



# MEMORANDUM OF DECISION AND ORDER

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State of Vermont

Natural Resources Board

District 3 Environmental Commission

100 Mineral Street, Suite 305

Springfield, VT 05156-3168

<https://nrb.vermont.gov/>

RE: Peacefield, LLC and  
John and Maureen Holland  
257 Tremont Street  
Braintree, MA 02184  
[john@peacefieldfarm.com](mailto:john@peacefieldfarm.com)

Memorandum of Decision and Order  
10 V.S.A. §§ 6001-6111 (Act 250)  
Act 250 Rule 21 Partial Findings  
Act 250 Application #3W1122

## I. Background

On May 17, 2021, Peacefield, LLC and John and Maureen Holland filed an application for an Act 250 permit for a project generally described as approval of the 36-foot by 72-foot barn-style structure constructed for use as an 80-seat restaurant and for storage, preparation, processing, and sale of farm products. The tracts of land consist of 194.11 acres. The Applicants' legal interest is ownership in fee simple described in deeds recorded on February 19, 2020 in the land record of Woodstock (SPAN #786-250-10334) and on February 28, 2020 in the land records of Pomfret (SPAN #489-154-10119), Vermont.

The Commission held hearings on this application on June 15, 2021 and September 9, 2021. A site visit was conducted prior to the hearing on June 15, 2021 and a site visit was conducted after the hearing on September 9, 2021 to view the lighting at night. The Commission started the September hearing by taking evidence on Criteria 10 Conformance with Local or Regional Plans and 9(L) Settlement Patterns, and moved on to take additional evidence on 8 Aesthetics (lighting and noise) and 1(G) Wetlands.

Parties were granted preliminary party status under Criteria 1B Waste Disposal, 1D Floodways, 1G Wetlands, 2 Sufficient Water Supply, 3 Burden on Existing Water Supply, 4 Soil Erosion, 5A and 5B Traffic, 7 Municipal Services, 8 Aesthetics (noise and lighting), 8A Necessary Wildlife Habitat, 9A Impact of Growth, 9B Primary Agricultural Soils, 9C Productive Forest Soils, 9H Costs of Scattered Development, 9K Public Investments, 9L Settlement Patterns, and 10 Conformance with Local or Regional Plans.

All parties were given an opportunity to present evidence and cross-examine each other under Criterion 10.

In order to address the remaining criteria, the Commission would schedule at least one more hearing, and possibly more.

## **II. Act 250 Rule 21**

Act 250 Rule 21(II), Partial Review, allows the Commission, on its own motion, to consider whether to review any issue under the criteria or sub-criteria before proceeding to the review of issues under the remaining criteria. The decision to issue a decision or proceed to the remaining criteria is in the sole discretion of the District Commission (Rule 21(II)(C)). If the Commission first issues a partial decision under Rule 21(II), the decision must state which findings of fact support conclusions of law under the applicable criteria, and which findings of fact are preliminary and do not support a conclusion of law. (Rule 21(II)(C)).

These procedures are intended to minimize costs and inconvenience to applicants and shall be applied liberally by the District Commission for that purpose consistent with the right of other parties and the requirements of law and any pertinent regulations. Rule 21 (II)(G).

The Commission has decided to issue findings of fact that support conclusions of law as they relate to Criterion 10. Also, the Commission issues preliminary findings of fact that do not support a conclusion of law under Criteria 1B, 1D, 1G, 2, 3, 4, 5, 7, 8, 8A, 9A, 9B, 9C, 9H, 9K, and 9L.

The Applicants have met the burden of proving compliance with the following criteria through submittal of the application: 1 Air Pollution; 1A Headwaters; 1C Water Conservation; 1E Streams; 1F Shorelines; 6 Educational Services; 9D Earth Resources; 9E Extraction of Earth Resources; 9F Energy Conservation; 9G Private Utility Services; and 9J Public Utility Services.

## **III. Decision and Order**

Pursuant to Act 250 Rule 21, Findings of Fact and Conclusions of Law are issued under Criterion 10 and are binding upon all parties until October 15, 2024 unless it is shown that misrepresentation or, fraud occurred, or that the facts relevant to the matter have changed to the extent that the findings or conclusions are no longer valid. Act 250 Rule 21(II)(E).

Preliminary Findings of Fact are issued under Criteria 1B, 1D, 1G, 2, 3, 4, 5A, 5B, 7, 8, 8A, 9A, 9B, 9C, 9H, 9K and 9L.

A permit for any phase shall not be granted under Rule 21 until the Applicant has fully complied with all criteria and positive findings of fact and conclusions of law for that phase have been made by the District Commission as required by Act 250.

If any party has any questions regarding this Memorandum of Decision, please contact Linda Matteson, District Coordinator at 802-289-0598 or email her at [Linda.Matteson@Vermont.gov](mailto:Linda.Matteson@Vermont.gov).





# PARTIAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Corrected\*

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State of Vermont  
Natural Resources Board  
District 3 Environmental Commission  
100 Mineral Street, Suite 305  
Springfield, VT 05156-3168  
<https://nrb.vermont.gov/>

**CASE NO:** 3W1122

Peacefield, LLC  
John & Maureen Holland  
257 Tremont Street  
Braintree, MA 02184

**LAWS/REGULATIONS INVOLVED**

10 V.S.A. §§ 6001 - 6111 (Act 250)

## I. INTRODUCTION

On May 17, 2021, Peacefield, LLC and John and Maureen Holland filed an application for an Act 250 permit for a project generally described as approval of the 36-foot by 72-foot barn-style structure constructed for use as an 80-seat restaurant and for storage, preparation, processing, and sale of farm products. The tracts of land consist of 194.11 acres. The Applicants' legal interest is ownership in fee simple described in deeds recorded on February 19, 2020 in the land record of Woodstock (SPAN #786-250-10334) and on February 28, 2020 in the land records of Pomfret (SPAN #489-154-10119), Vermont.

The Commission held hearings on this application on June 15, 2021 and September 9, 2021. A site visit was conducted prior to the hearing on June 15, 2021 and a site visit was conducted after the hearing on September 9, 2021 to view the lighting at night.

Pursuant to Act 250 Rule 21(II) Partial Review, these partial Findings of Fact and Conclusions of Law are issued as explained in the Memorandum of Decision and Order for Application #3W1122.

As set forth below, the Commission finds that the Project complies with Criteria 8 Aesthetics and 9L Settlement Patterns, and does not comply with Criterion 10 Conformance with Local Plans. 10 V.S.A § 6086(a)(1)-(10) (Act 250).

## II. JURISDICTION

As determined in a project review sheet issued on May 9, 2018 jurisdiction attaches because construction of improvements for commercial purpose on more than one acre in Woodstock triggers Act 250. 10 V.S.A. §6001(3)(A).

\* Correction applies to page 29, under Section VII. SUMMARY CONCLUSION OF LAW – Partial Findings, last sentence changed to agree with the Partial Findings of Fact

If the Commission was to issue a permit, jurisdiction would attach to all land owned and/or controlled by the Applicant that supports the development. 10 V.S.A. §6001(3)(E). The Commission would require the Applicant to submit a plan that clearly shows this. Jurisdiction would, at a minimum apply to the barn/restaurant building, patios, lawns, access road, parking areas, the pond with a 50-foot buffer measured outwardly from the high-water level, the water line from the pond to the hydrant at the bottom of the hill that will provide water for the restaurant's sprinkler system, and the road constructed or improved to serve the pond and 3-acre exclusion site. Parties would be given an opportunity to review and respond to the plan. With additional evidence the scope of jurisdiction could change from this preliminary statement of scope.

### **III. OFFICIAL NOTICE**

Under 3 V.S.A. § 810(4) of the Administrative Procedure Act ("APA"), notice may be taken of judicially cognizable facts in contested cases. See 10 V.S.A § 6007(c) and 3 V.S.A. § 801(b)(2). Under § 810(1) of the APA, "[t]he rules of evidence as applied in civil cases . . . shall be followed" in contested cases. Under the Vermont Rules of Evidence, "(a) judicially noticed fact must be one not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); See *In re: Handy*, 144 Vt.601, 613 (1984).

The Commission may take official notice of a judicially cognizable fact whether requested or not, and may do so at any stage of the proceeding. See V.R.E. 201(c) and (f). Under 3 V.S.A. § 809(g), the Commission may make findings of fact based on matters officially noticed. A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e). The Commission takes official notice of the Woodstock Comprehensive Plan (Town and Village) and the Woodstock Zoning Regulations.

