



LAND USE PERMIT AMENDMENT

State of Vermont
Natural Resources Board
District 8 Environmental Commission
440 Asa Bloomer State Office Building
88 Merchants Row, 4th Floor
Rutland, VT 05701-5903
<https://nrb.vermont.gov/>

CASE NO: 8B0503-3

Poulin Grain, Inc.
24 Railroad Square
Newport, VT 05855

LAW/REGULATIONS INVOLVED

10 V.S.A. §§ 6001 – 6111 (Act 250)

The District 8 Environmental Commission (“Commission”) hereby issues Land Use Permit (“LUP”) amendment 8B0503-3, pursuant to the authority vested in it by 10 V.S.A. §§ 6001-6111. This permit amendment applies to the lands identified in Book 507, Page 254 of the land records of the Town of Bennington, Vermont as the subject of a deed to Poulin Grain Inc., the Permittee.

Land Use Permit 8B0503 Condition 5 limited hours of operation of the processing plant/conveyors or delivery trucks entering the new facility to 7:00 AM to 7:00 PM Monday through Saturday. **This permit specifically authorizes the expansion of the operating hours of the processing plant/conveyors and/or delivery trucks entering or leaving the facility from 6:00 AM to 9:00 PM, Monday through Saturday, as further specified herein (Condition 9).**

The project is located at 1873 VT Route 67E in North Bennington Village, Vermont.

Jurisdiction attaches because the Project constitutes a material change to a permitted development or subdivision, and thus requires a permit amendment pursuant to Act 250 Rule 34.

The Permittee and its assigns and successors in interest, is obligated by this permit to complete, operate and maintain the project as approved by the District Commission in accordance with the following conditions.

1. The project shall be completed, operated and maintained in accordance with the conditions of this permit, Findings of Fact and Conclusions of Law 8B0503-3, the permit application, plans, and exhibits on file with the Commission, and other material representations. In the event of any conflict, the terms and conditions of this permit and the conclusions in the findings shall supersede the approved plans and exhibits.
2. All conditions of Land Use Permit 8B0503 and amendments are in full force and effect except as further amended herein.

3. Representatives of the State of Vermont shall have access to the property covered by this permit, at reasonable times, for the purpose of ascertaining compliance with Vermont environmental and health statutes and regulations and with this permit.
4. No change shall be made to the design, operation or use of this project without a permit amendment issued by the Commission or a jurisdictional opinion from the District Coordinator that a permit is not required.
5. No further subdivision, alteration, and/or development on the tracts of land approved herein shall be permitted without a permit amendment issued by the Commission or a jurisdictional opinion from the District Coordinator that a permit is not required.
6. Pursuant to 10 V.S.A. § 8005(c), the Commission or the Natural Resources Board may at any time require that the permit holder file an affidavit certifying that the project is in compliance with the terms of this permit.
7. The conditions of this permit and the land uses permitted herein shall run with the land and are binding upon and enforceable against the Permittee and their successors and assigns.
8. The Permittee shall comply with all conditions of the Agency of Natural Resources (“ANR”) Wastewater System and Potable Water Supply Permit WW-8-0327-1, issued on January 31, 2005, by the ANR Drinking Water and Groundwater Protection Division. Any nonmaterial changes to these permits shall be automatically incorporated herein upon issuance by the ANR.
9. **The hours of operation of the processing plant/conveyors shall be limited to 7:00 AM to 9:00 PM Monday through Saturday and the hours delivery trucks enter or leave the facility shall be limited to 6:00 AM to 9:00 PM Monday through Saturday. There shall be no grain processing operations, including loading/unloading delivery trucks, prior to 7:00 AM; authorized activities during the expanded morning hours approved herein (i.e., activity between 6:00 AM and 7:00 AM) shall be limited to loaded delivery trucks leaving the facility from the approved overnight parking area.**
10. A maximum of 20 ingredient truckloads per day shall enter the Project.
11. The Permittee shall employ the following noise and traffic safety mitigation measures:
 - a. Bulk delivery trucks and tractor trailers shall not be parked overnight on the ‘Crandall property’. Bulk delivery trucks shall be parked in the lower lot west of the processing area at Main Street near Buckley Road except while loading/unloading or queued to be loaded/unloaded during the hours approved herein.
 - b. There shall be a one-way traffic flow for bulk delivery trucks and tractor trailers; delivery trucks and tractor trailers shall enter the Project from Greenwich Street and travel southwest parallel to the railroad tracks, exiting from Main Street near Buckley Road.
 - c. Incoming bulk delivery trucks may idle only while actively in process of unloading grain in order to operate the PTO (power take-off). Bulk delivery trucks shall not idle while being loaded or queued to be loaded or unloaded. Bulk delivery trucks parked overnight in the approved lower lot shall not idle more than five (5) minutes during any 60-minute period while the truck is stationary.

