



LAND USE PERMIT AMENDMENT

State of Vermont
Natural Resources Board
District 9 Environmental Commission
10 Baldwin Street
Montpelier, VT 05633-3201
<https://nrb.vermont.gov/>

[phone] 802-476-0185

CASE NO: 9A0158-11

VT Agency of Transportation
Rail & Aviation Bureau
219 N. Main Street
Barre, Vermont 05641

LAWS/REGULATIONS INVOLVED

10 V.S.A. §§ 6001 - 6093 (Act 250)

The District 9 Environmental Commission hereby issues Land Use Permit Amendment #9A0158-11, pursuant to the authority vested in it by 10 V.S.A. §§ 6001-6093. This permit amendment applies to the lands identified in Book 66, Pages 491 and 494, and Book 125, Page 199 of the land records of the Town of Middlebury, Vermont as the subject of a deed to the State of Vermont.

This permit specifically authorizes the cutting of six acres of trees on state-owned property, primarily on the northerly side of Munson Road, at the north end of the Middlebury State Airport. The project is to achieve compliance with FAA safety regulations and to allow for more cost-effective and efficient management of the cleared area by State of Vermont employees. There is no tree clearing or other impacts proposed or authorized for the south end of the airport. The project is located at 467 Airport Rd, Middlebury, 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.

1. 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 9 Environmental Commission (the "Commission") in accordance with the following conditions.
2. The project shall be completed, operated and maintained in accordance with the conditions of this permit and the permit application, plans, and exhibits on file with the Commission and other material representations.

The approved plans are:

Sheet 6 of 9 – "General and Safety Plan," dated 3/27/2020 (Exhibit #007);

Sheet 7 of 9 – "Tree Clearing Plan," dated 02/18/2021 (Exhibit #071);

Sheet 8 of 9 – "Erosion Control Plan," dated 3/27/2020 (Exhibit #007); and

Sheet 9 of 9 – “Erosion & Sediment Control Details,” dated 3/27/2020 (Exhibit #007).

3. All conditions of Land Use Permit #9A0158 and amendments are in full force and effect except as further amended herein.
4. The Permittee shall comply with all of the conditions of the following Agency of Natural Resources Permits:
 - a. **Individual Wetland Permit #RU07-0300 issued on July 27, 2016** by the ANR Watershed Management Division.
5. Any nonmaterial changes to the permits listed in the preceding condition shall be automatically incorporated herein upon issuance by the Agency of Natural Resources.
6. 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.
7. A copy of this permit and plans shall be on the site at all times throughout the construction process.
8. 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.
9. No further subdivision, alteration, and/or development on the tract/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.
10. Pursuant to 10 V.S.A. § 8005(c), the Commission 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.
11. 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.
12. **All approved tree-clearing and obstruction removal shall occur between November 1 and March 31 to avoid a take of listed bat species (Northern Long Eared Bats and Indiana Bats.)**
13. **Prior to site preparation and clearing, the limits of the 25-foot bat travel corridor identified in Exhibit #007 shall be permanently marked with sixteen (16) total “BAT CORRIDOR” flexible boundary markers as depicted on Sheet 7, Tree Clearing Plan (Exhibits #007 and 071) to mark the corridor as a protected area and to prevent accidental encroachments into the corridor.**
14. **Upon satisfaction of Condition 13, and prior to any tree removal authorized by this Permit, the Permittee shall notify the District Coordinator to schedule a site visit inspection.**
15. **The Permittee shall implement Exhibit #030 (Dubois & King Bat Monitoring Memo, dated 06.03.2020) regarding acoustic surveys and canopy surveys. Survey results and reports shall be provided to the Agency’s Department of Fish and Wildlife Bat Biologist within 60 days of completion of surveys, as well as to the District 9 Commission.**
16. **USFWS and DFW shall determine whether additional monitoring or mitigation measures are required based on review of the acoustic survey and canopy survey following the clearing.**

VTrans shall implement additional monitoring or mitigation measures, if required, during the summer following the clearing, and as deemed necessary in consultation with the USFWS and Department of Fish and Wildlife (Exhibit #023).

17. **The Permittee shall implement and comply with all measures established in Exhibit #023 as approved by the U.S. Fish and Wildlife Service (USFWS) and Vermont Fish & Wildlife Department (VT F&W):**
 - a. An acoustic survey for Myotis bat presence within the bat travel corridor and adjacent cut area will be performed by a qualified Wildlife Biologist following the proposed removal of trees per the Tree Removal Plan of March 27, 2020 (attached). The acoustic monitoring plan will be developed in consultation with the VTDFW and USFWS.
 - b. Canopy closure, age class distribution and tree heights within the bat travel corridor will be assessed during the summer following tree removal.
 - c. Based on the results of the acoustic monitoring and the canopy study, USFWS and VT F&W will determine whether additional monitoring or mitigation measures are required.
 - d. VTrans will implement additional monitoring or mitigation measures, if required, during the summer following the proposed cut, and as deemed necessary in consultation with the USFWS and VT F&W.
18. The Permittee shall provide the District Commission with a copy of the acoustic monitoring survey and canopy study. If USFWS and VT F&W determine that additional monitoring or mitigation measures are required, a copy of the implementation plan shall also be provided to the District Commission.
19. **Where the Project is within 100 feet of any Class II wetland buffer zones, prior to site preparation and obstruction removal, the Permittee shall install a continuous line of green or wood snow fencing outside the buffer zone identifying the wetland and buffer as a protected area. All fencing shall be promptly removed following completion of all approved work.**
20. **The Permittee shall maintain an undisturbed, naturally vegetated, un-mowed 50-foot buffer from the edge of Class II Wetlands except as required for obstruction removal. Trees (obstructions) to be removed within wetlands and wetland buffers shall be cut, but not stumped, in the winter during frozen ground conditions in accordance with the provisions of the Vermont Individual Wetlands Permit issued for the project. Snowplowing or storage of materials within this buffer is prohibited. Both the wetland and wetland buffer boundaries shall be identified with forestry flagging tape.**
21. **The Permittee shall maintain an 80-foot naturally vegetated buffer zone along the Project tract's entire western property boundary, between Munson Road to the south and the 25-foot Bat Travel Corridor to the north. Within this 80-foot buffer zone, the Permittee is authorized to continue removing trees utilizing the "selective cut" method approved in Permit #9A0158-8 (Altered) and shall only remove trees which are within 15 feet of the approach surface. The buffer zone boundary line shall be continuously identified with forestry flagging tape.**
22. **The Permittee shall not remove any trees from the Munson Road Right-of-Way except as in accordance with the "selective cut" method approved in Permit Amendment #9A0158-8**

(Altered) and as necessary to install the approved stabilized construction entrances. The ROW boundary line shall be continuously identified with forestry flagging tape.