Accordingly, official notice is hereby taken of the Town & Village of Woodstock's Comprehensive Plan, the "Town Plan," and Zoning Regulations subject to the filing of an objection on or before thirty days from the date of this decision pursuant to Act 250 Rule 6.

### **IV. PARTY STATUS AND FRIENDS OF THE COMMISSION**

#### **A. Parties by Right**

Parties by right to this application pursuant to 10 V.S.A § 6085(c)(1)(A)-(D) who attended the hearing are:

The Applicant by John Holland, Greg McKenney, P.E., Mathew Lombard, and Alexander LaRosa, Esq.

The Town of Woodstock, by Mary Riley and Jill Davies.

The Town of Pomfret, by Emily Grube and John Peters. Jr.

The Woodstock Planning Commission, by Sally Miller and Neil Leitner.

The Pomfret Planning Commission, by John Moore and Doreen Hurley.

The Two Rivers-Ottawaquechee Regional Commission, by Kevin Geiger.

The State of Vermont Agency of Natural Resources (ANR), by Jennifer Mojo, Senior Planner, Office of Planning.

B. Interested Parties

Any person who has a particularized interest protected by Act 250 that may be affected by an act or decision of the Commission is also entitled to party status. 10 V.S.A § 6085(c)(1)(E).

i. Preliminary Party Status Determinations

Pursuant to Act 250 Rule 14(E), the District Commission made preliminary determinations concerning party status at the commencement of the hearing on this application. The following persons requested party status pursuant to 10 V.S.A § 6085(c)(1)(E), and were either admitted as parties or denied party status, as indicated below:

1. Tom Meyerhoff and Cynthia Volk, reside at 460 Pomfret Road, Woodstock, adjacent to the proposed project. A portion of their property is devoted to agriculture, and they lease a portion of the acreage for hay production. They requested party status under Criteria 1B Waste Disposal, 1D Floodways, 1G Wetlands, 2 Sufficient Water Supply, 3 Impact on existing water supply, 4 Soil Erosion, 5A&B Traffic Issues, 7 Impact on Municipal Services, 8 Scenic or Natural Beauty, Aesthetics (including Noise), Rare and Irreplaceable Natural Areas, 8A Necessary Wildlife Habitat and Endangered Species, 9A Impact on Growth, 9B Primary Agricultural Soils, 9C Productive Forest Land, 9H Costs of Scattered Development, 9K Development Affecting Public Investment, 9L Scattered Patterns, and 10 Conformance with Local and Regional Plans. Mr. Meyerhoff and Ms. Volk are represented by David L. Grayck, Esq. (Exhibit #039). The Commission granted preliminary party status under Criteria 1B, 1D, 1G, 2, 3, 4, 5A & B, 7, 8, 8A, 9A, 9B, 9C, 9H, 9K, 9L, and 10. There were no objections.
2. Al Alessi resides at 799 Pomfret Road, Woodstock, and his property abuts the Applicants property. He is interested in impacts from the project related to traffic, sound and lighting. He requested party status under Criteria 5 Traffic Issues, 8 Aesthetics as it relates to Noise, 9L Settlement Patterns, and 10 Conformance with Town Plan. (Exhibit #041). The Commission granted preliminary party status under Criteria 5, 8, 9L and 10. There were no objections.
3. Lawrence Niles and Dawn Niles, reside at 100 Pomfret Road, Woodstock, less than one mile from the project site. Mr. Niles and Ms. Niles requested party status under Criteria 5 Traffic Issues, 8 Aesthetics as it relates to Noise, 9K Development Affecting Public Investments, and 10 Conformance with Town Plan. (Exhibit #042). The Commission granted preliminary party status under Criteria 5, 8, 9L and 10. There were no objections.

4. David Nixa resides at 819 Pomfret Road, Woodstock, and his property abuts the Applicants property. He originally requested party status under Criteria 5 Traffic Issues, 8 Aesthetics as it relates to Noise, 9K Development Affecting Public Investments, and 10 Conformance with Town Plan. He revised his request to include Criteria 1B Waste Disposal, 1D Floodways, 1G Wetlands, 2 Sufficient Water Supply, 3 Impact on Existing Water Supply, 4 Soil Erosion, 7 Impact on Municipal Services, 8A Necessary Wildlife Habitat and Endangered Species, 9A Impact on Growth, 9B Primary Agricultural Soils, 9C Productive Forest Land, 9H Costs of Scattered Development, 9K Development Affecting Public Investment, and 9L Scattered Patterns. The Commission granted preliminary party status under Criteria 5, 8, 9K and 10. There were no objections.
5. BJ Dunn and Rich Bennett, reside at 89 Stimets Road, Woodstock. They have views of the barn and project from their property and requested party status under Criteria 8 Aesthetics, 9A Impact of Growth, and 9(L) Settlement Pattern. They did not appear at the first hearing, however, the Commission found that good cause was demonstrated for failure to request party status in a timely fashion and determined that the late appearance would not unfairly delay the proceedings or place an unfair burden on the parties. The Commission granted preliminary party status under Criteria 8, 9A and 9L. There were no objections.

ii. Final Party Status Determinations –

Prior to the close of the two hearings, the District Commission re-examined the preliminary party status determinations in accordance with 10 V.S.A § 6086(c)(6) and Act 250 Rule 14(E) and found no reason to change its preliminary determinations. However, final party status may change if and when subsequent hearings are held.

**VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Applicants have met the burden of proving compliance with the following criteria through submittal of the application:

- |                           |                                      |
|---------------------------|--------------------------------------|
| 1 - Air Pollution         | 9(D) - Earth Resources               |
| 1(A) - Headwaters         | 9(E) - Extraction of Earth Resources |
| 1(C) - Water Conservation | 9(F) - Energy Conservation           |
| 1(E) - Streams            | 9(G) - Private Utility Services      |
| 1(F) - Shorelines         | 9(J) - Public Utility Services       |
| 6 - Educational Services  |                                      |

Therefore, the application shall serve as the Findings of Fact on these criteria.

The findings of fact are based on the application, Exhibits 001 - 085, and other evidence in the record.

Under Act 250, projects are reviewed for compliance with the ten criteria of Act 250, 10 V.S.A § 6086(a)(1)-(10). Before granting a permit, the District Commission must find that the Project complies with these criteria and, therefore, is not detrimental to the public health, safety or general welfare. The burden of proof under Criteria 1 through 4 and 9 and 10 is on the applicant, and the burden is on the opponent under Criteria 5 through 8, and 9A if the municipality does not have a duly adopted capital improvement program.

General Findings:

1. The Overall Site Plan indicates Peacefield Farm is comprised of Parcel 1A, 67.71+/- acres with an existing barn and a 2.0-acre Exclusion Area; and Parcel 1B, 14.66+/- acres with an existing residence; Parcel 2A, 13.35+/- acres with farm structures and the Barn Structure to Serve Accessory On Farm Business (which includes the proposed 80-seat restaurant); Parcel 2B, 36.70+/- acres with a 3-acre exclusion area; and Parcel 3, 61.69+/- acres. The parcels on the west side of Pomfret Road (Parcels 1A and 1B) are deeded to John & Maureen Holland and the parcels on the east side of Pomfret Road (Parcels 2A, 2B and 3) are deeded to Peacefield LLC. The Applicant requested that Act 250 jurisdiction attach only to Parcel 2A pursuant to 10 V.S.A. § 6001(3)(E). Exhibits #004 and #075.
2. The property is located in Woodstock and Pomfret. Parcels 1A, 1B, 2A and 2B are all located in Woodstock. Parcel 3 is located in Pomfret. Exhibit #075.
3. A Project Review Sheet, dated May 9, 2018, indicated that Act 250 jurisdiction attaches to the Project described as:

“Build a barn for agricultural use, living space, and functions in the current use exclusion zone on a 13.35 acre lot (adjoining parcels exist under same ownership).

Mr. Holland has been working with Vermont Land Trust to get this property [is] on its way to be a working farm again. The function of the barn is to a) house the farmer b) serve farming operations c) serve as a gathering space for events. The understanding is that the farm will have opportunities for folks to come and learn about farming. Gatherings such as ‘farm suppers’ are also anticipated. These events should not exceed 60 times/year and would likely occur more frequently during the summer months. (They are trying to stay under a ‘public water supply’ level of use.)