- d. The Permittee shall implement a policy of not using jake brakes onsite.
 - e. The Permittee shall utilize broadband rather than tonal back-up alarms on bulk delivery trucks. The Permittee shall continue to assess and implement truck staging strategies to minimize the need for bulk delivery trucks to back up.
 - f. There shall be no loading and/or unloading of rail cars and bulk delivery trucks between the hours of 9:00 PM and 7:00 AM (overnight hours).
 - g. Trucks parked overnight in the approved lot shall be backed in and ready to pull out to eliminate the use of back-up alarms during the expanded morning hours of 6:00 AM to 7:00 AM.
 - h. The grain mill/grinder shall only be operated during the hours of 7:00 AM to 7:00 PM.
 - i. The doors and windows on the grain mill building facing Greenwich Street shall remain closed during operation of the grain hammer mill/grain grinder.
 - j. There shall be no hammering or banging on silos/bins to dislodge grain outside the hours of 7:00 AM to 7:00 PM except when unavoidable. The Permittee shall not utilize steel mallets to hammer the bins, instead utilizing rubber mallets. Under no circumstance shall there be hammering or banging (for grain processing activities) after 9:00 PM.
 - k. There shall be no hammering or banging on rail cars (as needed to dislodge grain) except during the hours of 7:00 AM to 5:00 PM.
 - l. The Permittee shall install and utilize chain unloaders (aka Flying Dutchmen) or other material loosening systems such as turbine vibrators, air canons, on the silos/bins to dislodge grain from silos in order to avoid hammering on the outside of the silos.
 - m. The silos and chutes shall be treated with a paint-on vibration dampening compound.
 - n. The Permittee shall install a motor enclosure or noise barrier on the tower railing to further mitigate sound from the electric motors used to operate the grain silo augers.
 - o. The Permittee shall conduct regular preventative maintenance of its trucks and equipment to mitigate noise.
12. As part of an ongoing effort to reduce aesthetic impacts on neighbors, the Permittee shall continue to assess noise impacts and mitigation opportunities.
 13. The Permittee shall not erect additional exterior lighting without prior written approval from the District Coordinator or the Commission, whichever is appropriate under the Act 250 Rules. All exterior lighting shall be downcast and shielded in such a manner as to minimize glare and prevent light trespass.
 14. The Permittee shall provide each prospective purchaser of any interest in this Project a copy of the Land Use Permit amendment and the Findings of Fact before entering into any written contract of sale.
 15. Pursuant to 10 V.S.A. § 6090(b)(1), this permit amendment is hereby issued for an indefinite term, as long as there is compliance with the conditions herein. Notwithstanding any other

provision herein, this permit shall expire three years from the date of issuance if the Permittee has not commenced construction and made substantial progress toward completion within the three-year period in accordance with 10 V.S.A. § 6091(b).

Failure to comply with any condition herein may be grounds for permit revocation pursuant to 10 V.S.A. sec. 6027(g).

Dated in Rutland this 13th day of June 2022.

By /s/ Richard Kobik
Richard Kobik, Acting Chair
District 8 Commission

Members participating in this decision: Don Miller and Michael McDonough

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. Decisions on minor applications may be appealed only if a hearing was held by the district commission. Please note that there are certain limitations on the right to appeal, including appeals from Administrative Amendments and interlocutory appeals. See 10 V.S.A. § 8504(k), 3 V.S.A. § 815, and Vermont Rule of Appellate Procedure 5. 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.

CERTIFICATE OF SERVICE 8B0503-3

I hereby certify that I, the undersigned, sent a copy of the foregoing Land Use Permit and Findings of Fact, Conclusions of Law on June 13, 2022, by U.S. Mail, postage prepaid, to the individuals without email addresses, and by electronic mail to the following with email addresses. All email replies should be sent to NRB.Act250Rutland@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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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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I. INTRODUCTION

On June 1, 2020, Poulin Grain, Inc., filed application number 8B0503-3 seeking authorization to expand the operating hours of the processing plant/conveyors and deliveries from the currently approved hours of 7:00 AM to 7:00 PM Monday through Saturday to 4:00 AM to 11:00 PM Monday through Saturday (the “Project”). The Project is located at 1873 VT Route 67E in North Bennington Village, Vermont. The tracts of involved land consist of 2.44 total acres over three tracts (SPAN 573-254-11732, SPAN 051-138-64539, and SPAN 051-138-64558, collectively the “Project Tract”). The Applicant's legal interest is ownership in fee simple described in a deed recorded on June 30, 2015, in Book 507, Page 254, in the land records of Bennington, Vermont.

The application was determined to be incomplete under Act 250 Rule 10(D) for reasons stated in an email from the District Coordinator to the Applicant dated June 10, 2020. The required supplemental information was submitted on June 30, 2020, and the application was deemed complete on July 1, 2020.

Pursuant to Act 250 Rule 16, the District 8 Environmental Commission (“Commission”) convened a Prehearing Conference (“PHC”) on August 7, 2020; the PHC was held remotely by Microsoft Teams videoconferencing software due to the coronavirus/“COVID-19” pandemic. Pursuant to EO No. 19-17, the Convening Officer disclosed a potential conflict of interest. In response to this disclosure, all Parties stated on the record they had no objections to Chair Kobik’s participation in the proceedings, as the interest was deemed ‘arms-length’ and insignificant, and not disqualifying. Jim Sullivan, Bennington County Regional Commission (“BCRC”) Executive Director, also disclosed a potential institutional conflict of interest; in response to this disclosure, all Parties stated on the record they had no objections to Mr. Sullivan’s representing the BCRC, as the interest was also deemed insignificant, and not disqualifying. The Commission issued Prehearing Conference Reports and Orders (“PHCROs”) on September 24, 2020, October 21, 2020, and November 11, 2020.

The Parties agreed to a Non-adversarial Meeting and Negotiation Session, held remotely on December 3, 2020. The Commission conducted a site visit on November 4, 2020, and a hearing on December 11, 2020. At the PHC, all parties waived their rights to an in-person hearing and instead agreed to a process that also allowed for the hearing to be held via Microsoft Teams videoconferencing software. The Project was evaluated by the Commission at the hearing in accordance with Act 250 Rule 34(E) – Stowe Club Highlands Analysis and the implicated environmental criteria of 10 V.S.A. § 6086(a). The Commission intended to narrow the scope of the hearing to criteria 8 – Aesthetics/noise) and 10 – Local and regional Plans but expanded the scope to include criteria 5 – Transportation and 9K – Public Investments. At the end of the hearing, the Commission recessed the proceeding pending the submittal of additional information. The Commission adjourned the hearing after receipt of the additional information, an opportunity for parties to respond to that information, and the completion of Commission deliberations.