23. **By no later than May 31st, 2021, the Permittee shall submit to the District 9 Commission a revised Planset depicting the buffer zone established in Permit Condition 21.**
24. Construction hours shall be limited to Monday through Saturday from 7:00AM to 5:00PM, with no construction on State or Federal Holidays.
25. If a spill or release of any toxic substance occurs within the SPA area during the life of the Project, the Permittee or their representative must immediately report the event to the Vermont Department of Conservation Spills Program and the SPA area's water system owner or operator. The Spills Program can be reached during regular office hours: 802-828-1138 or via the 24-hour hotline: 800-641-5005 anytime, day or night. Any person reporting a release shall talk directly with a person, rather than reporting by email, text, or any written form of communication. The person reporting a release shall provide the WSID to the Spills Program. The Permittee shall provide instructions with emergency contact numbers to all contractors for the Project and those instructions must be displayed onsite.
26. At a minimum, the Permittee shall comply with the Vermont Department of Environmental Conservation's *Low Risk Site Handbook for Erosion Prevention and Sediment Control* (2006).
27. The Permittee shall install a minimum of two (2) "Truck Crossing" signs on Munson Road as Depicted on Sheet 6, General and Safety Plan, Exhibit #007. The signs shall be installed to face in both directions along Munson Road and shall be removed when not in use.
28. The Permittee shall install stabilized construction entrances as depicted on Sheet 8, Erosion Control Plan, Exhibit #007 in accordance with *Low Risk Handbook*.
29. The Permittee shall comply with Exhibit #007 for erosion prevention and sediment control. The Permittee shall prevent the transport of any sediment beyond that area necessary for construction approved herein. All erosion prevention and sediment control devices shall be periodically cleaned, replaced and maintained until vegetation is permanently established on all slopes and disturbed areas.
30. The Permittee shall not extract any stumps. The stumps in the runway approach vegetation removal area would be ground to the ground surface level, but not removed.
31. In addition to conformance with all erosion prevention and sediment control conditions, the Permittee shall not cause, permit or allow the discharge of waste material into any surface waters. Compliance with the requirements of this condition does not absolve the Permittee from compliance with 10 V.S.A. (§§ 1250-1284) Chapter 47, Vermont's Water Pollution Control Law.
32. **The Permittee shall ensure that all Middlebury State Airport employees, VTrans employees, and any Contractors tasked with implementing the approved tree removal receive and review the Middlebury Airport Tree Clearing & Obstruction Removal Memo (Exhibit #072).**
33. The Commission reserves the right to evaluate and impose additional conditions with respect to Criterion 8A and the bat monitoring plan.

34. The Permittee shall provide each prospective purchaser of any interest in this Project a copy of the original Land Use Permit and Amendments and any Findings of Fact before any written contract of sale is entered into.
35. 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).
36. All site work and tree removal shall be completed in accordance with the approved plans by **October 15, 2024** unless an extension of this date is approved in writing by the Commission. Such requests to extend must be filed prior to the deadline and approval may be granted without a public hearing. Ongoing annual brush hogging and mowing and maintenance is authorized beyond this project completion date.
37. Failure to comply with any condition herein may be grounds for permit revocation pursuant to 10 V.S.A. sec. 6027(g).

Dated this 8th day of April 2020.

By /s/ Fred Baser
Fred Baser, Chair
District 9 Environmental Commission

Members participating in this decision:

Allen Karnatz, Vice Chair
Warren Van Wyk

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

I hereby certify on this 8th day of April 2021, a copy of the foregoing **Land Use Permit and Findings of Fact Conclusions of Law and Order for 9A0158-11 (VT AGENCY OF TRANSPORTATION)**, was sent by e-mail to:

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BY: /s/ Lori Grenier
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FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER

State of Vermont

Natural Resources Board

District 9 Environmental Commission

10 Baldwin Street

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CASE NO: 9A0158-11

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LAWS/REGULATIONS INVOLVED

10 V.S.A. §§ 6001 - 6111 (Act 250)

I. INTRODUCTION

On May 25, 2020, the Vermont Agency of Transportation (hereinafter “Applicant”) filed application #9A0158-11 for a project described as the clearcutting of six acres of trees, all on state-owned property at the north end of the Middlebury State Airport. A revised project description clarifies that the Project also entails ongoing annual maintenance of the cleared area consisting of mowing and/or brush hogging. The stated purpose of the project is to achieve compliance with Federal Aviation Administration (FAA) safety regulations and to allow for more cost-effective and efficient management of the cleared area by State of Vermont employees. There is no tree clearing or other impacts proposed for the south end of the airport. The Project is located primarily on the north side of Munson Road in Middlebury, Vermont. The project is being evaluated by the District 9 Environmental Commission in accordance with the 10 environmental criteria of 10 V.S.A., § 6086(a). Specifically, the Application proposes to revise Findings 6 and 51 of Land Use Permit #9A0158-11(Altered).

Previously, the District Commission issued Land Use Permit #9A0158-8 (Altered) authorizing VTrans to construct an expansion of the existing runway by ten feet in width and 700 feet in length to 60' x 3,200' and an extension of the parallel taxiway. The permit also authorized the removal of trees obstructing the runway approach; specifically, the permit allows VTrans to remove trees that are identified to be within 10 feet of the 20:1 Runway 19 Approach Zone. That permit amendment established a number of permit conditions and findings of fact that are of relevance to the present matter before the District Commission (see *Stowe Club Highlands* analysis below).

The current application was originally deemed a “Minor” project by the District Commission and a draft permit was publicly noticed on July 8, 2020. On July 24, 2020, adjoining Landowner Mr. James Ploof submitted a timely request for party status and a public hearing. In consideration of the ongoing COVID-19 pandemic and restrictions in place on indoor public gatherings, the District Commission convened a remote virtual Prehearing Conference on October 8 in order to identify the parties and

issues in controversy in this matter. The District Commission subsequently held an in-person site visit at the project location on October 22, 2020, with state-established COVID-19 protocols in place.

On November 24, 2020, the District 9 Environmental Commission held a remote public hearing Pursuant to Act 250 Rule 13(B), the Commission recessed the hearing pending submittal of additional information by the Parties, with a deadline of February 19, 2021. After receipt and review of the requested additional information and the completion of Commission deliberations, the District 9 Commission hereby issues the following Decision.

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

II. JURISDICTION

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

III. 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...[a]n application which seeks to amend project plans, exhibits, representations by the applicant for the applicable permit, findings, or conclusions which have been incorporated into the permit through a specific or general condition, shall constitute an application to amend a permit condition.” Act 250 Rule 34(E)(1).

The Applicant in the current matter does seek to amend such a critical permit condition:

Condition 18: The Permittee shall comply with all the terms and conditions for protecting the Bat travel corridor as outlined in Exhibit #25 and shall comply with all supplemental terms and conditions as expressed in Exhibit #42.

Condition 20: The Permittee shall maintain an undisturbed, naturally vegetated, unmowed 50-foot buffer from the edge of Class II Wetlands except as required for obstruction removal. Trees (obstructions) to be removed within wetlands and wetland buffers shall be cut, but not stumped, in the winter during frozen ground conditions in accordance with the provisions of the Vermont Individual Wetlands Permit issued for the project. Snowplowing or storage of materials within this buffer is prohibited.

Finding of Fact 6: In addition, areas for select cutting of trees have been identified. In these areas only those trees which are within 10 feet of the approach surface will be removed. Select clearing has been defined in the plans for all wetland, wetland buffers, the Beaver Brook corridor and the tree clearing to the north of the runway. (Exhibit #2)

Finding of Fact 44: Project includes extending the existing runway by 700 feet and removal of trees to the south and north of the runway within the approach as outlined in Findings of 5 and 6. (Exhibit #1)

Finding of Fact 51: Tree surveys were undertaken in the area north of the airport to determine ground elevations and the elevations of the tops of representative trees. These elevations have been compared to the elevations of the required clear zones. It has been determined that for the southern 300' of the clearing area, only approximately one quarter of the trees will need to be cut, and for the northern 300' of the clearing area, only approximately one-half of the trees will need to be cut. Thus, clear-cutting will be avoided, and selective cutting of only the tallest trees interfering with flight safety will be accomplished. This will leave the majority of the forest north of the airport intact. Therefore, the travel corridor for the bats will effectively constitute the majority [sic] of the 600' wide cutting area, much more than the 25' wide corridor required by the USFWS and VT F&W.