From a WW permitting standpoint, they are designing the leachfield to serve the 2 bedroom apt. and a ‘20 seat restaurant’ which allocates a design flow of 880 gal/day for 24 people (both located in the barn). The barn has a kitchen downstairs including a sink, dishwasher, and stove which will aid in facilitating these functions and help with processing plants/crops grown on the farm.

Plans also indicate a proposed 300’ 15” PVC culvert along an existing drainage ditch from a spring to the road culvert, and 460 cy of fill to bring the drainage ditch to grade.



Also, plans indicate regrading (fill) of a historically existing pond, which has been completed.

Exhibit #039, page 9.

4. The Project Review Sheet was not appealed.

**Criteria 1(B) Waste Disposal and 4 Soil Erosion:**

Findings of Fact

5. Waste generated by the Project will include sewage, food waste, farm waste, and stormwater runoff.
6. The total design flow for the restaurant with 80 seats and 10 employees is 2,310 gallons per day of wastewater that will be disposed of through an on-site innovative/alternative treatment system. Exhibits #006, #008 and #022.
7. The ANR Department of Environmental Conservation issued Wastewater System and Potable Water Supply Permit #WW-3-2807-1 (the "WW Permit") on September 18, 2020. This revised WW permit is for a project "consisting of revising the previous project for an 80-seat restaurant with 10 employees . . ." Exhibit #022.
8. The original WW Permit #WW-3-2807, issued on June 11, 2018, was for the construction of a building with a 2-bedroom residence and a 35-person event space with commercial catering kitchen. Exhibit #039, pages 12-14.
9. The Project does not have any floor drains. Exhibit #001a.
10. A Stormwater operational permit is not required because the acreage of non-farm impervious area is less than one acre (0.940 acres per calculations). There are 1.963 acres of impervious farm use area. Exhibits #072 and #074.
11. Stormwater runoff will sheet flow across lawn areas. Exhibit #001a.
12. Construction debris will be hauled off site in dumpsters. Any stumps will be disposed on adjacent lands of the Applicant. Exhibit #001a.
13. Hazardous materials will not be used or stored on the site. Exhibit #001a.
14. The Applicant will use erosion prevention and sediment control measures contained in the *Low Risk Site Handbook for Erosion Prevention and Sediment Control*, Vermont ANR, February 2020 to control stormwater runoff. Exhibit #001a.
15. The Project does not have coverage under the Construction General Permit.

16. Permanent erosion control measures to stabilize soils will include grass and landscaping features. Exhibit #001a.

The above findings of fact are preliminary and do not support a conclusion of law.

Prior to making final conclusions under Criteria 1B and 4, the Commission would require that the Applicant provide evidence that the issued ANR permits do not need to be revised. The Commission would also require confirmation that the farm vs. on-farm impervious areas as calculated in Exhibit #072 are true and accurate. This would include explaining the use of the access road to the pond behind (to the east of) the barn/restaurant and also access to the 3-acre excluded area as a possible house site.

**Criterion 1(D) – Floodways:**

Findings of Fact

17. Barnard Brook bifurcates Parcel 1A and Parcel 1B on the west side of Pomfret Road. Exhibit #075.
18. The 100-year flood plain is at the elevation of 696 feet and is mapped on the plans. Exhibits #075 and #078.
19. The agricultural fields are within the Special Flood Hazard Area (“SFHA”). Exhibits #025 and #026.
20. The Federal Emergency Management Agency has determined that the barn/restaurant building is not located in the SFHA by issuing a Letter of Map Amendment (“LOMA”). Exhibits #025 and #026.
21. The ANR “requested additional information for review. Specifically, the [Floodplain] Program requested a site plan that show in more clarity the revised flood hazard area as approved through the FEMA Letter of Map Amendment with the new proposed farm structures shown in relation to the flood hazard area. The plan will need to include information that demonstrates the project is in compliance with the floodplain management standards and the No Adverse Impact Standard as found Procedure.” Exhibit #037.
22. Overall Site Plan, Sheet C-1, revised on June 14, 2021, includes the 100-year floodplain (from LOMA) and the adjusted building footprint on Parcel 1A. Exhibit #075.
23. Approximately 600 cubic yards of fill was placed in the flood storage area on the Project site adjacent to the barn/restaurant building. Flood storage compensation is proposed north of the fill area. Exhibit #078.

The above findings of fact are preliminary and do not support a conclusion of law. The Project involves the development of lands within a floodway. If a permit was to be issued, the

Commission would include a condition requiring the Applicant to provide flood storage upstream to compensate for the filled area adjacent to the barn/restaurant building. With this condition, the Commission could conclude that the Project would not restrict or divert the flow of flood waters and endanger the health, safety, or welfare of the public or riparian owners during flooding. However, prior to concluding that the Project complies with Criterion 1(D), those parties with party status under this Criterion would be given an opportunity to cross examine the Applicant and submit additional evidence.

**Criterion 1(G) - Wetlands:**

Findings of Fact

24. There are Class 2 wetlands on the Project Tract. Exhibits #073 and #075.
25. A farm pond on Parcel 2B was developed and permitted in 2017. Exhibits #001a and #023.
26. In 2014 a farm pond with stagnant water located on Parcel 2A was filled with onsite material. This pond was located in the 100-year flood plain and reviewed and approved by ANR. Exhibit #057.
27. Rebecca Chalmers, District Wetland Ecologist with the ANR's Wetland Program, requested a plan that depicts the wetland assessment area and accurate delineation of the assessment areas. Exhibit #037.

The above findings of fact are preliminary and do not support a conclusion of law. Prior to making final conclusions, the Commission would require additional evidence that the Project complies with Criterion 1G Wetlands.

**Criteria 2 and 3 – Water Availability and Impact on Existing Water Supply:**

Findings of Fact

28. The drilled well serving the barn/restaurant has a maximum daily demand of 2,550 gallons per day or 3.54 gallons per minute (“gpm”), for an 80-seat restaurant and 10 employees. Exhibit #001a.
29. The next closest well is over 750-feet from the Project's well. The Project's well yields 14 gpm. Exhibit #001a.
30. The restaurant is approved for connection to a public transient non community water supply system. The installation of the public water system shall be completed in accordance with the conditions of the Public Water System Construction Permit PID# C-3832-20.0 WSID# VT0021706 dated July 21, 2020 or any subsequent approvals for this system issued by the Drinking Water and Groundwater Protection Division. Exhibits #020, #021 and #022.

31. The ANR Department of Environmental Conservation issued Wastewater System and Potable Water Supply Permit #WW-3-2807-1 on September 18, 2020. Exhibits #022.
32. The ANR Drinking Water Program requested the Applicant to address drinking water capacity and to submit a Construction Permit Application to amend Construction Permit C-3832-20.1. Exhibit 083.

The above findings of fact are preliminary and do not support a conclusion of law. The Commission requires additional evidence with respect to Criteria 2 and 3 before it can make a final conclusion as to the compliance with these criteria.

### **Criterion 5 - Transportation:**

#### Findings of Fact

33. The Project is not located in a Transportation Improvement District (TID).
34. Access into the Project is off Pomfret Road, a town road. The driveway is generally flat with sight distances of 445-feet or more to the north and south, meeting or exceeding the minimum intersection sight distance required to meet the VTrans B-71 Standard for Commercial Drives. Exhibits #001a, #034, #050, and #075.
35. The speed limit is 40 mph at the access to the barn/restaurant. Exhibit #001a.
36. The proposed Project's peak hour trip generation, using 10th Edition ITE, is 21 trips in the PM peak hour. VTrans comments indicate the project would generate approximately 28 trips in the PM peak hour. The Applicant used a conservative estimate of 40 vehicles per hour generated in the PM peak hour. Exhibits #001a, #036 and #050.
37. In addition to the traffic generated by restaurant customers, there will be approximately 10 employees, and vendor deliveries. Most of the traffic generated will be between the hours of 5:00 PM and 10:00 PM, dining hours. Exhibit #001a.
38. Vendor deliveries will, generally, be made during weekdays in the morning during lower hours of traffic. Exhibit #050.
39. The Route 12 intersection is approximately a half mile south of the Project access. VTrans compared the current traffic volumes at the Route 12 and Pomfret Road intersection to the project generated traffic for the future No Build and Build scenarios and concluded that the addition of 40 PM peak hour trips increased the intersection delay by less than a second. The Level of Service at the intersection was the same for the No Build and the Build scenarios (LOS of B). Exhibit #036.
40. There have been no crashes at the intersection of Route 12 and Pomfret Road over the last five years and it is not considered a high crash location. VTrans has no concerns with this project with respect to traffic congestion or safety. Exhibit #036.