As set forth below, the Commission finds that the Project complies with 10 V.S.A § 6086(a) (Act 250).

II. JURISDICTION

Jurisdiction attaches because the Project is a material change to a permitted development or subdivision, and thus requires a permit amendment pursuant to Act 250 Rule 34.

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 previous applications and decisions related to the 8B0503 series.

Accordingly, official notice is hereby taken of the Land Use Permit (“LUP”), Findings of Fact and Conclusions of Law, and applications related to the 8B0503 series, 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. AMENDMENT APPLICATION – RULE 34(E)

The threshold question on an amendment application is “whether the applicant proposes to amend a permit condition that was included to resolve an issue critical to the issuance of the permit.” Act 250 Rule 34(E)(1).

The applicant here *does* seek to amend such critical permit conditions, as follows, by expanding the approved hours of operation:

LUP 8B0503 Condition 5: Hours of operation of the processing plant/conveyors or delivery trucks entering the new facility shall be limited to 7:00 AM to 7:00 PM, Monday through Saturday.

LUP 8B0503 Condition 8: The Commission reserves the right to impose additional conditions to this permit with regard to noise. Such conditions would not be imposed without notice and an opportunity for a public hearing.

Findings of Fact 8B0503 #11 stated, “The applicant has proposed hours of operation of 7:00 AM to 8:00 PM for the new facility.” Despite that adjoining landowners at that time declined to seek party status, LUP 8B0503 authorized more limited hours of 7:00 AM to 7:00 PM Monday through Saturday, a 12-hour day, because “[t]he noise associated with truck operations and processing can be an annoyance for residential properties nearby in North Bennington and Shaftsbury”, and noise can be considered under the aesthetics criterion (8). The conditional approvals in LUP 8B0503 were constricted by those impacts related only to the new facility and related trucking operations because residential properties bordered the project area; they did not extend to the pre-existing impacts. The Commission decided that a “reasonable time for operation of the new feed processing, storage, and loading facility is 7:00 AM to 7:00 PM”, and that “[s]uch a restriction would not apply to neither the pre-existing Feed Store retail operation nor to train deliveries which were expected to be infrequent”.

Therefore, the Commission must conduct the Rule 34(E) analysis, as set forth below.

The second factor that must be considered is whether the applicant “is merely seeking to relitigate the permit condition or to undermine its purpose and intent.” Rule 34(E)(2). In this instance, the Commission has determined that the Applicant is *not* merely seeking to relitigate the permit condition or undermine its purpose and intent. Therefore, the Commission proceeds to review the other factors under Rule 34(E).

Rule 34(E) requires the Commission to balance the need for flexibility against the need for finality, considering at least the following factors:

- (a) Whether there has been a change in fact, law, regulation beyond the permittee’s control;
- (b) Whether there has been a change in technology, construction, or operations which necessitates the amendment;

- (c) Whether there are other factors, including innovative or alternative design, which provide a more efficient or effective way to mitigate impacts from the Project;
- (d) Whether there are other important policy considerations, including the Project's furtherance of the goals and objectives in the municipal plan;
- (e) Whether there was manifest error in issuance of the permit condition; and
- (f) The degree of reliance on the prior permit condition(s) or material representation(s) made in the prior proceeding, by the Commission, Environmental Court or former Environmental Board if applicable, or any other person with a particularized interest protected by 10 V.S.A. Chapter 151 that may be affected by the proposed amendment.

The Applicant's operations will not differ from what has already been permitted; however, the Applicant does seek to extend the hours they are able to perform those permitted operations, resulting in a change in size/frequency of operations.

In this instance, not all threshold factors are applicable; changes in facts and operations since the original permit was issued +/-25 years ago are the primary factors under which the Applicant is seeking flexibility. The Applicant is not relitigating the cited permit conditions, but merely seeks flexibility to adapt to those changes in facts and operations.

Changes in facts beyond the Permittee's control and changes in operations (factors a and b) that favor flexibility: Since 1995, the dairy industry has changed considerably. There are fewer dairy farms, and the average size of the remaining farms has increased; many farms are considered 'large farm operations', which operate on a much tighter margin.

Fewer farms and larger and more intensive dairy operations have resulted in changes to the daily operations of those dairy farms. The larger dairy farms no longer rely on a more traditional milking and feeding schedule, and instead operate nearly continuously on an around-the-clock schedule, necessitating feeding and deliveries during 'off hours'.

The dairy farms have had to maximize nutrition to maximize milk production and increase output from the livestock on their farms. The dairy operations are more complex and intensive, also relying on a variety of different mixes of grain/feed formulas for specialized nutrition. These adaptations on the part of the dairy farmers have allowed dairy farms to survive in an era in which operating a dairy farm is considerably more difficult.

However, feed storage capacity on farms has not kept pace with increased herd size, non-traditional feeding schedule, and specialized nutritional needs, requiring more frequent grain deliveries.

In order to meet the demands of the dairy industry, grain processors have had to follow suit and undergo similar adaptations. Similar to the dairy industry, the number of grain processors in the area has also decreased over the established time period. The remaining processors have had to

expand operations to accommodate closures of other mills while providing services that correspond to the different and expanded needs of the dairy farms. Expanded hours for grain processing has been necessary to serve the client dairy farms and accommodate their feeding schedules, feed mix needs, and feed storage limitations, as well as the Applicant's own onsite storage limitations.