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 record shows 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:

1. Whether there has been a change in law, regulation, or fact beyond the permittee's control.
2. Whether there has been a change in technology, construction, or operations which necessitates the amendment.
3. Other factors, including innovative or alternative design, which provide a more efficient or effective way to mitigate impacts from the Project.
4. Other important policy considerations, including the proposal's furtherance of goals in the municipal plan.
5. Whether there was manifest error in issuance of the permit condition.

6. The degree of reliance on the permit condition or material representations made in the prior proceeding, by the Commission, Environmental Court, or former Environmental Board if applicable, or any other person with a particularized interest in the proposed amendment.

Act 250 Rule 34(E)(4). The first three factors are relevant to the analysis in this instance. First, Applicant states in its application and other exhibits on record that one of the purposes for the application is to achieve compliance with applicable FAA safety regulations and grant funding policy that have changed since Land Use Permit #9A0158-8(Altered) was issued on September 15, 2016. Second, although there has not been a change in technology, construction, or operations, it is Applicant's *proposed* change to previously approved operations which necessitates this permit amendment application. Third, and related, it is Applicant's position that the proposed change in operations is a more effective and efficient way of achieving compliance with FAA safety standards. The Commission also notes here that, from the Act 250 perspective, the project is for State and public safety purposes.

There is no evidence on the record that supports the conclusion that the proposed clearcut is absolutely necessary to gain or maintain compliance with applicable FAA safety regulations, nor any evidence that allows the Commission to conclude that continued select tree removal as approved would necessarily lead to noncompliance with the FAA regulations. Indeed, it appears the primary change behind the proposal to clearcut the parcel is in FAA policy that disallows certain grant funding to be utilized for the selective tree removal approach presently authorized and implemented by the Applicant. However, in evaluating all relevant factors together, the Commission concludes that the need for flexibility in this instance, particularly when considering safety implications, outweighs the need for finality and therefore the Commission should proceed to a full review of the application on its merits.

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:

1. Applicant, The Vermont Agency of Transportation, by Jenny Ronis et al.; and by Charlotte Brodie and Mark Goodrich of DuBois & King, Inc.;
2. Agency of Natural Resources ("ANR"), by Jen Mojo, Senior Planner;
3. Vermont Agency of Commerce and Community Development, Division for Historic Preservation, by Scott Dillon, Senior Review Coordinator;
4. Town of Middlebury, by Jen Murray, Town Planner;
5. Addison Country Regional Planning Commission, by Mike Winslow, Transportation Planner.

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).

a. 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. James Ploof, Adjoining Landowner, by John Mazzuchi of Lynch & Foley, P.C., under Criteria 8, 8A, and 10. Is the Commission granting final status under Criterion 10?

b. 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):

1. Town of Middlebury Conservation Commission, by Judy Wiger-Grohs, under Criteria 8 and 8A.
2. Town of Middlebury Tree Committee (ad hoc), by Leslie Kameny, under Criteria 8 and 8A.
3. Ross Conrad, 609 Burnham Drive, Middlebury, VT, under Criteria 8 and 8A

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The District Commission initiated the review process on this application as a Minor application under Act 250 Rule 51 on July 8, 2020. The Commission distributed a notice and proposed permit establishing a deadline of July 24, 2020 by which parties, or the Commission on its own motion, could request a hearing on this matter. The Commission received a timely request for a public hearing from Mr. James Ploof under Criteria 8, 8A, and 10. On November 13, 2020, the Commission issued a Notice of Public Hearing indicating that a public hearing would be held because substantive issues were raised on Criteria 8, 8A, and 10. Pursuant to Act 250 Board Rule 51(F), the Commission need only prepare Findings of Fact and Conclusions of Law on those criteria or sub-criteria at issue during the hearing.

Therefore, the following Findings of Fact are limited to Criterion 8 for Aesthetics and Historic Sites, Criterion 8A for Wildlife Habitat & Endangered Species, and Criterion 10 for Local and Regional Plans.

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

- | | |
|-------------------------------------------|---------------------------------------|
| 1 - Air Pollution | 6 - Educational Services |
| 1 - Water Pollution | 7 - Municipal Services |
| 1(A) - Headwaters | 9(A) - Impact of Growth |
| 1(B) - Waste Disposal | 9(B) - Primary Agricultural Soils |
| 1(C) - Water Conservation | 9(C) - Productive Forest Soils |
| 1(D) - Floodways | 9(D) - Earth Resources |
| 1(E) - Streams | 9(E) - Extraction of Earth Resources |
| 1(F) - Shorelines | 9(F) - Energy Conservation |
| 1(G) - Wetlands | 9(G) - Private Utility Services |
| 2 - Water Supply | 9(H) - Costs of Scattered Development |
| 3 - Impact on Existing Water Supplies | 9(J) - Public Utility Services |
| 4 - Soil Erosion | 9(K) - Effects on Public Investments |
| 5(A) - Transportation Congestion & Safety | 9(L) - Settlement Patterns |
| 5(B) - Transportation Demand Management | |

Therefore, the application shall serve as the Findings of Fact on these criteria. The Findings of Fact are based on the application, Exhibits #001 – 071, and other evidence in the record. The Exhibits to this Application are broken down by the submitting party as follows:

Applicant, Vermont Agency of Transportation: #001-028, 034-038, 043-046, 051-063, 070, & 071

Statutory Parties:

ANR: #029, 030, 067

DHP: #033 & 065

Town of Middlebury: #039-042, 058, 059, 066, 066a, 066b, 069.

Mr. James Ploof: #031, 032, 047-050, & 068

Mr. Ross Conrad: #064

The Commission notes its appreciation to the Parties for their time and effort in compiling and submitting the information and exhibits in response to its requests.

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 Middlebury State Airport has been a part of the Middlebury community since the 1950's and is part of the National Plan of Integrated Airport Systems and is classified by FAA as a utility airport. The Airport has one runway, Runway 1/19, with a single parallel taxiway on the west side of the runway. FAA Advisory Circular (AC), 150/5300-13A sets the standards for runway and taxiway design based on the aircraft class normally operating at an airport. The ACs establish design criterion to allow for the safe operation of aircraft both for take-off/landings and then movements on the airfield itself, taking into consideration, wing spans, weight, maneuverability, speed, aircraft performance, etc. (Findings of Fact #2 & 61, LUP #9A0158-8(Altered))
2. On September 15, 2016, the District 9 Environmental Commission issued Land Use Permit Amendment #9A0158-8 (Altered) for a project that entailed a variety of improvements, including a runway extension and obstruction removal. A portion of that project involved the safety measure of removal of trees which constituted obstructions to the "approach surfaces" (elevations required for aircraft to safely approach or depart the runway) and their 10' buffers of Runway 01 (southern end) and Runway 19 (northern end). Trees were selectively cut in the approach of Runway 19 during the winter of 2016-2017. (Exhibit #004)
3. That project proposed, and the Commission authorized, removal of trees above certain specified heights in certain specified areas north and south of the airport, both on and off airport property, as shown on the attached "Threshold Siting vs. Part 77" plan, dated February 2015. The removal of the trees was required to bring the airport into conformance with current FAA safety regulations regarding clear space needed for safe take-off and landing procedures. (Finding of Fact #48, LUP #9A0158-8 (Altered))
4. LUP #9A0158-8 (Altered) authorized a plan in which only trees currently or soon to be within the approach surfaces were to be selectively cut, occurring on a seven-to-ten-year rotation. The selective cutting was to remove only those trees which threatened to impinge upon the approach safety surfaces. (Exhibit #004)
5. This application proposes a change from the "select cut" tree removal method approved under #9A0158-8 (Altered) to a clearcut removal of ALL trees in the approach surfaces and buffer, *except* within Class II wetlands and their buffers, the Munson Road Right-of-Way, and the 25-foot Bat Travel Corridor at the north end of the tree removal area. (Exhibit #s 004, 007, 071)
6. The approach surface is a line which extends upwards and outwards from the runway centerline at each end of the primary runway surface. For the Middlebury Airport, the approach surface extends

for a horizontal distance of 5,000 feet at a slope of 20:1 (Exhibit 2 “Project Narrative”). A “Visual Analysis” in the #9A0158-8 (Altered) permit record provides a visual representation of this approach surface and shows that the approach surface does not completely overlap with the ±6-acre Project Tract. (Exhibit #011, LUP #9A0158-8(Altered))