41. There will be a total of 70 parking spaces - 28 parking spaces on gravel surface and 42 grass parking spaces. Exhibits ##001a, #004, #007, and #076.
42. It is expected that there will be two dinner seatings per night with the last reservation scheduled for 8:30 PM. The staff will be done by 11:15 PM. Testimony.
43. The Pomfret Road is a popular bicycle and running route. The Pomfret Road is on the annual Covered Bridge Half Marathon route. Testimony.

The above findings of fact are preliminary and do not support a conclusion of law. Criterion 5(A) requires that the Project “will not cause unreasonable congestion or unsafe conditions with respect to use of the highways.” See 10 V.S.A § 6086(a)(5)(A). Notwithstanding the requirement for a positive finding, the Commission may not deny a permit solely on the reasons set forth under Criterion 5. See 10 V.S.A § 6087(b). The Commission may, however, attach reasonable conditions to alleviate traffic burdens. *Id.*

Criterion 5(B) requires that a project, “as appropriate . . . incorporate transportation demand management strategies and provide safe access and connections to adjacent lands and facilities and to existing and planned pedestrian, bicycle, and transit networks and services.” 10 V.S.A § 6086(a)(5)(B). In determining what is appropriate for a particular project, the Commission considers whether the measure is reasonable, “given the type, scale and transportation impacts” of the proposed project. *Id.*

#### **Criteria 7 - Municipal Services:**

##### Findings of Fact

44. The Project will utilize municipal police, fire, rescue services, and road maintenance. Exhibit #001a.
45. A completed Municipal Impact Questionnaire, signed by the Woodstock Municipal Manager, indicates that the municipality has the capacity to provide these services without unreasonable burdens. Exhibit #001d.

The above findings of fact are preliminary and do not support a conclusion of law. Notwithstanding the requirement for a positive finding, the Commission may not deny a permit solely on the reasons set forth under Criterion 7. See 10 V.S.A § 6087(b). The Commission may, however, attach reasonable conditions to alleviate the burdens created. *Id.*

Under Criterion 7, the question is whether the Project places an unreasonable burden on the ability of the municipality to provide services. Relevant services include municipal fire, police, rescue, solid waste disposal, road maintenance, sewer and water service. *RE: Barre Granite Quarries, LLC, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 77 (Vt. Envtl. Bd. Dec. 8, 2000).*

The burden of proof is on the opponents under Criterion 7, but the burden of production is on the Applicant. No evidence has been presented to contend that the proposed Project will cause an unreasonable burden on the municipality, however, because the Commission is applying Act 250 Rule 21 Partial Findings, the parties have not been given an opportunity to present their evidence and testimony.

### **Criterion 8 - Aesthetics, Historic Sites and Rare and Irreplaceable Natural Areas:**

#### FINDINGS OF FACT

##### Findings of Fact: Aesthetics, Scenic or Natural Beauty

46. The barn/restaurant Project is located on Parcel 2A in an open area between rolling hills typical of the region. Parcel 2A is generally flat with slopes of approximately 2-3%. Slopes rise more quickly in elevation to the east (Parcel 2B). Exhibit #071.
47. The height of the red, wooden barn structure with dark standing-seam roof is approximately 38 feet. North of the barn are agricultural tunnel houses and agricultural fields with crops. Exhibit #071.
48. The barn/restaurant is accessed off Pomfret Road via a gravel drive south of the barn. One utility pole is located near the entry drive that connects power underground to the barn/restaurant. Gravel parking spaces are located to the north and east of the building and 12 grass parking spaces are located south along the access drive and 17 grass parking spaces are located north of the building. Exhibits #071 and #076.
49. Landscaping includes raised beds, stone patios, stone walls, a split rail fence and landscaping vegetation consisting of street trees, ornamental plantings, open lawn space and wildflowers on the hillside behind the barn/restaurant. Exhibit #071.
50. A perennial stream crosses Parcel 2A north of the barn, flowing from east to west. Exhibit #071.
51. Barnard Brook flows south through the Applicant's property on the west side of Pomfret Road. Exhibits #001a and #075.
52. The Project is located in an area characterized by farms and agriculture mixed with lower density single family residential development and various independent commercial operations. The landscape has open fields that are broken up by farm hedgerows, roadside vegetation, and blocks of wooded areas. Directly across the road from the Project is a single-family home, owned by the Applicant, and an access road to agricultural operations. Directly adjacent to the Project are a few single-family homes along Pomfret Road, open fields, and woods. Exhibit #071.
53. Nearby development includes the Prosper Valley School, a Windsor Central primary school, located less than a half mile to the north. Exhibit #071.

54. Suicide Six ski resort and facilities, the local store (Teago General), the post office, Grange Theater, Abbot Memorial Library, and the ArtisTree Community Arts Center/Purple Crayon Center are all located within 1.6+/- miles of the Project. The Billings Farm & Museum and Woodstock Village is within 1.6+/- miles south of the Project. Exhibit #071.
55. The scale, mass and materials are compatible with surrounding barns such as the ArtisTree Community Arts Center and Chippers. Exhibit #071.
56. The Project is not located in any scenic viewsheds or vistas and Pomfret Road is not part of an identified scenic byway or scenic road. Exhibit #071.
57. The propane tanks are buried and the dumpster is located on the backside of the building. Exhibits #001a and #006.
58. The Exterior Lighting Plan is depicted in Exhibit #081 and includes lighting for the barn/restaurant, driveway, parking and landscaping. All lights are dimmable. The lighting fixtures are described in Exhibit #018 and include upward pointed landscape lighting (type E1/FL, E1/SP, E4) on trees and the building. The beam from the up lighting has been narrowed. The pole light fixtures along the driveway and front and rear of the building are downlit "Gooseneck" fixtures with the globe from the bulb extending below the shade. Shielded bollard lights and lights installed into the stonewall are also used in the landscaping. Exhibits #018, #081 and Testimony.
59. The overall lighting design meets the IES standards. All lights are dimmable All exterior lights have been dimmed to 50% and the lights in the trees have been dimmed to 35%. All lighting around the facility will automatically cut-off at 11:00 PM when service ends and customers have been given enough time to safely leave the facility. Exhibit #050 and Testimony.
60. A 2.5-foot by 4-foot, LED lit from above, sign will be mounted on an approximate 7-foot post on the north side of the entry road. Exhibits #007, 016 and #018 (type H3 sign light).
61. Interior and exterior lighting and landscaping lighting is visible to neighbors. Exhibits #044, #046, #085 and Testimony.
62. During construction, music from a boom box was clearly heard from neighbors' residents. Sound carries in the valley. Neighbors are concerned that enjoyment of their homes will be adversely impacted by noise from activity at the restaurant, particularly in the warmer months when the windows will be open. The restaurant will be open until 11:00 PM. Exhibit #085 and Testimony.
63. Neighbors are concerned that noise from increased traffic, including delivery trucks, will negatively impact the enjoyment of their homes and community. Testimony.

64. The Project will not generally produce noise greater than 55 dBA at any residence or greater than 70 dBA at the property line. Indoor music will be digitally controlled and will be set so that with the windows open, it will not produce excessive noise at the property line. Exhibits #050 and #051.
65. Meat processing/packaging will operate Monday through Saturday, 7:00 AM to 5:00 PM. The hours of operation for the restaurant dining will typically be 5:00 PM to 11:00 PM, Tuesday through Sunday. In certain seasons, lunch and dinner will be served 11:00 AM to 11:00 PM, Tuesday through Sunday. Exhibit #001a.

#### Findings of Fact: Historic Sites

66. In 1997 the Advisory Council on Historic Preservation determined that the project property was not eligible for the State Register of Historic Places (SRHP)(Survey #1424-126). In 1992 the c.1823 house burned and was rebuilt and the c.1913 barn was demolished in c.2013. The proposed project will not detract from the two historic sites adjacent to the project property that are listed in the SRHP, Survey #1424-125 and -127. Exhibits #001a and #038.