There are no innovative or alternative designs which provide a more efficient or effective way to mitigate impacts from the Project.

There are no important policy considerations.

There was no manifest error in issuance of the permit conditions.

The neighbors have relied on the prior permit conditions to mitigate impacts from the Project. Neighbors testified at the hearing that there has been a noticeable difference in operations from the prior owner (Whitman) to the current owner (Poulin Grain); Poulin Grain expanded the business right away, but not the infrastructure, putting a strain on the operation and placing the onus on the neighbors to adjust [to noise impacts].

Exhibit 003 and Testimony.

Having considered all the factors, the Commission finds that flexibility outweighs finality, so the amendment application will be considered on its merits.

V. 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 and Landowner, by Josh Poulin and Jeffrey Polubinski, Esquire.

The municipality of North Bennington Village not represented.

The Shaftsbury Planning Commission [adjoining municipality], by Naomi Miller, Mike Foley, and Chris Williams.

The Bennington County Regional Planning Commission by Jim Sullivan, Executive Director and Catherine Bryars, Senior Planner.

The State of Vermont Agency of Natural Resources ("ANR"), by Jennifer Mojo, Senior Regulatory Policy Analyst, Office of Planning & Policy.

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 prehearing 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:

Erika Tanner Floriani (lives at 1910 Route 67E), granted party status under criteria 5 and 9K (Traffic & Safety), 8 (Aesthetics/Noise), and 10 (Local and Regional Plans).

Richard J. Howe (lives at 1910 Route 67E), granted party status under criteria 5 and 9K (Traffic & Safety), 8 (Aesthetics/Noise), and 10 (Local and Regional Plans).

James Derby (lives at 2017 Route 67E), granted party status under criteria 5 and 9K (Traffic & Safety), 8 (Aesthetics/Noise), and 10 (Local and Regional Plans).

H V Nonprofit, Inc. c/o Shires Housing (Route 67E), by Stephanie Lane, Executive Director, granted party status under criteria 5 and 9K (Traffic & Safety), 8 (Aesthetics/Noise), and 10 (Local and Regional Plans).

ii. Final Party Status Determinations

Prior to the close of 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.

C. Friends of the Commission

The District Commission allowed the following nonparties to participate as Friends of the Commission pursuant to 10 V.S.A § 6085(c)(5). Unless otherwise noted below, each was granted the rights of full participation allowed under 10 V.S.A § 6085(c)(5):

Patricia Barber, adjoining landowner, currently residing in the Village of North Bennington, VT 05257.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Applicant has met the burden of proving compliance with the following criteria through submittal of the application:

1 - Air Pollution

1 - Water Pollution

1(A) - Headwaters

1(C) - Water Conservation

1(D) - Floodways

1(E) - Streams

1(F) - Shorelines

1(G) - Wetlands

2 - Water Supply

3 - Impact on Existing Water Supplies

4 - Soil Erosion

6 - Educational Services

7 - Municipal Services

8 - Natural Areas

- | | |
|--|---------------------------------------|
| 8 – Historic Sites | 9(E) - Extraction of Earth Resources |
| 8(A) - Wildlife Habitat & Endangered Species | 9(F) - Energy Conservation |
| 9(A) - Impact of Growth | 9(G) - Private Utility Services |
| 9(B) – Primary Agricultural Soils | 9(H) - Costs of Scattered Development |
| 9(C) - Productive Forest Soils | 9(J) - Public Utility Services |
| 9(D) - Earth Resources | 9(L) – Settlement Patterns |

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

The findings of fact are based on the application, Exhibits 001 - 026 and other evidence in the record. Findings made in this decision are not limited to the specific criterion in which they appear and may apply to other sections of the decision. To the extent that any proposed findings of fact are included in this decision, they are granted; otherwise, they are denied.

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 Project is located on several parcels in North Bennington and Shaftsbury. Most of the parcels are owned by Poulin Grain, but some parcels are leased to Poulin Grain.
2. The Project is located adjacent to the Vermont Rail line.
3. Originally a retail feed supply store, a milling operation to mix custom feeds was added to the operations and was permitted under LUP 8B0503 in 1995.
4. The Project is focusing on expanded hours for the bulk grain delivery/milling operations, not the retail operations.

Criterion 1(B) - Waste Disposal:

Findings of Fact

5. The Project Tract is served by a municipal sewer system and is subject to existing Wastewater System and Potable Water Supply Permit WW-8-0327, issued on October 6, 1994, and

amended on January 31, 2005 (WW-8-0327-1), by the Agency of Natural Resources ("ANR") Department of Environmental Conservation. Exhibit 026.

6. The Project does not entail modifications to the existing buildings or water/wastewater utilities that would constitute the need for an amendment to the previous Wastewater System and Potable Water Supply Permits. Exhibit 026.
7. Permitted hours of operation are 7:00 AM to 7:00 PM; Project proposes to expand those hours from 4:00 AM to 11:00 PM. There are a total of 30 employees at the facility. The most people there at one time are between 15 to 16 employees during the middle of the day. It is expected that 1 to 2 staff would be onsite from 4:00 AM to 7:00 AM and 1 to 2 staff would be onsite from 7:00 PM to 11:00 PM. No additional employees would be hired for the expanded hours; the existing employees would just work longer hours in the event that the hours were expanded. Exhibit 026.
8. The proposed expansion of hours, without corresponding increase in the total size of the workforce beyond the permitted limit (a total of 32 persons, maximum, during any 24-hour day of operation), does not require an amendment of the previous Wastewater System and Potable Water Supply Permits. Exhibit 026.
9. The Commission will include a condition to comply with the existing Wastewater System and Potable Water Supply Permit(s).