7. Illustrations of the tree clearing plan in overhead, side elevation profile, and sample cross-section view are found in Exhibit #071.
8. The change to removal of all trees is a result, in part, of new management and policies resulting from the recent changes to the VTrans Aviation Section, and subsequently, the Vermont Rail and Aviation Bureau, as described in the following section. (Exhibit #004)
9. At some point following the issuance of LUP #9A0158-8 (Altered), restrictions on FAA grant funding were implemented such that federal grant funds are now prevented from being used for selective clearing on an on-going basis. It is now Applicant’s understanding that on-going selective cutting will not be paid for by FAA. With uncertain budgets going into the future, Applicant believes it will be difficult to assure that selective tree cutting contracts can be secured as necessary. (Exhibit #004)
10. Because of new FAA funding restrictions, the Applicant now wishes to remove all trees within the Runway 19 approach surfaces and buffers. Applicant states that FAA safety initiatives change year to year and are becoming more conservative (e.g., lowering the approach slope which must be kept clear of obstructions for the safety to air traffic and the public good). (Exhibit #004)
11. FAA’s current policy allows for FAA funding to clear trees in the airport approaches once per parcel. The Middlebury State Airport is made up of several parcels, but the Applicant has not yet used FAA grant funding on the Project parcel under review in this application. Applicant is proposing a complete clearcut tree removal in the Runway 19 approach zone and buffer in order to have it paid for by an FAA grant. (Exhibit #004)
12. Applicant states that a complete clearcut tree removal would allow the vegetation removal area to be maintained by brush-hogging by State employees and would save the State taxpayers a significant amount of money into the future by avoiding the need for selective tree clearing on a seven-year rotation. (Exhibit #004)
13. Upon completing the proposed clearcut, it is Applicant’s intent to maintain approach surfaces by VTrans maintenance personnel with a brush hog or similar equipment in perpetuity. (Exhibit #044)
14. The clearcut approach to obstruction removal would come with an initial one-time cost of ±\$46,000 plus \$2,200 annual maintenance expenses, while continued select cutting would come at a cost ±\$26,400 per every occurrence. In a 5-year cost comparison, brush hogging the Project tract following the proposed tree removal would cost an estimated \$1,500 verse an estimated cost of \$49,903 if the select tree removal were continued as previously authorized with no changes. Put another way, the currently approved select-cut approach will exceed the total costs of the proposed

clearcut and maintenance approach in less than two years. (Applicant Testimony; see also Exhibits #043, 052-055, and 070)

15. The Middlebury State Airport's existing Mowing and Vegetation Management Plan (Dated April 14, 2008) can be found on pages 41-50 of Exhibit #071.
16. Applicant states that the Middlebury Airport is not currently out of compliance with these FAA safety regulations and there are no existing violations of 20:1 approach surface right now. However, there are some existing trees that are within the 10-foot zone below the 20:1 approach surface. (Exhibit #070, Applicant hearing testimony)
17. Applicant states that the proposed project is necessary to maintain compliance with applicable FAA regulations. As stated at the hearing, the costs of maintaining the project area in the current manner of selective logging have become prohibitive. (Exhibit #070)
18. Witnesses for the Applicant testified at the November 2020 Act 250 hearing that the Agency's federal obligations to maintain compliance are ongoing, with severe consequences should the Airport fall out of compliance. (Exhibit #070)
19. Exhibit #057 is a memo provided to Applicant as the Middlebury Airport "airport sponsor" reminding of FAA mandates to clear approaches and departure surfaces at airports.
20. The Memo states, "The airport sponsor is ultimately responsible for providing the most current survey data to the FAA. The ADO should also remind the sponsor to be proactive on clearing or mitigating obstacles and providing validation of removal to the FAA prior to the FAA's scheduled review of the flight procedures at the airport. While mitigation of obstacles is an on-going objective, validation of obstacle mitigation prior to a schedule review of flight procedures will significantly enhance the likelihood of continued availability of published approaches." Exhibit #057
21. Essentially, this memo is saying that the Applicant as the airport sponsor needs to maintain approaches or there will be negative consequences, including shortening of the runway; if the runway is shortened, that reduces the size of aircraft that are allowed to land there, which in turn would negatively impact airport activities. (Applicant Testimony)
22. It is Applicant's position that the current Middlebury Airport maintenance program is not sustainable and therefore that is why the clearcutting as proposed is necessary to continue to comply with applicable regulations. (Exhibit #070)
23. In general, however, the project area will be maintained according to the Middlebury State Airport Mowing and Vegetation Plan. (Exhibit #070)
24. Information regarding mowing costs incurred by Applicant can be found in Exhibits #044, 052, 053.
25. To summarize, the various purposes/reasons presented by the Applicant for this application include: (1) ongoing compliance obligations with FAA safety regulations; (2) more cost-effective

and efficient management of the Project tract; (3) new FAA funding restrictions; (4) new management and policies resulting from the recent changes to the VTrans Aviation Section.

Town of Middlebury

26. The Town of Middlebury Selectboard, Middlebury Planning Commission, Middlebury Conservation Commission, and Middlebury Tree Committee submitted comments to the District Commission, which generally express concerns under Criterion 8, 8A, and 10 and collectively oppose the proposal to clearcut ±6-acres of land that is the subject of this application. (See Exhibits #039-042)
27. The Middlebury Conservation Commission submitted comments expressing concern that the Project contradicts the will of the Town Plan and the function of the Forest District to prioritize the protection of the Town's drinking water, wetlands, and wildlife habitat. Other concerns expressed include potential impacts of the proposed tree removal on the Town Plan, the 25-foot Bat Travel Corridor, ecological functions of the Project tract, and wildlife habitat and connectivity. (Exhibits #039, 066, 066a, 066b)
28. The Middlebury Tree Committee submitted comments expressing four primary concerns (Exhibit #040):
 - a. That removal of the six-acre stand of trees proposed by this application will eliminate numerous benefits provided by the trees, including potential impacts on climate change, ecosystem health, and wildlife habitat.
 - b. That a clearcut increases soil erosion, water degradation, and increased silting in creeks, rivers, and reservoirs; a clearcut inhibits the sustainability of healthy, holistic forest ecosystems and can harm the food chain by eliminating other species that rely on one another; a clearcut compromises the aesthetic and scenic qualities of the area.
 - c. Concerns relating to stormwater runoff and water quality, particularly since the land in question falls within a source protection area (SPA) for two public water systems.
 - d. Forest fragmentation and the habitat destruction and loss of important wildlife corridors associated with it. The area in question is a critical link within a larger continuous forest. That forest stretches from the Green Mountain National Forest to the east to an area of forest west of the airport between Schoolhouse Hill Road and Route 116. That same contiguous forest then extends south to East Middlebury proper along Route 125. Deer use this corridor throughout the year. Several bat species, including the endangered Indiana Bat and the Northern Long-eared Bat use this corridor at various times of the year but particularly when they prepare for overwintering and then emerge again in the Spring. Most importantly loss of habitat is almost always permanent.