#### Findings of Fact: Rare and Irreplaceable Natural Areas

67. There are no rare and irreplaceable natural areas on the Project site. Exhibit #001a.

#### CONCLUSIONS OF LAW

The above findings of fact are preliminary and do not support a conclusion of law. Prior to granting a permit, the Commission must find that the subdivision or development under Criterion 8 "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." 10 V.S.A § 6086(a)(8). This Project involves concerns under Criterion 8 related to noise and lighting.

#### Conclusions of Law: Aesthetics and Scenic or Natural Beauty

The Commission uses a two-part test to determine whether a project meets the portion of Criterion 8 relating to aesthetics and natural and scenic beauty. First, it determines whether the project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. *In re Rinkers, Inc., No. 302-12-08 Vtec, Decision and Order at 12 (Vt. Envtl. Ct. May 17, 2010)* (citations omitted); see also, *Re: Quechee Lakes Corporation, #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 18-20 (Vt. Envtl. Bd. Nov. 4, 1985); In re Halnon, 174 Vt. 514 (mem.)* (applying Quechee test in Section 248 context).

The burden of proof under Criterion 8 is on any party opposing the project, 10 V.S.A § 6088(b), but the applicant must provide sufficient information for the Commission to make affirmative findings. *In re Rinkers, No. 302-12-08 Vtec, Decision and Order at 10-11 (Vt. Envtl. Ct. May 17, 2010)* (citing *Re: Susan Dollenmaier, #3W0125-5-EB, Findings, Conclusions and Order at 8 (Vt Envtl. Bd. Feb. 7, 2005); In re Eastview at Middlebury, Inc., No. 256-11-06 Vtec, slip op. at 5 (Vt. Envtl. Ct. Feb.*



15, 2008), *aff'd*, 2009 VT 98. "Either party's burden, however, may be satisfied by evidence introduced by any of the parties or witnesses . . ." *In re McShinsky*, 153 Vt. 586, 589 (1990) (quoting *In re Quechee Lakes Corp.*, 154 Vt. 543, 553–54 (1990)).

### 1. Adverse Effect

To determine whether the Project will have an adverse aesthetic effect, the Commission looks to whether the Project will "fit" the context in which it will be located. In making this evaluation, the Commission examines a number of specific factors, including the following: the nature of the project's surroundings; the compatibility of the project's design with those surroundings; the suitability of the colors and materials selected for the project; the locations from which the project can be viewed; and the potential impact of the project on open space. *Quechee Lakes Corp et al.* #3W0411-EB and #3W0439-EB *Findings of Fact, Conclusions of Law and Order at 18* (Vt. Envtl. Bd., Nov. 4, 1985) (cited in *Rinkers*, No. 302-12-08 *Vtec, Decision and Order at 12-13*).

The Project is in a rural area with open and wooded areas and a low density of single-family homes. Visually, the building fits in with the character of the area. However, the exterior lighting and potential noise from diners on the outside patios or walking around the gardens does not fit in with the quiet, rural area.

This Project will have an adverse aesthetic impact. Accordingly, we must determine whether that impact is undue.

### 2. Undue Adverse Effect

An adverse aesthetic impact is undue if any of the following is true: (1) the project violates a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area; (2) the project offends the sensibilities of the average person, or is offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area; or (3) the Applicants failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings. *In re Rinkers*, 302-12-08 *Vtec, Decision and Order at 15* (May 22, 2010) (citing *In re: Times & Seasons, LLC*, 2008 VT 7, ¶ 8; *In re McShinsky*, 153 Vt. at 592).

#### (a) Clear, Written Community Standard

In evaluating whether a project violates a clear written community standard, the Commission looks to town plans, open land studies, and other municipal documents to discern whether a clear, written community standard exists to be applied in review of aesthetic impacts of a project. *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, *Findings of Fact, Conclusions of Law, and Order at 18* (Vt. Envtl. Bd. 4/9/02). A clear, written community standard must be intended to preserve the aesthetics or scenic beauty of the area where the project is located. *Re: Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action*, #2WO694-I-EB, *Findings of Fact, Conclusions of Law, and Order at 36* (Vt. Envtl. Bd. 12/21/00).

The Commission has reviewed relevant portions of the Town Plan and found no clear community standards relevant to the proposed Project's impacts on aesthetics.

The proposed Project does not violate a clear community standard.

*(b) Offensive or Shocking Character*

Criterion 8 "was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from their property will remain the same forever." *Re: Okemo Mountain, Inc. #2S0351-S-EB Findings of Fact, Conclusions of Law, and Order (Dec. 18, 1986).*

Criterion 8 was intended to ensure that as development occurs, reasonable consideration will be given to visual impacts on neighboring landowners, the local community, and on the special scenic resources of Vermont. *Rinkers, No. 302-12-08 Vtec, Decision and Order at 11-12; Horizon Development Corp., #4C0841-EB, Findings of Fact, Conclusions of Law, and Order (Vt. Envtl. Bd. Aug. 21, 1992).*

The building and landscaping are designed to fit within the context of the area. The lighting, however, does not fit in with the rural character of the area. The uplighting of the trees, the pole lights with the globes visible below the shades, and the light emanating from the second floor is excessive for this rural setting.

Regarding noise generated on the site, the Commission would require additional information related to outdoor activities/events and music. We would also require hours of operation of the restaurant to end by 10:00 PM.

The Project is offensive or shocking with respect to the excessive lighting and possibly noise.

*(c) Generally Available Mitigating Steps*

The question under this factor of the aesthetics analysis is whether the Applicant has "failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings." *In re Times & Seasons, 2008 VT 7, ¶ 8.* If a project does have an adverse aesthetic effect, the applicant must "take generally available mitigating steps to reduce the negative aesthetic impact of a particular project," otherwise, "[f]ailure to take advantage of available alternatives may render an aesthetic impact unduly adverse." *In re Stokes Communications Corp., 164 Vt. 30, 39 (1995)* (quoted in *In re Rinkers, 302-12-08 Vtec, Decision and Order at 19 (May 22, 2010)*). A generally available mitigating step "is one that is reasonably feasible and does not frustrate [either] the project's purpose or Act 250's goals."

To mitigate the aesthetic impacts of the Project, the Applicant has designed the building to fit in with the rural area. If the Commission was to continue its review of the application, it would issue another recess order that would require the Applicant to submit a revised lighting plan and lighting schedule. Eliminating uplighting trees, replacing the Gooseneck lights with bulbs without globes so that light is not visible below the shade and installing window treatments to

reduce the brightness of light emanating from the second story are recommended mitigating measures to address Criterion 8 impacts.

We find that the Applicant has not taken the available mitigating steps to minimize the adverse impacts of the proposed Project on the scenic or natural beauty of the area.

*(d) Conclusion*

Without a revised lighting plan the Commission cannot conclude that the Project will not have an undue adverse effect on the aesthetics or natural and scenic beauty of the area.

**SUMMARY CONCLUSIONS OF LAW: Aesthetics, Historic Sites and Rare & Irreplaceable Natural Areas**

The above findings of fact are preliminary and do not support a conclusion of law. The Commission cannot conclude that the Project 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.

**Criterion 8(A) - Wildlife Habitat and Endangered Species:**

Findings of Fact

68. The District Wildlife Biologist, ANR Department of Fish & Wildlife (“DFW”), notes the eastern portion of parcel 2B includes important habitat characteristics that make up a deer wintering area that has been professionally maintained for decades. An important component of this deer habitat is the portion of the hillside that is still forested and that provides the deer cover and serves as a north-south travel corridor for the deer in the winter. Exhibit #037.
69. The DFW recommends that this band of trees not be cleared as part of any future agricultural projects so deer may continue to have a travel corridor between the northern and southern extents of the wintering deer area. Exhibit #001a.

The above findings of fact are preliminary and do not support a conclusion of law. Criterion 8(A) requires that the Commission not grant a permit if it the proposed Project will destroy or significantly imperil necessary wildlife habitat or any endangered species, and

- (i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or
- (ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or

- (iii) a reasonable acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

10 V.S.A § 6086(a)(8)(A).

The burden of proof is on the opponent under Criterion 8(A). *Id.* § 6088(b).

Necessary wildlife habitat is defined by Act 250 as “concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species or wildlife at any period in its life including breeding and migratory periods.” 10 V.S.A § 6001(12).

Criterion 8(A) involves a three-part test:

- (1) whether the Project will impact any “necessary wildlife habitat” or endangered species;
- (2) if so, whether the Project will destroy or significantly imperil such habitat or species; and
- (3) if so, whether one or more of sub-criteria (i) through (iii) is satisfied.