Conclusions of Law

The ANR permits create a presumption pursuant to Act 250 Rule 19 that the disposal of wastes through the installation of wastewater and waste collection, treatment and disposal systems authorized by the permits will not result in undue water pollution. Technical determinations made by ANR in issuing the permits are entitled to substantial deference. 10 V.S.A § 6086(d).

The Project will meet all applicable Department of Environmental Conservation (DEC) regulations on waste disposal and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells. In addition, the Project will not cause undue water pollution.

The Wastewater System and Potable Water Supply Permit #WW-8-0327-1 will be incorporated into the Act 250 permit.

The Project complies with Criterion 1(B) (Waste Disposal).

Criterion 5 - Transportation:

Findings of Fact

10. LUP 8B0503 Condition 4 stated, "A maximum of 20 ingredient truckloads per day shall enter the project." Official Notice.
11. On average there are between six and thirteen trucks per day delivering from Poulin Grain to dairy farm customers and three to four bulk grain deliveries arrive per day by tractor

- trailer; there are between nine and seventeen incoming and outgoing truck deliveries. There will really only be truck traffic in the morning and there will be no material increase in terms of the number of trucks and maybe no increase. The expanded hours will serve to spread-out the trucks from the peak hours, minimizing traffic congestion onsite and mitigating safety concerns. Exhibit 013 and Testimony.
12. Findings of Fact 8B0503 #13 stated, "The applicant has agreed to park bulk delivery trucks overnight west of the new facility instead of on the Crandall property where they currently cause a nuisance at night when idling. Furthermore, the applicant has agreed to relocate truck fueling tanks away from the Crandall house on Route 67. The new installation will be subject to labor and Industry or ANR Underground Storage Tanks regulations." Official Notice.
 13. LUP Condition 6 stated, "Bulk delivery trucks and tractor trailers shall not be parked overnight on the Crandall property." Official Notice.
 14. Tractor trailers used for incoming and outgoing deliveries park in the rear of the property near the silos and grain storage while loading and unloading. Some loaded trucks remain overnight and leave from the lower lot behind the fuel tanks. Some trucks are parked by the retail store, but Poulin Grain has a policy of informing drivers they may not park at that location. Exhibit 013 and Testimony.
 15. The later returning client delivery trucks are loaded in succession in the evening for the next day; they pull into the 'Crandall property'. One truck is pulled in to be loaded and the others are parked in the lower lot by Main Street and Buckley Road. Sometimes two to three trucks can be lined up waiting to be filled, but usually the trucks are revolving, where only one truck is pulled forward to be loaded and once loaded, it is parked, and the next truck is pulled forward from the lower lot. It takes approximately 45 minutes to load each truck. During the day, drivers load their own trucks if they are going back out for the day on a delivery. Testimony.
 16. Bulk grain delivery trucks typically travel either from north or south on Route 67. Exhibit 013.
 17. The Applicant states that truck traffic 'generally' arrives via one access and exits another; trucks generally arrive on Greenwich Street and exit on Main Street at Buckley Road, travelling parallel to the railroad tracks. Exhibits 013, 022, and Testimony.
 18. A one-way traffic flow for bulk delivery trucks and tractor trailers was previously authorized and was accomplished by creating a travel way for trucks picking up or dropping off ingredients at the facility to exit only via North Main Street. Official Notice.
 19. While in her vehicle, Erika Floriani was hit by a truck exiting the Project Tract, at the intersection of Route 67 and Main Street. Testimony.

20. Motor vehicle accidents involving trucks when they are backing up and maneuvering is rare because the Applicant has safety instructions in place and training for drivers. Testimony.

21. The trucks carry GPS software, so data can be reviewed for traffic and speed. Testimony.

Conclusions 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.*

The Commission cannot lawfully deny a permit for failure to conform with Criterion 5; instead, the Commission is obligated to condition the permit in a manner that will satisfactorily address any deficiencies.

To that end, the Commission will reiterate conditions related to truck parking, truck movements, and traffic flow in the Act 250 permit.

The Commission concludes that the Project will not cause unreasonable congestion or unsafe conditions with respect to use of roads, highways, waterways, railways, airports, and other existing or proposed means of transportation.

The Project complies with Criterion 5(A).

The Project complies with Criterion 5(B).

Criterion 8 - Aesthetics:

FINDINGS OF FACT

Findings of Fact: Aesthetics, Scenic or Natural Beauty

22. Findings of Fact 8B0503 #11 stated, “The applicant has proposed hours of operation of 7:00 AM to 8:00 PM for the new facility.” LUP 8B0503 authorized the limited hours of 7:00 AM to 7:00 PM Monday through Saturday, a 12-hour day. Official Notice.

23. Findings of Fact 8B0503 #10 stated, “Noise can be considered under the aesthetics criterion. This project has noise associated with it through operation of elevators, processing mill, and trucking operations.” Official Notice.

