and also states that development on slopes greater than 20% "shall be avoided." The Applicants assert in Exhibit 145 at page 98 that, "…the steep slope provision in the Town Plan is ambiguous and unenforceable." The Commission disagrees. "Shall be avoided" is unambiguous under any plausible construction or interpretation that the Commission can comprehend."

The Commission's opinion is unchanged from the determination expressed in the Conclusions of Law; the Town Plan in this context is not vague and ambiguous, and is therefore enforceable.

In reviewing a project's conformance with a town plan under Criterion 10, the Supreme Court has observed:

We require plan provisions to be clear and definite to prevent arbitrary application and to provide adequate notice to landowners. *In re JAM Golf, LLC*, 2008 VT 110, ¶¶ 13, 17–19, 185 Vt. 201, 969 A.2d 47 ("We will not uphold a statute that fail[s] to provide adequate guidance, thus leading to unbridled discrimination by the court and the planning board charged with its interpretation." (quotation omitted)). Nonetheless, we do not require "mathematical certainty of language." *State v. Danaher*, 174 Vt. 591, 594, 819 A.2d 691, 695 (2002) (mem.); see also *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (concluding that ordinance was not unconstitutionally vague because although language was "marked by flexibility and reasonable breadth, rather than meticulous specificity," it was clear what ordinance as a whole prohibited (quotation omitted)).

In re B & M Realty, LLC, 2016 VT 114, ¶ 33, 203 Vt. 438, 454–55, 158 A.3d 754, 766 (2016).

Town of Essex

Town Claim: The Town asserts that the Development Review Board's (the DRB) interpretation of the Town Plan and applicable regulations in this case was consistent with past precedent and an appropriate use of the DRB's statutory powers, as the language noted by the Commission primarily comes from the Town's Zoning Regulations that have been in place for many years.

Commission Response: The Town's claim is virtually identical to the Applicants' Claim 3, and the Commission's response is likewise the same. The Town's statement that the interpretation and approval of the Project was consistent with past precedent does not negate nor supersede the Commission's determination that this Project does not comply with the Town Plan.

As stated by the Commission in the Conclusions of Law for Criterion 10, "The Commission is mindful that the Applicants submitted a letter from the Town Manager stating that the Project conforms with the Town Plan, Exhibit 138. The letter, however, does not overcome the steep slope prohibitions contained in the Town Plan and the Zoning Regulation, which are "stated in language that is clear and unqualified, and creates no ambiguity." In re Wheeler Parcel Act 250 Permit Determination, 2025 VT 29, ¶ 35 (citing In re John A. Russell Corp., 2003 VT 93, ¶ 16, 176 Vt. 520, 838 A.2d 906 (mem.)). The Commission determines that there is a specific policy that has been established, both in the Town Plan and, to the extent we need to rely on them, in the Zoning Regulations, that development on slopes 20% and steeper is prohibited."

Opponents: Jared Carter and James Dumont, on behalf of represented interested parties

Opponents Claim: "There was no dispute that these persons are residents of the Town of Essex. Under longstanding and unambiguous precedent under Criterion 10, this showing suffices."

Commission Response: Party status is twofold: (1) particularized interest and (2) causal connection between potential adverse impacts and the person's particularized interests. The caselaw cited by these Project Opponents covers the first part (particularized interest) but does not cover the "causal connection" requirement. Without meeting the causal connection requirement, the Commission cannot grant party status under Criterion 10. In consideration of these facts, the Commission declines to modify its decision to deny party status under Criterion 10 to the Opponents.

The following caselaw supports the Commission's denial of Party Status under Criterion 10:

"To demonstrate that this particularized interest may be affected by an act or decision by a district commission, an appellant must allege some causal relation between the proposed development and her interest . . . . Mr. Baker relies on both personal knowledge and an expert's advice rather than speculation, all of which taken together is sufficient to demonstrate a causal connection between the proposed project and the alleged adverse impacts upon his interests." *Gingras Act 250 Amended Permit Application (Application #6F0501-1)*, No. 22-3-15 VTEC, 2015 WL 5285404, at *3 (Vt.Super. Aug. 21, 2015) (citing I*n re Bennington Wal-Mart Demolition/Constr. Permit,* No. 158-10-11 Vtec, slip op. at 9-10 (Vt. Super. Ct. Envtl. Div. Apr. 24, 2012) (Walsh, J.)).