*Re: Gary Savoie d/b/a WLPL and Eleanor Bemis, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order (Vt. Envtl Bd. October 11, 1995). If the Project will destroy or significantly imperil necessary wildlife habitat, and if any of the sub-criteria apply, then the permit must be denied. Southview Associates, 153 Vt. 171 (1989).*

The above findings of fact are preliminary and do not support a conclusion of law. The Commission would require the Applicant to revisit this Criterion and apply the 3-part test and would allow parties sufficient opportunity to review and respond to the Applicant’s supplemental information.

**Criterion 9(A) - Impact of Growth:**

Findings of Fact

- 70. The Project will not result in a significant amount of economic growth. Exhibit #001a.
- 71. Property tax values should not change significantly. The existing restaurant business, Mangalitsa (located in the Village of Woodstock), that will be operating from this property pays approximately \$60,000 in rooms and meals tax and \$45,000 in payroll tax. Exhibit #001a.

The above findings of fact are preliminary and do not support a conclusion of law. To make an affirmative finding under Criterion 9(A), the Commission must determine that the proposed development will not significantly affect the municipality’s and the region’s ability to accommodate two separate items: (i) growth that will occur generally, regardless of the proposed project, and (ii) growth that will occur specifically because of the project. *Re: Town of*

*Stowe, #100035-9-EB, Findings of Fact, Conclusions of Law, and Order at 52 (Vt. Env'tl. Bd. May 22, 1998); Re: St. Albans Group and Wal\*Mart Store. Inc., #6F0471-EB, Findings of Fact, Conclusions of Law, and Order (Altered) at 29 (Vt. Env'tl. Bd. June 27, 1995), aff'd., In re Wal\*Mart Stores. Inc., No. 95-398 (Vt. Sup. Ct. Aug. 29, 1997).* The analysis under this criterion differs from that under Criterion 7 in that here we consider the experienced growth, expected growth and project growth of the municipality. See *Home Depot USA, Inc., Ann Juster, Homer and Ruth Sweet, 1R0048-12-EB Findings of Fact, Conclusions of Law, and Order at 49 (Vt. Env'tl. Bd. August 20, 2001).*

### **Criterion 9(B) - Primary Agricultural Soils:**

#### Findings of Fact

72. The property is enrolled in the Use Value Appraisal Program. Exhibits #001a and #030.
73. The Applicant operates a farm that includes raising livestock (pigs, beef and poultry) and growing vegetables. Exhibits #001a, #032,
74. The Project Tract contains 31.17+/- acres of mapped NRCS Prime and Statewide soils, therefore considered Primary Agricultural Soils ("PAS"). 4.56+/- acres of those soils are located on the east side of the Pomfret Road. Approximately 1.82 acres is impacted by the Project (also on the east side of Pomfret Road). Exhibits #001a and #009.
75. The Project will not reduce the agricultural potential of any remaining primary agricultural soils on the site. Exhibits #001a, #009 and #075.
76. Soils that are not mapped as PAS are being used for agricultural purposes.
77. The Project is not located in a designated growth area referenced in 10 V.S.A. § 6093(a). Exhibit #001a.
78. There are agricultural activities on adjoining lands. Exhibit #001a.
79. The barn/restaurant building was constructed in the general area of a previous barn that was removed. Exhibit #001a.
80. Approximately 18 acres of forested lands (non- PAS) have been converted to agricultural use. Exhibit #001a.

#### Conclusion of Law

The above findings of fact are preliminary and do not support a conclusion of law. Under Criterion 9(B), a subdivision or development may not result in any reduction in the agricultural potential of the primary agricultural soils or must meet sub-criteria i-iv. Prior to making positive findings under Criterion 9(B), the Commission would take additional testimony from the Applicant and would allow parties an opportunity to present evidence and testimony related to Primary Agricultural Soils.

### **Criterion 9(C) - Productive Forest Soils:**

Findings of Fact

81. The site is enrolled in the Use Value Appraisal Program and is managed for commercial forestry. Exhibits #001a, #052
82. There are 130 acres of productive forest soils on the Project Tracts (both side of Pomfret Road). Approximately 18.4 acres have been or will be converted to agricultural use. Exhibits #001a, #029 and #030.
83. The Project has been planned to minimize the reduction of the potential of the productive soils so that the remaining forest soils on the project tract may contribute to a commercial forestry operation. Exhibit #001a.
84. The Project is being developed near the existing road, in an unwooded area where a barn building was formerly located. This will not impact productive forest soils. Exhibit #001a.
85. The Bassett Farm is to the south and the Peacefield Farm (Applicant) manages the adjacent agricultural land for agricultural purposes. Exhibit #001a.

The above findings of fact are preliminary and do not support a conclusion of law. If a permit was to be issued, additional testimony and/or evidence would be allowed to be presented by the Applicant and the parties.

**Criterion 9(H) - Costs of Scattered Development:**

Findings of Fact

86. The Project is not located within or immediately contiguous to an existing settlement because it is not a community center which is compact in size, or does not contain a mix of uses, including commercial and industrial, and, importantly, a significant residential component. Exhibit #001a.
87. The Project is just over a mile outside the Village of Woodstock. Exhibit #001a.
88. Tax revenues will outweigh any cost to the municipality, as the Project is only served by an existing town-maintained road. There are no other municipal utilities. Exhibit #001a..

The above findings of fact are preliminary and do not support a conclusion of law. Criterion 9(H) applies only to projects that are not located within or immediately contiguous to an existing settlement. An "existing settlement" is defined as a designated center pursuant to 24 V.S.A. Chapter 76A, or:

An existing center that is compact in form and size; that contains a mixture of uses that include a substantial residential component and that are within walking distance of each other; that has significantly higher densities than densities that occur outside the center; and that is typically served by municipal infrastructure such as water, wastewater, sidewalks, paths, transit, parking areas, and public parks or greens.

10 V.S.A § 6001(16).

Criterion 9(H) requires a demonstration that:

the additional costs of public services and facilities caused directly or indirectly by the proposed development or subdivision do not outweigh the tax revenue and other public benefits of the development or subdivision such as increased employment opportunities or the provision of needed and balanced housing accessible to existing or planned employment centers. 10 V.S.A § 6086(a)(9)(H).

Criterion 9(H) requires that the Commission determine whether the proposed Project is or is not physically contiguous to an existing settlement. If the proposed project is not physically contiguous to such a settlement, then the applicant must demonstrate that the project's tax revenues and other public benefits outweigh the additional costs of public services and facilities caused by the Project. See *Re: St. Albans Group and Wal\*Mart Stores, Inc., #6F0471-EB, Findings of Fact and Conclusions of Law and Order (Altered) at 36 (Vt. Env'tl. Bd. June 27, 1995), aff'd on other grounds, In re Wal\*Mart, 167 Vt. 75 (1997)*.

**Criterion 9(K) – Development Affecting Public Investments:**

Findings of Fact

89. The Project is adjacent to the Pomfret Road, a town road. Nearby roads include VT Route 12, VT Route 106, VT Route 4, Police, Fire, and Post Office are approximately two miles south in Woodstock Village. Exhibit #001a.
90. There is minimal impact to the neighboring properties, however, the Applicant has installed screening from the parking area on the Project site and on the neighboring property. Exhibit #001a.

The above findings of fact are preliminary and do not support a conclusion of law. Criterion 9(K) applies to projects that are adjacent to governmental and public utility facilities, services, or lands. With regard to such projects, the applicant bears the burden of proving that the Project 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. 10 V.S.A § 6086(a)(9)(K).

**Criterion 9(L) – Settlement Patterns:**

Findings of Fact

*Existing Settlement*

91. The Project Tract is not in a village center, downtown development district, growth center, new town center, Vermont neighborhood or neighborhood development area

designated pursuant to 24 V.S.A. Chapter 76A. Exhibit #001a and Testimony of Dana Hanley.

92. The area surrounding the Project Tract is not a compact, walkable, community center with a mix of uses and substantial residential component, that has significantly higher densities than outside that center. Exhibit #001a and Testimony of Dana Hanley.

*Efficient Use*

93. The Project makes efficient use of land, energy, roads, utilities, and other supporting infrastructure as follows:
- a. The barn structure is located adjacent to Pomfret Road and is in a flat, open area that was the previous site of a demolished barn.
  - b. There are two access points
  - c. The site features are clustered around the building.
  - d. The structure is a multi-story building.
  - e. The three grassy and graveled parking areas are near the building.
  - f. The property is set up to maximize the use of the existing agricultural fields.