24. Findings of Fact 8B0503 #12 stated, "The noise associated with truck operations and processing can be an annoyance for residential properties nearby in North Bennington and Shaftsbury." Official Notice.
25. Findings of Fact 8B0503 #13 stated, "The applicant has agreed to park bulk delivery trucks overnight west of the new facility instead of on the Crandall property where they currently cause a nuisance at night when idling. Furthermore, the applicant has agreed to relocate truck fueling tanks away from the Crandall house on Route 67. The new installation will be subject to labor and Industry or ANR Underground Storage Tanks regulations." Official Notice.
26. The Applicant does not propose to operate every day starting at 4:00 AM or until 11:00 PM but needs the flexibility to work within those extended hours on occasion. Exhibit 013.
27. Four to five cars of bulk grain deliveries arrive by rail each week, typically in the afternoon. The grain is transferred from the rail car into a pit, then moved into the silos via grain elevator. If unloaded at once, it can take three to four hours, but is often completed at times when other operations are slow. Exhibit 013.
28. Three to four bulk grain deliveries arrive per day by tractor trailer (18-wheeler) with hopper trailers. Occasionally the trucks arrive outside the currently permitted operating hours of 7:00 AM to 7:00 PM. Grain is unloaded via the same process as for rail car deliveries and the delivery process take 45 minutes to an hour. Exhibit 013.
29. There are between nine and seventeen incoming and outgoing truck deliveries per day. Depending on the day, up to six truck trips will occur between 4:00 AM and 7:00 AM, but the majority of trucks leaving prior to the existing 7:00 AM operating hour will occur between 6:00 AM and 7:00 AM. Exhibit 017.
30. Loud noise is generated by trucks from use of back-up alarms, brakes, and upshifting/downshifting, and by loaded trucks upon leaving the lower lot in the morning. Exhibit 022 and Testimony.
31. Incoming delivery trucks must operate their power take-off systems to empty the grain from the trailers, so idle during loading. Outgoing delivery trucks do not need to idle during loading, but some parked trucks require a five- to ten-minute warm up period during cold months; this occurs in the parking area by Buckley Street, not by Greenwich Street. Exhibit 013.
32. Jake brakes are not used and would not be used in the location of any adjoiners anyway. Testimony.
33. There is traffic noise from other, regular truck traffic throughout the day and night, plus noise from the railroad. Testimony.
34. Grain processing noise is generated by the grain hammer mill/grain grinder, hammering on the rail cars and bins with a sledgehammer to dislodge the grain, operation of the grain

- elevators (bearings), and grain falling/rushing from silos when trucks pull in and are loaded. Exhibits 013, 022, and Testimony.
35. The Applicant had started using rubber mallets to dislodge grain from rail cars, but they no longer use rubber mallets because they are less effective. The Applicant only uses rubber mallets to dislodge grain from equipment owned by Poulin Grain, such as silos. Testimony.
 36. Pounding on the silos sometimes occurs nonstop for approximately 20 minutes. Testimony.
 37. The grain mill is only operated during the day. Exhibit 013 and Testimony.
 38. Adjoining landowners Mr. Derby and Mr. Howe agreed that some expansion of the operating hours was acceptable, and they were not opposed to the granting of more limited expanded hours (e.g., 6:00 AM to 9:00 PM), but were opposed to the full expanded hours requested (4:00 AM to 11:00 PM). Ms. Floriani was opposed to any extension of the currently permitted operating hours. The neighbors accepted that truck and grain processing noises during the currently approved hours of 7:00 AM to 7:00 PM are assumed and reasonable; however, those same noises occurring outside those hours is what they find offensive or shocking. Testimony.
 39. Shires Housing, represented by Stephanie Lane, testified that they have residents in seven apartments; Shires Housing has already lost tenants and have had to re-lease units because the noise was shocking and offensive enough to make tenants move out. Testimony.
 40. A sound measurement and noise control engineering study was conducted to evaluate potential for noise mitigation at the grain processing mill. The study identified the following:
 - a. Truck sound was primarily from the engine and tires, as well as air brake pressure releases and idling while trucks queued to be loaded.
 - b. Sound from the grain grinder is attenuated by the walls of the building, but at times, the door to the building is open.
 - c. The grain silo augers are located on towers above the silos and are operated with electric motors. The sound of the motors is a continuous source of sound from the facility and is audible above background.
 - d. Manual hammering on emptying silos to loosen remaining grain is not dampened by material inside the bin. During the day, hammering on the silos was barely audible, but with lower background sound at night, the sound could be more distinguishable.
 - e. Sound from mechanical augers used to load grain into silos and trucks was distinguishable above background sound during periods without traffic on VT 67E.

Exhibit 024.

CONCLUSIONS 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 aesthetics and noise.

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 a 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 located within a Village Center on several involved parcels in North Bennington and Shaftsbury. It is not located in an historic district; the area is mixed use, including a large residential component proximate to the Project. The grain processing facility was established adjacent to the Vermont Railroad line and accepts bulk grain deliveries by rail car. The full range of operations involved in the Project generate a variety of noises that have proven troublesome to the adjoining neighbors, in particular.

The expansion of the business and the adaptations undertaken to accommodate client needs, resulting in activities occurring outside the currently approved operating hours, have caused the Project to no longer 'fit the context in which it is located'.

Noise *is* generated from other truck traffic through the Village, as well as from the railroad; therefore, some truck noise generated by the Project is not entirely incompatible and out of context with the area, given the Project's proximity to the highway and rail line. However, trucks employed by the grain processing operation are not merely driving through the Village but are being maneuvered and loaded in close proximity to a largely residential area. Additionally, the cumulative noise impacts from the close-range truck movements, loading the trucks with grain, and the grain processing itself are *not* compatible with the surroundings, and have an adverse aesthetic impact.

Accordingly, it must be determined 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)*.

A plan which states "consideration should be made . . ." is not a clear, written community standard. *Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079(Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 81 (Vt. Envtl. Bd. Dec. 8, 2000)*.