29. The Town of Middlebury Planning Commission (PC) submitted comments expressing opposition to the proposed Project. It is the PC's preference that trees impinging on the avigation easement be removed over time rather than being clear-cut all at once, so that the character of the area and habitat function of this parcel are preserved. It is also the PC's position that the clearcutting such as what proposed in this application is a violation of Middlebury Zoning/Subdivision Regulations and that selectively harvesting trees over time would conform with the Town Plan and Land Use Regulations. (Exhibit #041)
30. The Middlebury Selectboard's comment letter echoes concerns under Criterion 8, 8A, and 10 established in the comment letters received by the Planning Commission, Conservation Commission, and Tree Committee. Additionally, the Selectboard requests that a buffer of trees be maintained along Munson Road with replacement in-kind of every tree removed from the public ROW. (Exhibit #042)
31. The "use" proposed by this application – clearcut and ongoing routine maintenance of ±6-acres of land– is for state purposes, not for commercial or residential development purposes as defined by Act 250 statute and Rules.
32. Ross Conrad, Middlebury resident and Friend of the Commission, submitted comments expressing a range of concerns under Criteria 8 and 8A, where are included under those Criteria below. (Exhibit #064)

Compliance & Enforcement

33. On November 3, 2020, NRB Enforcement Officer (EO) Katharine Servidio was informed of possible violations of LUP series #9A0158; specifically, allegations of tree cutting beyond the authorization of LUP #9A0158-8 (Altered) were made by an adjoining landowner through his attorney. All allegations were in regard to the portion of Airport land to the north of Munson Road, which is also the subject of this application. (NRB Compliance Report, dated 02/18/2021)
34. The Vermont Natural Resources Board is delegated with the statutory authority and duly authorized to initiate enforcement investigations at its discretion, whether as a result of a complaint or otherwise. (10 V.S.A. § 8005(a)(1)-(2))
35. After evaluating the merits of the alleged violations, pursuant to the authority vested in it, the Natural Resources Board opened an investigation of potential noncompliance by the Applicant with Land Use Permit #9A0158 (Altered). (NRB Compliance Report, dated 02/18/2021)
36. EO Servidio visited the area north of the runway on November 6, 2020 and again on November 20, 2020 where evidence of recent tree cutting including fresh stumps, wood chips, and logging slash on the property was observed. North of Munson Road, at least 18 trees were cut in Fall 2020 with stump diameters ranging from 5-23". The cut trees are no longer on the property so it was not possible to determine whether the tree heights would have been within 10' of the approach surface. Six of the cut trees appear to be within the Class II Wetland ("Wetland A") or 50' buffer and were cut during non-frozen ground conditions. (NRB Compliance Report, dated 02/18/2021)

37. Based on field observations and an interview with the Airport Manager as described in the Compliance report, EO Servidio determined the Fall 2020 tree clearing activities north of Munson Road appear to be a violation of LUP #9A0158-8 (Altered). (NRB Compliance Report, dated 02/18/2021)
38. As of the date of this Decision, the Natural Resources Board is working with the ANR Wetlands Division to determine next steps in this investigation.

Criterion 8 – Aesthetics, Historic Sites, and Rare and Irreplaceable Natural Areas

FINDINGS OF FACT

Findings of Fact: Aesthetics, Scenic or Natural Beauty

39. The Middlebury State Airport is located in the Town of Middlebury in Addison County, Vermont. The Airport is three miles southeast of the Middlebury Town Center and approximately one mile north of the Village of East Middlebury. The Airport is situated at the western edge of the Green Mountain National Forest, and at the eastern end of the physiographic region known as the "Champlain Lowlands" which parallels Lake Champlain. The ground surface is gently rolling low hills and lakeshore terraces. (Finding #38, LUP #9A0158-8 (Altered))
40. Applicant states that the Project area is characterized by a patchwork of forest and open land and in conformance with the context of the surrounding area. (Exhibit #060).
41. The project will result in a new ± 6-acre area of open field, to be maintained by brush-hogging and mowing. (Exhibit #004)
42. The proposed clearcut of ±6.0 acres equates to approximately 0.54% of the total forested land (1,102.6 acres) within a one-mile radius of the Project. (Exhibit #021)
43. Immediately to the north of the Project tract is a ± 20.56-acre tract, along with surrounding lands to the northwest, that appear to be mostly in agricultural use (Exhibits #010 and 044; site visit observations)
44. The surrounding landscape setting and photographs of the Project tract can be viewed in Exhibits #010 and 011.
45. About ±1,4000 feet to the north (as the crow flies) of the Project tract is Joseph P. Carrara & Sons, Inc. which, according to its website, "produces sand and stone aggregates, ready-mixed concrete, precast/pre-stressed concrete products, and has recently added construction and masonry products." Act 250 Permit Series #9A0145 and 9A0167.
46. The floor of the Project tract, between Munson Road and the northern boundary, is about ±470-480 feet above sea level. (Pages 39-40, Exhibit #071)

47. Any tree that reaches above ± 570 feet in elevation should start to be looked at and cut. (Applicant Testimony)
48. As the project tract is fairly level, the canopies are about the same height, so it's possible that in future years a select-cut approach could result in most if not all trees could be removed at the same time as a result of their proximity to the approach surface. (Applicant Testimony)
49. In Land Use Permit #9A0158-8 (Altered), Findings of Fact, and Conclusions of Law, the District 9 Commission concluded at the time that, the removal and trimming of trees proposed by that Project would be visible to neighbors in the area and therefore the removal of the tree cover would have an adverse impact to the character of the area.
50. Residential homes exist both to the east and west of the Project tract along Munson Road, with Mr. Ploof's property being the closest in proximity, immediately abutting the Project tract to the west.
51. The Project involves maintenance and continuation of the existing Bat Travel Corridor, which serves as a vegetated buffer along the northern property boundary.
52. There will be no ground disturbance in terms of stump removal, which will be ground to the surface and not pulled out and the Applicant instructs its contractors to make a site look better than when they first approached it, which means no slash is allowed to be left behind, but rather chipped and loaded into trucks to be removed from the property. (Applicant Testimony)
53. Along the eastern boundary of the Project tract, a vegetated buffer will remain between the eastern boundary and Munson Road.
54. Along the southern boundary of the Project tract, a vegetative buffer will remain within the Munson Road Town Right-of-Way.
55. Applicant does not propose a vegetative buffer along the western boundary of the Project tract shared with Mr. Ploof, which would directly expose the Ploof property to the proposed clearcut.
56. The residential homes east of the Project tract along the eastern terminus of Munson Road are all further removed from the Project tract as compared to the Ploof property and a vegetated buffer will remain between the eastern boundary of the Project tract and Munson Road. (Exhibit #007)
57. The municipal plan that applies to this application is Middlebury 2017 Town Plan (Town Plan), duly adopted on November 28, 2017. (Exhibit #058)
58. The Zoning Regulations that apply to this application is Middlebury Zoning and Subdivision regulations (Zoning Regulations), duly adopted on March 21, 2018. (Exhibit #069)
59. The portion of the Project Tract on the north side of Munson Road falls within the Forest District. (Exhibit #058, Page 212)

60. The Forest District is identical in both the Town Plan and Zoning Regulations.

61. The portion of the Town Plan that describes the Forest District is as follows:

The Forest District includes areas where topography, natural resources, aquifer/wellhead protection, wetlands, wildlife habitats and/or poor access severely limit development or dictate it. Most of this district consists of National Forest and commercial timberlands. A substantial portion of the Forest District comprises the aquifer recharge and wellhead protection areas for the Middlebury and East Middlebury water systems. Remoteness from public services and the cost of improving and maintaining roads make this district undesirable for development. The Zoning Ordinance provides for limited types and density of development in this district, consistent with 24 VSA 4414(1)(B)(ii). New or substantially extended gravel pits shall be reviewed on a conditional use basis, must have appropriate access to a State highway, and not adversely affect adjacent settled neighborhoods. Gravel pits and concrete operations will have a current reclamation plan outlining a program of progressive restoration of forested cover and ultimate preservation of these lands since they surround the Town's water supply. (Town Plan, Page 149)

62. The Town Plan specifies a number of "particularly important vistas" in Middlebury Village and the surrounding area. Munson Road and the area surrounding Middlebury Airport are not specifically identified in the list of important vistas. (Town Plan, Pages 30-31)

63. A general objective of the Town Plan is to maintain Middlebury as a traditional Vermont town and to protect its unique historic and natural character and qualities. (Town Plan, Page 134)

64. There are no provisions or standards established in the Town Plan regarding protection of scenic or aesthetic resources in the Forest District.