*Strip Development*

94. The Project is not confined to an area of linear commercial development with the following characteristics:
- a. Broad road frontage – frontage along Pomfret Road is approximately 1148 feet on the east side of Pomfret Road and 825 feet along the west side of Pomfret Road. Frontage related to the barn/restaurant project is approximately 250-feet along the road with two accesses off the public road. The building is set back off the public road and parking is in the back and along the sides of the building. Exhibit #075.
  - b. Lack of connection to surrounding land uses except by highway - The restaurant is not connected to any other commercial business. The farmland is connected to other farmland. There are no sidewalks or other pedestrian multi-use infrastructure that connect a development to an existing development.
  - c. Lack of coordination with surrounding land uses except by highway. The current surrounding land uses are rural and residential.
  - d. Limited accessibility for pedestrians.
95. The following evidence demonstrates that the Project will not cause or contribute to a pattern of strip development along the Pomfret Road:



Conservation easements with the Vermont Land Trust (“VLT”) restricts development on all the flat agricultural land on both sides of the Pomfret Road. The agricultural land must remain in agricultural use. Testimony.

The Applicant has worked with VLT, the VT Agency of Agriculture and a local farmer to revitalize the farm. Produce and protein produced on the farm is intended to be served on the menu for the restaurant. The property’s primary use is agricultural. Exhibit #001a and Testimony.

The property is enrolled in the State of Vermont’s Use Value Appraisal Program that requires managing the property for agricultural and forestry purposes. Exhibit #030.

96. Not all of the property of others along the Pomfret Road corridor are subject to conservation easements. Testimony.
97. Even though the area is in the R-5 district, zoning boundaries and districts can change. Current zoning prohibits most commercial uses in the R-5 district. Testimony.

#### Conclusions of Law

The above findings of fact are preliminary and do not support a conclusion of law. Criterion 9(L) is intended to “promote Vermont’s historic settlement pattern of compact village and urban centers separated by rural countryside” by requiring that projects outside an existing settlement: (1) make efficient use of land, energy, roads, utilities, and other supporting infrastructure; and (2) not contribute to a pattern of strip development; or, if confined to existing strip development, the project must infill and minimize strip characteristics. 10 V.S.A § 6086(a)(9)(L).

Under this Criterion, the threshold question is whether the proposed Project is in an “existing settlement.” Act 250 defines “existing settlement” as any designated center pursuant to 24 V.S.A. Chapter 76A, or:

An existing center that is compact in form and size; that contains a mixture of uses that include a substantial residential component and that are within walking distance of each other; that has significantly higher densities than densities that occur outside the center; and that is typically served by municipal infrastructure such as water, wastewater, sidewalks, paths, transit, parking areas, and public parks or greens. 10 V.S.A § 6001(16).

Strip development outside a designated center is not an existing settlement. *Id.*

Strip development is “linear commercial development along a public highway” that, considering topographic constraints of the area, includes three or more of the following characteristics:

- broad road frontage

- predominance of single-story buildings
- limited reliance on shared highway access
- lack of connection to any existing settlement except by highway
- lack of connection to surrounding land uses except by highway
- lack of coordination with surrounding land uses
- limited accessibility for pedestrians.

10 V.S.A § 6001(36).

The Project is outside an existing settlement, therefore it must meet the requirements of Criterion 9(L).

Criterion 9(L) requires that projects:

1. make efficient use of land, energy, roads, utilities, and other supporting infrastructure;
2. not contribute to a pattern of strip development; and
3. if confined to existing strip development in a built-up area, infill and minimize the characteristics of strip development.

The project, an 80-seat restaurant located in a barn on a 194.11-acre property with farming activities on a portion of the property, accessed by a town road makes efficient use of the land.

The project exhibits a number of the characteristics associated with strip development. Of the 7 characteristics, the Project exhibits four of them. But even though the project may meet the description of strip development, there may mitigating circumstances where we could conclude that it “will not contribute to a pattern of strip development along public highways.” The central question to ask is, are there particular circumstances that make it unlikely that the project will not attract other commercial development.

The VLT has placed development restrictions on the Applicant’s property. The project is located in a part of town which is zoned for very limited commercial development. The barn/restaurant is built to support a working farm and therefore supports the Vermont working lands economy.

If we were to issue a permit, we would require additional information that would describe the conservation easement restrictions made by the Vermont Land Trust. We would also require additional evidence to address whether the project contributes to or creates a magnate for a pattern of strip development. The Applicant and parties would be given an opportunity to respond to any additional evidence submitted. We would also give the Applicant an opportunity to submit additional information related to Criterion 9(L).

**Criterion 10 – Town and Regional Plans:**

Before granting a permit, the District Commission shall find that the subdivision or development is in conformance with any duly adopted local or regional plan or capital program under 24 V.S.A. chapter 117. 10 V.S.A. §6086(a)(10).

Findings of Fact

98. The proposed restaurant may qualify as an Accessory On Farm Business (“AOFB”). This is the responsibility of the Town of Woodstock to determine and not the District Commission. The District Commission has no legal authority to make such a determination. The District Commission’s responsibility is to determine whether the proposed project, an 80-seat restaurant, conforms to the Woodstock Town Plan. We hold that it does not.

99. From “Accessory On-Farm Businesses: FAQs”

What does the 50% threshold for total annual sales in the definition of AOFBs mean?

This threshold means that to qualify as an AOFB based on sales of qualifying products, at least 50% of the total annual gross sales, in dollars, from the farm business must be generated through the sale of principally produced products. **The municipality is responsible for making this threshold determination.** (Emphasis added.)

<https://agriculture.vermont.gov/land-use-renewable-energy-0/accessory-farm-business>

100. The municipal plan that applies to this application is the “Town & Village of Woodstock, Vermont, Comprehensive Plan” (“Town Plan”), adopted on September 17, 2019. Official Notice, Town Plan.

101. The Future Land Use map of the Town Plan identifies the project site to be in an “R5” (Residential Five-Acre Area) district. Official Notice, Town Plan.

102. The Town Plan describes the Residential Five-Acre Area as:

The Residential Five-Acre Area makes up a majority of the low-density land area in Woodstock. The primary purpose of this land use area is to provide a location for low-density residential development while perpetuating the open, natural landscape that is so essential to Woodstock’s rural character. Most of the development in this land use area lies directly along town roads, with much of it within three hundred feet of these roads. With many of the homes being built close to the road, the back of the lots remain undeveloped. When combined with neighboring lots, the undeveloped portions contribute to larger areas of undeveloped land creating the desired outcome for wildlife habitat and healthy forests. These larger lots carry a twofold benefit, homes for the residents and when viewed in total, a healthy ecosystem.

Minimum density for this land use area should be no less than five acres. Uses in this area should be limited primarily to residential and occupations that can be conducted within a home such as a day care facility or bed and breakfast. Home occupations and home enterprises are encouraged.

Development in this area must be of a type and scale that is consistent with the purpose of this land use area. Retail development of any scale is not appropriate for this land use area.

Town Plan, pages 109-110.

103. The Land Use section of the Town Plan, page 108 states:

Woodstock's character is formed by its historic beauty, both that which was created by the geological forces thousands of years ago and the more recent architecture of the nineteenth century. These two factors created Woodstock's predominant economy, tourism and second homes. The community is recognized the world over for its beauty and pleasant experience. The village is a walkable size with a compact yet vibrant downtown. Viewed from anywhere within the village one can see the natural beauty that surrounds the village. The intent of the community is to maintain this balance of the natural countryside juxtaposed to the developed area of the village. Development and future growth are to take place in established growth centers, as it is here that the necessary infrastructure exists.

104. The Future Pattern of Settlement subsection of the Land Use section of the Town Plan, also on page 108, states:

First in importance in formulation of the proposed land use pattern is consideration of the existing settlement pattern. Woodstock has already been settled into clusters of residences and other activities in the form of villages and hamlets surrounded by less dense settlement, rural in character, or large spaces in natural vegetation. The existing settlement pattern has demonstrated itself to be of sociological, psychological, and aesthetic benefit to the region, while at the same time working within a system of neighboring centers that are efficient and economical for the conduct of business enterprise and for the provision of social and community facilities and services. This pattern must be protected and enhanced and is supported by state planning law.