Neither Shaftsbury nor North Bennington Village has an active noise ordinance. The closest thing to a written community standard is in the Conditional Use Section (3.4) of the Town of Shaftsbury Zoning Ordinance dated March 5, 2019; this standard is not applied unless there is a conditional use variance. For a conditional use to be allowed in Shaftsbury, the applicant must demonstrate that it meets a number of standards including a noise standard, as follows: *Site generated noise shall not exceed 70 dBA (measured on a one hour LEQ) at the property line in Rural and Village zones and 75 dBA (measured on a one hour LEQ) at the property line in all other zones, except during site development, outdoor maintenance procedures, transportation ingress and egress, or temporary auxiliary operations deemed similar by the DRB. No vibration shall be produced which is transmitted through the ground and is discernible without aid of instruments at any point beyond the lot line.*

Exhibits 013, 022, and Testimony.

Therefore, 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. Env'tl. Bd. Aug. 21, 1992)*.

Noise occurring during the daytime hours (i.e., typical 'business hours') is often distinctly different from noise occurring during the very early and very late (or overnight) hours because of ambient conditions. An adverse sound level that is not undue at 4:00 PM could very well be undue at 4:00 AM. Neighbors accepted that truck and grain processing noises during the currently approved hours of 7:00 AM to 7:00 PM are assumed and reasonable; however, those same noises occurring outside those hours is what they have found offensive or shocking.¹

Given all the aforementioned considerations, the Commission finds that the Project is offensive or shocking.

(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 agreed to implement or continue utilizing the following mitigation measures:

- Adjusted and recast the lighting at the Project site near Greenwich Street to be less visible to neighbors.

¹ The Applicant has been operating outside of the currently permitted hours of 7:00 AM to 7:00 PM, as documented by the NRB; as such, the neighbors have already experienced the unduly adverse noise conditions created by the operational sounds during the very early and very late hours for which the Applicant is now seeking permit approval.

- Limit the hours operation of the hammer mill and rail cars:
 - Only operate the grain mill/grinder between the hours of 7:00 AM to 7:00 PM.
 - Avoid hammering or banging on silos/bins outside the hours of 7:00 AM to 7:00 PM and utilize rubber mallets when it is unavoidable to dislodge grain after 7:00 PM.
 - No hammering or banging on rail cars (as needed to dislodge grain) except during the hours of 7:00 AM to 5:00 PM. [Most banging is done during the unloading of the rail car, and that is shut down after 5:00 PM; if it occurs after 5:00 PM, it is due to a delay in the railroad schedule, and if the Applicant requires that product, it may be necessary to bang on the rail cars during late hours. Testimony.]
- Utilize chain unloaders (aka Flying Dutchmen) or other material loosening systems such as turbine vibrators, air canons, on the silos/bins to dislodge grain from silos in order to avoid hammering on the outside of the silos. Prohibit the use of steel mallets to hammer the outside of the bins, instead only allowing the use of rubber mallets.
- Treat silos and chutes with a paint-on vibration dampening compound.
- The doors and windows on the mill building facing Greenwich Street remain closed during use of the grain hammer mill/grain grinder.
- Continue policy that limits the use of jake brakes.
- Limit the extent to which trucks can idle at the site.
- Conduct regular preventative maintenance of its trucks and equipment to mitigate noise.
- Install a motor enclosure or noise barrier on the tower railing to further mitigate sound from the electric motors used to operate the grain silo augers.
- Implement truck staging strategies to minimize the need for bulk delivery trucks to back up.
- Use broadband rather than tonal back-up alarms on bulk delivery trucks.

Exhibits 001, 013, 022, Testimony.

The aforementioned measures will be incorporated as conditions into the Act 250 permit.

(d) Conclusion

Despite the generally available mitigating steps to be undertaken by the Applicant, the Commission still finds that the Project, if permitted to operate during the full requested expanded hours, will continue to expose neighbors to undue adverse impacts.

At primary issue are the *hours* within which noise will be generated by the entire scope of activities involved in the grain processing operation, in addition to certain of the noise in general. Some noise

during typical 'business hours' is generally anticipated and accepted; however, cumulative noise generated by the scope of the Project has become excessive in magnitude, and with expanded operating hours, will become excessive in duration as well. The existing/approved operating hours already extend for a 12-hour period, until 7:00 PM six days per week.

Noise generated by the project beyond the existing operating hours, which if approved as requested, would extend for a duration of 19 hours per day, six days per week, affording neighbors a mere five hours of quietude daily for almost the entirety of the week. Further, noise generated during the proposed extended hours will not have the effect of being 'dampened' by ambient daytime conditions, but rather will have the effect of being amplified by the ambient overnight conditions.

At the morning site visit, the Commission did not have opportunity to observe the full range of noises under the conditions experienced by the neighbors. Further, the Commission was unable to witness whether or not the mitigation measures will be effective; some measures may only *reduce* noise, they won't *eliminate* it.

Despite those remaining concerns, due to the neighbors' willingness to compromise so as not to impede the success of a local business, and in consideration of the Applicant's assertion that they would not need to operate *every* day starting at 4:00 AM or until 11:00 PM but merely need to work within extended hours *on occasion*, the Commission will approve expanded hours, with limitations. The operating hours will be expanded only as follows:

- The hours of operation of the processing plant/conveyors and/or delivery trucks shall be expanded from the currently approved hours to 6:00 AM to 9:00 PM, Monday through Saturday.
- The one-hour expansion of the morning hours (i.e., 6:00 AM to 7:00 AM) shall be solely to allow pre-loaded trucks to leave the facility for client delivery. (Earlier departures may allow for earlier return and refilling of trucks, alleviating the necessity of late-night returns and loading.) There shall be no grain processing operations or loading/unloading of bulk trucks prior to 7:00 AM on any day.
- Loaded trucks will be backed into the approved parking area at Main Street near Buckley, so that trucks are prepared to pull out in order to avoid using back-up alarms.
- As part of an ongoing effort to reduce aesthetic impacts on neighbors, the Permittee shall continue to assess noise impacts and mitigation opportunities.