65. There are no provisions or standards established in the Middlebury Zoning and Subdivision Regulations regarding protection of scenic or aesthetic resources in the Forest District.

66. VTrans has not proposed to incorporate any reasonably available aesthetic mitigation measures into the Project.

67. In his comment letter, Ross Conrad shares the following observations:

- a. The north end of Middlebury airport where the Project is proposed rests in a residential community; Munson Road, the North end of School House Hill Road, Burnham Drive, Oak Drive, and Birch Drive are home to approximately 40 residential households.
- b. These streets are used extensively by the residents of the neighborhood and the wider surrounding area for exercise and recreation.
- c. The proposed clear-cut is not in keeping with the scenic beauty of the surrounding area and will have a negative impact on the aesthetic, scenic and natural beauty of the area;

specifically, clear-cuts are inherently unsightly, and the proposed Project will be an eye sore clearly visible to anyone who travels the North end of the airport along Munson Road or passes by the intersection of Munson, School House Hill Road and Burnham Drive.

- d. Munson Road is the primary egress from this residential area to all points north and northwest as well as being the quickest and shortest route to downtown Middlebury, the primary shopping district in the area that also contains the majority of the local government, social service and other amenities. The only other route out of this area is south along School House Hill Road to East Middlebury. Thus, nobody living in this cluster of 40+ residential homes surrounding the proposed project will be able to avoid passing by and seeing the clear cut and brush hogged eye sore left behind by the applicant without having to travel several miles out of their way through East Middlebury every time they wish to go to town or points north. (Exhibit #064)

Findings of Fact: Historic Sites

68. On July 24, 2020, the Vermont Division for Historic Preservation (DHP) filed an Entry of Appearance under Criterion 8 for Historic Sites, wherein it requests that application in this matter remain open with regard to Historic Sites in order to fully address concerns. (Exhibit #033)
69. As determined by the Vermont Division for Historic Preservation, the Project will have **No Effect** on any historic site that is listed in or eligible for inclusion in the State Register of Historic Places. (Exhibit #065; also see Hartgen Report, Exhibit #071, Pages 51-70)

Findings of Fact: Rare and Irreplaceable Natural Areas

70. In its comment letter, ANR states the following, "Under criterion 8, DFW's Ecologist, Eric Sorenson, reviews projects to ensure there are no undue adverse impacts to rare and irreplaceable natural areas (RINAs). Under criterion 8, areas which provide significant landscape connectivity functions can be protected. To analyze the level of connectivity, DFW uses the Vermont Conservation Design (VCD), which identifies 'areas of the state that are the highest priority for maintaining ecological integrity. Together, these lands comprise a connected landscape of large and intact forested habitat, healthy aquatic and riparian systems, and a full range of physical features...' In reviewing VCD, the parcel was not identified as a highest priority or priority area for connectivity. The area also is not known to include any state-significant natural communities or concentrations of rare species. Therefore, DFW has determined the parcel does not qualify as a RINA. DFW noted that as a band of forest in the developed Champlain Valley, the parcel may provide some connectivity functions, but seems unlikely to be an important part of an ecological or wildlife connection between the Green Mountains and Cornwall Swamp. The riparian areas of the Middlebury River and Halnon Brook (farther south) are much more significant connections between the Green Mountains and Cornwall Swamp. The attached screen shot of a VCD map, shows the parcel (red asterisk) and the north of the map, connectivity blocks (Cornwall Swamp on the west and the Green Mountain on the east) in brown/orange, and the riparian corridors in brown." (Exhibit #067)

71. The Project does not qualify as a RINA for landscape connectivity functions under Criterion 8. (Exhibit #067)

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 visual/noise aesthetics, historic sites, and rare and irreplaceable natural areas.

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 several 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).

In the present matter, the area surrounding the project tract can be described as a fairly even mix and distribution of residential, forested, and agricultural lands. It also goes without saying that the Middlebury State Airport is the predominant and most visible use in the immediate area, and has been for over fifty years now. The Commission believes that an airport-related project such as the one proposed is reasonably foreseeable. However, as was the case with Land Use Permit #9A0158-8

(Altered), the Project proposal to clearcut roughly six acres of trees will be permanently visible to at least one neighbor in the area and therefore the removal of this tree cover will have an adverse impact to the character of the area, and therefore an adverse aesthetic impact.

From the perspective of the residential homes due east of the Project tract along the eastern terminus of Munson Toad, it can be concluded that the proposed Project will not result in impacts such that any new or different noise or visual aesthetic impacts should rise much beyond the level of existing conditions.

From the perspective of the Ploof property, the Commission believes there is a reasonable expectation of some degree of noise and visual aesthetic impact for a landowner with proximity to a state airport such as Mr. Ploof, but it is clear that the proposed clearcut will open up Mr. Ploof's home and surrounding property to entirely new and different noise and visual aesthetic impacts. Indeed, the Project tract's shared western boundary with Mr. Ploof would be the only property boundary without a vegetative buffer if the Project were approved as proposed. Accordingly, the Commission believes that the average person in the position and perspective of Mr. Ploof would undoubtedly find the project to be an adverse aesthetic impact and the Commission concludes as such. As the Project as proposed would result in adverse aesthetic impacts, the Commission must now consider whether those adverse impacts are "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 . . .", or

something in that vein, 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. Env'tl. Bd. Dec. 8, 2000).*

As stated in its findings above, the Commission has reviewed relevant portions of Middlebury's Town Plan and Zoning/Subdivision regulations and finds that there are no clear, written community standards or provisions established in either document regarding protection of scenic or aesthetic resources in the Forest District within which the Project is located and airport area generally. Therefore, the proposed Project does not violate a clear community standard.

Additionally, the Commission finds that the Project tract and surrounding area, in its current state, bears few qualities of a scenic vista. It is possible that the Proposed project may indeed result in new or expanded views of the Green Mountains to the north and east. Despite the proposed clearcut, the Project tract and its remaining wooded and vegetated buffers will help to retain a rural, agricultural feel, which fits within the context of the surrounding area. Lastly, the Commission finds that the Project is not contrary to the scenic or wildlife resources or aesthetic objectives identified, discussed, and/or established in the Town Plan.

(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).*

Any potential adverse visual impacts that will result from the improvements proposed by this application - a six-acre clearcut tree removal with heavy machinery and some associated site work - are reasonable expectations and improvements for an airport of the size of Middlebury State Airport and its associated airport maintenance. Therefore, given these considerations, the Commission concludes that the Project is not 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."

As stated in its findings above, the Applicant in this matter has not proposed to incorporate any available mitigating steps to help minimize the aesthetic impacts of the Project upon at least one residential neighbor to the Project tract, Mr. Ploof. Accordingly, the Commission will incorporate permit conditions designed to ensure that the Project's adverse aesthetic impacts will be properly and adequately mitigated such that the Project complies with Criterion 8 for Aesthetics.

Given all of these considerations, we find that the Project, if implemented as conditioned herein, will minimize the adverse impacts of the proposed Project on the scenic or natural beauty of the area.