105. The Woodstock Town Zoning Regulations, pages 10-11, state:

Section 302 Residential Five Acre – 5 Acres

- A. Purpose To designate areas of lower density residential development in the more open regions of the community.

B. Uses Not Requiring a Permit

1. Agriculture
2. Forestry
3. Short-Term Rental

C. Uses Requiring an Administrative Permit

1. Buildings and Structures for Agriculture and Forestry
2. Single-family Dwelling
3. Structures Accessory to a Single-family Dwelling
4. Two-family Dwelling
5. Detached Apartment
6. Home Occupation
7. Subdivision, Minor

D. Uses Requiring a Conditional Use Permit

1. Multi-family Dwelling
2. Subdivision, Major
3. Public and Quasi-public Use
4. Public Utility
5. Home Occupation
6. Home Enterprise
7. Special Care Facility
8. Day Care Facility
9. Bed and Breakfast
10. Commercial Recreational Facility
11. Extraction of Sand, Gravel, and Mineral

Conclusions of Law

Criterion 10 requires that a project must “be in conformance with any duly adopted local or regional plan.” 10 V.S.A. §6086(a)(10). The burden of proof is on the applicant. 10 V.S.A. §6088(a). The Commission understands that “weak language in a plan cannot serve as a bar to deny a project.” Words like “strongly encourages” and “should focus . . .” are not mandatory language. Enforceable verbs include only “shall” and “must.” Not only must mandatory language be used but the language must be specific.

A provision of a town plan evinces a specific policy if the provision: (a) pertains to the area or district in which the project is located; (b) is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and (c) is sufficiently clear to guide the conduct of an average person, using common sense and understanding. *Re: Times and Season, LLC and Hubert K. Benoit, #3W0839-2-EB (Altered), Findings of Fact, Conclusions of Law, and Order at 59 (Nov. 4, 2005), affirmed in part and reversed in part, In re Appeal of Times and Seasons, LLC, 2008 VT 7 (Vt. S. Ct.); The Mirkwood Group and Barry Randall, #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 29 (Aug. 19, 1996).*

Applying these requirements to the Woodstock Town Plan we find:

In the "Land Use" section of the Town Plan we find the following language:

First, "[t]he community is recognized the world over for its beauty and pleasant experience. The village is a walkable size with a compact yet vibrant downtown. . . Development and future growth are to take place in established growth centers, as it is here that the necessary infrastructure exists."

Second, under the section "The Future Pattern of Development," the Town Plan states the following:

First in importance in formulation of the proposed land use pattern is consideration of the existing settlement pattern. Woodstock has already been settled into clusters of residences and other activities in the form of villages and hamlets surrounded by less dense settlement, rural in character, or large spaces in natural vegetation. The existing settlement pattern has demonstrated itself to be of sociological, psychological, and aesthetic benefit to the region, while at the same time working within a system of neighboring centers that are efficient and economical for the conduct of business enterprise and for the provision of social and community facilities and services. **This pattern must be protected and enhanced and is supported by state planning law.** [Emphasis added.]

Clearly, the above language is mandatory in nature, directing those involved in development of the town to protect and enhance the existing settlement patterns. The project lies within the Residential 5-Acre Area.

According to the Town Plan;

The Residential Five-Acre Area makes up a majority of the low-density land area in Woodstock. The primary purpose of this land use area is to provide a location for low-density residential development while perpetuating the open, natural landscape that is so essential to Woodstock's rural character. Most of the development in this land use area lies directly along town roads, with much of it within three hundred feet of these roads. With many of the homes being built close to the road, the back of the lots remain undeveloped. When combined with neighboring lots, the undeveloped portions contribute to larger areas of undeveloped land creating the desired outcome for wildlife habitat and healthy forests. These larger lots carry a twofold benefit, homes for the residents and when viewed in total, a healthy ecosystem.

Minimum density for this land use area should be no less than five acres. Uses in this area should be limited primarily to residential and occupations that can be conducted within a home such as a day care facility or bed and breakfast. Home occupations and home enterprises are encouraged.

**Development in this area must be of a type and scale that is consistent with the purpose of this land use area. Retail development of any scale is not appropriate for this land use area.** [Emphasis added.]

According to the Town Plan, the 5-Acre district's primary purpose is for "low density residences which will leave open large tracks of open land for wildlife creating "a healthy ecosystem." Much of this language is not mandatory using the word "should" several times. We agree that the farm fits the primary purpose of this district.

However, what do we make of the language at the end of the section on Residential 5-Acre Area? The language is mandatory stating that development in the 5-Acre Residential area "**must** be of a type and scale that is consistent with the purpose of this land use area." Is an 80-seat restaurant consistent with the purpose of this land use area? Does an 80-seat restaurant constitute "retail development" and therefore is not "appropriate for this land use area?"

The word "appropriate" may not of itself be a mandatory expression but arguably it is when combined with the prior sentence commanding that development "must" fit the purposes of the "Five-Acre Area." But what of the word "retail?" Is a restaurant a retail operation? The noun retail is defined by the Oxford American Dictionary as "the sale of goods to the public in relatively small quantities for use or consumption rather than resale." Some experts contend that restaurants are retail in nature but it is somewhat unclear.

The word "retail" is somewhat ambiguous. The Vermont Supreme Court's decision *In re Molgano*, 163 Vt. 25, 30 (1994) instructs the Commissions to examine the relevant zoning regulations to resolve the ambiguity. "Zoning bylaws are more than strong indications of legislative intent in determining the meaning of an ambiguous town plan; they are the specific implementation of the plan." *Id.*

Upon examination of the zoning regulations a restaurant is neither a permitted use nor a conditional use in the Residential 5-Acre zone. The zoning regulations aid us in understanding the use of the word "retail" and helps us understand that a restaurant is not "consistent with purpose of this land use area."

The Town Plan, with the help of the Zoning regulations, as allowed by *In re Molgano*, "evinces a specific policy by (a) indicating the Five Acre Area in which the project is located, (b) guides and proscribes conduct i.e., "must" not be retail in purpose and with the help of the Zoning bylaw, an average person is able to clearly see that a restaurant is not intended for this area of town.

In the alternative, if we determine that the word "retail" evinced no ambiguity and includes restaurants, then we find that an 80-seat restaurant is completely out of scale with the existing uses and is not appropriate in this location. The Woodstock Town Plan requires that projects "must be of a type and scale that is consistent with the purpose of this land use area." Such purposes include residential, home occupations and home enterprises. An 80-seat restaurant is

a retail development and is not “appropriate” and violates the clear, mandatory language of the Woodstock Town Plan.

Therefore, the project is not in conformance with the Woodstock Town Plan.

Conclusion

The Project does not comply with Criterion 10.


**VII. SUMMARY CONCLUSION OF LAW - Partial Findings**

If the Commission was to make final Conclusions of Law and Order, additional public hearings would be scheduled to gather additional evidence and parties would be given an opportunity to present evidence and cross examine the Applicant under criteria where Findings of Fact have not been finalized. Based upon the foregoing Partial Findings of Fact, the Commission concludes that the Project does not comply with Criterion 10 Conformance with the Town Plan. 10 V.S.A § 6086(a).

**VIII. ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, Land Use Permit Application #3W1122 is hereby denied.

Dated this 22<sup>nd</sup> day of October, 2021.

By   
\_\_\_\_\_  
Tim Taylor, Chair  
District 3 Environmental Commission

Commissioners participating in this decision: Roderick Maclay  
Suzanne Butterfield

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. The appellant must file with the Notice of Appeal the relevant entry fee required by 32 V.S.A. § 1431.



The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

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, 2<sup>nd</sup> Floor, Suite 303, Burlington, VT 05401.

Documents associated with this decision can be viewed on the Natural Resources Board's website at <https://nrb.vermont.gov/>, select Act 250 Database, enter 3W1122 as the Project Number and follow prompts.

## **E-Notification CERTIFICATE OF SERVICE # 3W1122**

I hereby certify that I, the undersigned, sent a copy of the foregoing Partial Findings of Fact and Conclusions of Law and Order and Memorandum of Decision and Order on October 22, 2021 by electronic mail to the following email addresses. All email replies should be sent to [NRB.Act250Springfield@vermont.gov](mailto:NRB.Act250Springfield@vermont.gov). **Note: Any recipient may change its preferred method of receiving notices and other documents by contacting the NRB 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 the District Office of any email address changes.**

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