To obtain party status, person must first show that they have a specified interest protected by Act 250 that is particular to the person, not a general policy concern shared with the general public; second, person must demonstrate a causal connection between the proposed project's potential adverse impacts and the person's particularized interests. *Gingras Act 250 Amended Permit,* No. 223-15 Vtec, Decision on Motion for Party Status, at 4 (8/21/2015);

Parties must show a credible causal link between a project and a violation of the municipal plan provision(s) cited; specifically, parties must articulate how a project will result in nonconformance with a municipal plan. "In other words, it is not enough to merely quote from a municipal plan; to have standing, a litigant must articulate a causal link between a decision on a proposed project and reasonable possibility of harm to the litigant's particularized interests." See I*n re East Materials Group LLC, Amended Permit.*, No. 35-3-13 and *In re Granville Mfg. Co.*, No. 2-1-11 Vtec, slip op. at 6 (Vt. Super. Ct. Envtl. Div. July 1, 2011) (Durkin, J.).

Conclusion

The Commission has reviewed the requested changes within the submitted MTAs, and will not modify its April 7, 2026 decision as requested.

II. Decision and Order

The Commission has considered the Applicants', the Town's, and the Opponent's requests to alter the respective decision. For the reasons set forth in the Order and herein, the Commission denies the Applicants', the Town's, and the Opponents' motions; and affirms its denial of Party Status to the Opponents under Criterion 10, and its denial of the application under Criterion 10.

If any party has any questions regarding this Memorandum of Decision, please contact District 4 Coordinator Kaitlin Hayes at (802) 622-4084.

Dated this July 8, 2026.

By /s/ Thomas A. Little
Thomas A. Little, Chair
District 4 Commission

Commissioners participating in this decision:

Pam Loranger
Parker Riehle

Any party, or person denied party status, may file within 15 days from the date of a decision of the District Commission one and only one motion to alter with respect to the decision, pursuant to Act 250 Rule 31(A). Under Rule 31(A), no party, or person denied party status, may file a motion to alter a District Commission decision concerning or resulting from a motion to alter. Per Rule 31(A)(3), the running of the time for filing a notice of appeal is terminated as to all parties by a timely motion to alter.

Any person aggrieved by an act or decision of a District Commission or District Coordinator, or any party by right, may appeal to the Environmental Division of Vermont Superior Court within 30 days of the act or decision pursuant to 10 V.S.A. § 8504. Such appeals are governed by Rule 5 of the Vermont Rules for Environmental Court Proceedings. The appellant must file a notice of appeal with the clerk of the court and pay any fee required under 32 V.S.A. § 1431.

The appellant must also serve a copy of the Notice of Appeal on the Land Use Review Board and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings. The Land Use Review Board's copy may be sent to act250.legal@vermont.gov and/or 10 Baldwin Street, Montpelier, VT 05633-3201.

Note, there are certain limitations on the right to appeal, including on interlocutory appeals. See, e.g., 10 V.S.A. § 8504(k), 3 V.S.A. § 815, and Vermont Rule of Appellate Procedure 5. There shall be no appeal from a District Commission decision when the Commission has issued a permit and no hearing was requested or held, or no motion to alter was filed following the issuance of an administrative amendment. 10 V.S.A. § 8504(k)(1). If a District Commission issues a partial decision under 10 V.S.A. § 6086(b), any appeal of that decision must be taken with 30 days of the date of that decision. 10 V.S.A. § 8504(k)(3). For additional information on filing appeals, see the Court's website at: http://www.vermontjudiciary.org/GTC/environmental/default.aspx or call (802) 951-1740. The Court's mailing address is Vermont Superior Court, Environmental Division, 32 Cherry Street, 2nd Floor, Suite 303, Burlington, VT 05401.

The foregoing statements regarding motions to alter and appeals are intended for informational purposes only. They neither supplant nor augment any rights or obligations provided for by law nor do they constitute a complete statement of the rights or obligations of any person or party.

CERTIFICATE OF SERVICE

I hereby certify that I, Adriene Katz, Land Use Review Board Technician, District 4 Environmental Commission, sent a copy of the foregoing **MEMORANDUM OF DECISION AND ORDER** 4C0329-24,4C0347-6 by U.S. Mail, postage prepaid, on this July 8, 2026 to the following individuals without email addresses and by electronic mail, to the following individuals with email addresses:

Note: Any recipient may change its preferred method of receiving notices and other documents by contacting the District Office staff at the mailing address or email below. If you have elected to receive notices and other documents by email, it is your responsibility to notify our office of any email address changes.

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Dated this July 8, 2026.

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