(d) Conclusion

Based upon all of the above, the Commission finds that any noise impacts resulting from the project will be restricted to daytime hours and will otherwise be temporary and limited in duration; that the Project will not result in any permanent impacts on open space; that reasonable alternatives exist to the proposal to clearcut up to the east and west boundary lines of the Project tract; and that leaving a buffer as required herein will help mitigate any aesthetic noise and visual impacts, as well as help retain the general character of the surrounding area. Therefore, the Commission concludes that the Project will not have an undue adverse effect on the aesthetics or natural and scenic beauty of the area.

Conclusions of Law: Historic Sites

As verified by the Division for Historic Preservation, there will be "No Effect" on any historic site that is listed in or eligible for inclusion in the State Register of Historic Places. Therefore, the Commission concludes that the Project complies with 8 (Historic Sites).

Conclusions of Law: Rare and Irreplaceable Natural Areas

Under Criterion 8, before issuing a permit, the Commission must find the proposed project will not have an undue adverse effect on rare or irreplaceable natural areas.

The Commission uses a four-part test to determine whether a Project satisfies Criterion 8 (Rare and Irreplaceable Natural Areas):

- a. whether the Project is located in a natural area;
- b. whether the natural area is rare and irreplaceable;
- c. whether the Project will have an adverse effect on the rare and irreplaceable natural area;
and
- d. whether the adverse effect, if any, is undue.

There are officially designated "Natural Areas" in Vermont, but the Board has specifically ruled that a site does not have to be officially listed to be considered a natural area. If the Project is not located in a natural area, then the Project complies with Criterion 8, Rare & Irreplaceable Natural Areas.

As stated in the Findings above, the Project is not located in a natural area. Therefore, the Project complies with Criterion 8 for Rare & Irreplaceable Natural Areas.

SUMMARY CONCLUSIONS OF LAW

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.

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

Findings of Fact

72. The VT F&W reviewed the Project under Criterion 8A and determined the Project tract serves as necessary wildlife habitat for the state-endangered and federally threatened Northern Long Eared Bat (NLEB) and state and federally endangered Indiana Bat. (Exhibit #67)
73. The Town of Middlebury is mapped on the VANR Natural Resources Atlas as Summer Range for the Federal- and State-listed Indiana Bat (Exhibits #014, 056). The entire state is considered potential habitat for the Federal- and State- listed Northern Long-Eared Bat. The project area is recognized as a travel corridor for the Indiana Bat and Northern Long-Eared Bat. Years of coordination with the USFWS have resulted in the establishment of a 25'-wide protected bat travel corridor along the northern boundary of the proposed project (see Exhibit 015, D&K Middlebury Airport Bat Travel Corridor Mitigation and Monitoring Memo, 04.04.16; Exhibit 016, D&K Middlebury Airport Bat Travel Corridor Mitigation and Monitoring Memo, 05.13.16; Exhibit 017, D&K Bat Habitat Review Memo, 10.13.17; Exhibit 018, Email from USFWS, 09.19.17; and Exhibit 019, Email from VTF&W, 09.19.17). (Exhibit #001)
74. The Bat Travel Corridor will continue be protected as part of the proposed project and the protected Corridor will be monumented in the field as depicted in the Project Plans. (Exhibit #001, 007)
75. VTrans states that it is committed to protection and mitigation measures to help ensure the protection of the Bat Travel Corridor during and after the currently proposed tree removal. (Exhibit #001)
76. Adaptive management will be utilized to maintain the corridor as needed in consultation with the USFWS and VT F&W. (Exhibit #024)
77. Through discussions with VT F&W, USFWS and VTrans, the parties agreed upon a mitigation plan that provides a 25' wide wooded travel corridor with a minimum 60% canopy cover, on the northern edge of the parcel. Monitoring and adaptive management such as additional plantings are included in the agreements to ensure success of the corridor. (Exhibit #67)
78. VT F&W finds the effectiveness and integrity of the corridor would not be affected by the adjacent clearing as the agreements in place require 60% canopy cover within the corridor itself and

adaptive management to maintain the corridor. This agreement, combined with the presence of varied species, age classes, and heights of trees in existence within the corridor insures continuous vegetative protection even if select trees are periodically removed from the corridor over time. The primary purpose of the corridor is to maintain connections between foraging areas and roosting areas. However, the corridor can also serve as a foraging area for species like the Indiana bat, which forage along forest-field edges. Bats are known to use corridors narrower than 25' in the Champlain Valley, such as along hedgerows adjacent to large fields. (Exhibit #67)

79. In a letter dated April 21, 2020, to the U.S. Fish and Wildlife Service (USFWS) and Vermont Fish and Wildlife Department (VT F&W), the Applicant proposes the following five measures to comply with USFWS and VT F&W requirements (Exhibit #023):

- An acoustic survey for Myotis bat presence within the bat travel corridor and adjacent cut area will be performed by a qualified Wildlife Biologist following the proposed removal of trees per the Tree Removal Plan of March 27, 2020 (attached). The acoustic monitoring plan will be developed in consultation with the VTDFW and USFWS.
- Canopy closure, age class distribution and tree heights within the bat travel corridor will be assessed during the summer following the currently proposed tree removal.
- Based on the results of the acoustic monitoring and the canopy study, USFWS and VT F&W will determine whether additional monitoring or mitigation measures are required.
- VTTrans will implement additional monitoring or mitigation measures, if required, during the summer following the proposed cut, and as deemed necessary in consultation with the USFWS and VT F&W.
- The 25'-wide corridor will be identified by permanent markers in the field in order to prevent accidental intrusion into the corridor.

80. In a letter dated April 28, 2020, Susi von Oettingen, Endangered Species Biologist with the New England Field Office of the USFWS, states that the measures proposed by VTTrans in Exhibit #023, "will reduce the likelihood that adverse impacts will occur to Indiana bats and northern long-eared bats, with one caveat. The acoustic monitoring protocols for post-clearing monitoring must be in place before any tree clearing is to occur." (Exhibit #024)

81. In a letter dated April 28, 2020, Alyssa Bennett, Small Mammals Biologist with the Vermont Fish and Wildlife Department, approved of the measures proposed by VTTrans in Exhibit #023. (Exhibit #025)

82. In a letter dated June 3, 2020, a Bat Monitoring Protocol established in Exhibit #030 was distributed to USFWS and VT F&W for review and approval. Both USFWS and VT F&W offered their approval of the Bat Monitoring Protocol proposed. (Exhibits #030, 036, 037, 061, 062, 063)