Given the aforementioned conditions to be incorporated into the permit in addition to the available mitigating steps proposed by the Applicant, the Commission finds the adverse impacts of the proposed Project on the scenic or natural beauty of the area will be minimized.

Based on the above, and coupled with only limited expansion of the requested operating hours, the Commission concludes 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

The Commission concludes 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, and therefore complies with Criterion 8 – Aesthetics.

Criterion 9(K) – Development Affecting Public Investments:

Findings of Fact

41. The Project is adjacent to governmental and public utility facilities, services, and lands; specifically, it is adjacent to Vermont Routes 67 and 67E, a public investment subject to demonstrated conformance with Criterion 9(K).
42. The Commission readopts and incorporates by reference herein the findings with respect to Criterion 5.
43. The Commission will include conditions to comply with Criterion 9(K).

Conclusions 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).

With incorporation of the aforementioned conditions (under Criterion 5) into the permit, the Commission finds that the Project will not materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service or lands.

The Commission therefore concludes that the Project complies with Criterion 9(K).

Criterion 10 – Town and Regional Plans:

Findings of Fact

44. The municipal plan that applies to this application is the North Bennington Village Plan, adopted on December 11, 2018.
45. The municipal plan section 2.2 Goals states:
 - a. Plan development to maintain the Village's historic settlement pattern of a compact center with a diversity of land uses surrounded by lower density residential development and rural open spaces... The historic industrial character of the land and buildings along Paran Creek and Water Street should be maintained, either through clean and productive manufacturing facilities or through architecturally appropriate rehabilitation that provides opportunities for a mix of light commercial and residential development.

- b. Support economic development opportunities that will benefit local businesses and residents.
46. The municipal plan supports businesses that want to expand; there is a thrust around economic development. Testimony.
 47. The Regional Plan that applies to this application is the Bennington County Regional Plan, adopted on March 19, 2015.
 48. The Project does not meet the thresholds for having a ‘substantial regional impact’ as that term is defined in the Regional Plan. However, the involved land in the Project lies within two municipalities (North Bennington Village and Shaftsbury), and the BCRC is mandated to participate in a Project when the Project crosses municipal boundaries (Regional Plan Section 13.2). Exhibit 018 and Testimony.
 49. The Project is in and adjacent to an area identified as a Village Center. The Regional Plan Sections 7.3 states, in part, “[a] variety of residential, commercial, industrial, and cultural and public/institutional land uses are appropriate in village areas, but at a smaller scale than in the region’s urban centers”. The Project is in keeping with these guidelines, and its location on the Vermont Railway corridor is also consistent with Regional Plan policies (Section 10.4) supporting the use of rail for shipment of bulk products for commercial/industrial applications. Exhibit 018.
 50. Regional Plan Section 7.3 includes guidelines related to impacts of development in mixed use districts in order to protect the character of the community, and Section 7.7 includes policy specific to industrial development that states “[t]he amount of noise, vibration, dust, odor, glare, and lighting that effects nearby residential areas must be minimized”.
 51. With the inclusion of the aforementioned mitigation measures to limit adverse impacts, the Project is consistent with the land use and transportation policies in the Regional Plan. Exhibit 018 and Testimony.

Conclusions of Law

Before issuing a permit, the District Commission must find that the Project is in conformance with any duly adopted local or regional plan or capital program. 10 V.S.A § 6086(a)(10).

The Commission has determined that the Town Plan is sufficiently specific. *Re: The Mirkwood Group #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Vt. Envtl. Bd. August 19, 1996)*. Because the Town Plan is clear and unambiguous it is unnecessary to review the zoning bylaws. See *In re Frank A. Molgano Jr. 163 Vt. 25 (1994)*.

In Act 250 proceedings in which the provisions of a regional plan or a municipal plan are relevant to the determination of any issue:

- (1) the provisions of the regional plan shall be given effect to the extent that they are not in conflict with the provisions of a duly adopted municipal plan;

(2) to the extent that such a conflict exists, the regional plan shall be given effect if it is demonstrated that the project under consideration in the proceedings would have a substantial regional impact. 24 V.S.A. § 4348(h).

Maple Tree Place Associates, #4C0775-EB, Findings of Fact, Conclusions of Law, and Order at 53 (Vt. Envtl. Bd. June 25, 1998).

The Commission concludes the Project complies with Criterion 10.

VII. SUMMARY CONCLUSION OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes that the Project, if completed and maintained as represented in the application and other representations of the Applicant, and in accordance with the findings and conclusions of this decision and the conditions of Land Use Permit 8B0503-3, will comply with the Act 250 criteria. 10 V.S.A § 6086(a).

VIII. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, Land Use Permit 8B0503-3 is hereby issued.

Dated in Rutland this 13th day of June 2022.

By /s/ Richard Kobik
Richard Kobik, Acting Chair
District 8 Commission

Members participating in this decision: Don Miller and Michael McDonough

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. Decisions on minor applications may be appealed only if a hearing was held by the district commission. Please note that there are certain limitations on the right to appeal, including appeals from Administrative Amendments and interlocutory appeals. See 10 V.S.A. § 8504(k), 3 V.S.A. § 815, and Vermont Rule of Appellate Procedure 5. 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.