83. The Bat Monitoring Protocol in Exhibit #030 establishes the following five requirements:

- a. A VTrans' Consultant will assess the canopy closure of the corridor during full leaf out conditions prior to clearing (late summer 2020).
 - b. A VTrans' Consultant will assess the canopy closure of the corridor during full leaf out conditions after the clearing and provide an assessment of anticipated change and impact to corridor (early summer 2021)
 - c. During full leaf-out following the clearing (Summer 2021), a bat acoustic survey for all species of bats will be performed by a qualified wildlife biologist. The survey will be accomplished with at least four detectors active for at least four seven-day periods during each of the months of May, June, July and August for a total of 28 calendar nights (116 detector nights) beginning May 15th to August 31st. Two detectors will be placed along the corridor and two detectors will be placed away from the corridor in the cleared area. An acoustic report will characterize bat species composition, activity levels and compare bat acoustic results between 2017 and 2021.
 - d. In 2025, (4 years after the above acoustic monitoring), a VTrans' Consultant will assess the canopy closure of the corridor during full leaf out conditions and provide an assessment of how the corridor has changed and if it continues to provide quality corridor use. Will be described in a report.
 - e. In 2025 (4 years after the above acoustic monitoring), a follow-up acoustic monitoring effort will be performed using the same methods and reporting expectations as completed during the 2021 acoustic monitoring effort.
84. The 25-foot travel corridor will be assessed post tree clearing to determine whether the corridor still functions. The assessment will include acoustic monitoring for the presence of Myotis species by a qualified biologist and an analysis about the corridor habitat. (Exhibit #024)
85. Acoustic monitoring and a canopy assessment will be implemented during the summer of 2021 and in 2025 and adaptive management will be implemented as needed. (Exhibit #070)
86. ANR proposes the following conditions to ensure the project will not result in a take of listed bat species, and significantly imperil bat habitat (Exhibit #029):
- a. Tree clearing for the project shall occur between November 1 and March 31 to avoid a take of listed bat species (Northern Long Eared Bats and Indiana Bats.)
 - b. Prior to site preparation and clearing, the limits of the 25' bat corridor identified in Exhibit 22 shall be permanently marked in the field with signage, blazing or any combination thereof to mark the corridor as a protected area and to prevent accidental encroachments into the corridor.
 - c. The Permittee shall implement Exhibit #030 (Dubois & King Bat Monitoring Memo, dated 06.03.2020) regarding acoustic surveys and canopy surveys. Survey results and reports shall

be provided to the Agency's Department of Fish and Wildlife Bat Biologist within 60 days of completion of surveys.

87. The Commission accepts and incorporates all conditions as proposed by ANR, except as modified in the final permit.
88. To the extent that they are not specifically identified herein, and except as amended herein, the Commission carries forward all other previous permit conditions, findings of fact, and conclusions of law related to the protection of the Northern Long Eared and Indiana Bat and the 25-foot wood bat travel corridor. (LUP #9A0158-8)
89. The Project tract is not mapped as a Deer Wintering Area. (*see* Vermont Natural Resources Atlas)
90. Regarding larger game animals, ANR states, "many large mammals in the area such as deer are accustomed to crossing large open areas. Black bears, of which there are not many in the area, typically require larger forested corridors for linkages between habitats. In general, except for bats, the parcel would not be considered necessary wildlife habitat due to its small size and isolated nature." (Exhibit #67)
91. Ross Conrad, Friend of the Commission and resident of Burnham Drive, submitted comments stating that, "the tree clearing and brush hog maintenance will add to the problem of forest fragmentation that has been identified to be a big issue in Vermont and the project as proposed can be expected to have unforeseen negative impacts on the areas wildlife. As a result of the selective cutting that the commission approved several years ago, we have already seen a dramatic decline in the spring peeper population in the class II wetland area that sits between the north end of the airport runway and the south side of Munson Road... What I can say with a high level of confidence is that the current clear-cut and brush hogging proposal will result in additional harm to our natural environment." (Exhibit #064)
92. Mr. Conrad also expressed concerns about the cumulative impacts of the clearcutting of small parcels such as the 6-acre parcel at issue here upon the current high rate of species extinction and climate change. (Exhibit #064)

Conclusions 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).*

As confirmed by ANR and the Applicant, the Project will impact necessary wildlife habitat or endangered species under part one of this test due to its impacts on habitat for the federally Threatened and state Endangered Northern Long Eared Bat and federally and state Endangered Indiana Bat. Under part two of this test, the clearcutting of ±six acres of trees will by default result in the destruction of a large percentage of the bat habitat on the Project tract. However, as established in Land Use Permit #9A0158-8 (Altered) and confirmed by both the Vermont and United States Departments of Fish & Wildlife, Project impacts to the Northern Long Eared and Indiana Bat species are addressed and adequately mitigated through the mitigation and monitoring agreements and protocols established throughout various Project exhibits. Additionally, although impacts of the Project will be significant in the area immediately adjacent to the 25-foot Bat Travel Corridor, the Project does not propose any new or direct impacts to the Corridor previously protected in Land Use Permit #9A0158-8 (Altered).

Aside from impacts to bat habitat, the Commission is satisfied from the evidence on the record that ecological functions of the Project tract, including wildlife habitat and connectivity, will not be significantly adversely impacted. Therefore, as set forth above, because the Project will not destroy or significantly imperil necessary wildlife habitat or endangered species, the Project complies with Criterion 8A.

Criterion 10 – Town and Regional Plans:

Findings of Fact

93. The Commission restates Findings #029-035 and other findings as they relate to its analysis under Criterion 10.
94. The Regional Plan that applies to this application is the Addison County Regional Plan (Regional Plan), duly adopted on July 18, 2018. The project falls within the Industrial Land Use District Identified in the Regional Plan. (Exhibits #001, 059)
95. The Regional Plan states (Exhibit #059):
- a. Section 6. 1 B (Air Transportation) states, "The VTrans multi-year transportation program identified a need to improve runway safety by extending the runway and reconstructing the existing taxiway. This project has been largely completed. This Plan supports the safe, thoughtful expansion of the airport."
 - b. Section 6. 1 B (Air Transportation) establishes the goal, "Promote the Middlebury Airport to support economic development in the Region," and the policy, "Support infrastructure investment and services necessary to allow the Middlebury Airport to function effectively as a small, regional airport."
96. The municipal plan that applies to this application is the Middlebury 2017 Town Plan (Town Plan), duly adopted on November 28, 2017.
97. The portion of the Project Tract on the north side of Munson Road falls within the Forest District. Town Plan, Page 212.
98. Prior to the adoption of the 2017 Town Plan, the portion of the Project Tract on the north side of Munson Road fell within the Airport District, which was the only portion of the Airport District that was revised to be included in the Forest District. (Middlebury 2012 Town Plan).
99. The portion of the Town Plan that describes the Forest District is as follows:
- The Forest District includes areas where topography, natural resources, aquifer/wellhead protection, wetlands, wildlife habitats and/or poor access severely limit development or dictate it. Most of this district consists of National Forest and commercial timberlands. A substantial portion of the Forest District comprises the aquifer recharge and wellhead protection areas for the Middlebury and East Middlebury water systems. Remoteness from public services and the cost of improving and maintaining roads make this district undesirable for development. The Zoning Ordinance provides for limited types and density of development in this district, consistent with 24 VSA 4414(1)(B)(ii). New or substantially extended gravel pits shall be reviewed on a conditional use basis, must have appropriate access to a State highway, and not adversely affect adjacent settled neighborhoods. Gravel pits and concrete operations will have a current reclamation plan outlining a program of progressive restoration of forested cover and ultimate preservation of these lands since they surround the Town's water supply.

100. Gravel pits and related processing operations along Route 116 are in the aquifer recharge area and are close to the Town's public water supply wells. Similarly, a sand and gravel extraction performed by J.P. Carrara & Sons has potential impact to the Fire District #1, East Middlebury water supply as an existing pit and expansion are located in the recharge area and Wellhead/ Source Protection Area. Mineral deposits in the Town are important to local businesses and the economy. The gravel operations are also important in these regards but are of particular concern due to the potential impact on the aquifer. (Town Plan, Page 32)
101. The aquifer recharge area is mostly in a Forest zoning district that is designed to protect the fragile soils and the aquifer recharge functions of this area. About 75% of the aquifer recharge area is in Federal ownership as part of the Green Mountain National Forest. (Middlebury 2017 Town Plan, page 22)
102. Potential sources of contamination of the WHPA and SPA range from onsite septic, agricultural practices, previous petroleum fuel releases, and other hazardous material leaks. (Middlebury 2017 Town Plan, page 22)
103. The Project does not present any risk of releasing the contaminants identified in the Middlebury Town Plan.
104. The capacity of the aquifer to supply drinking water poses no limit to the development of the town in the foreseeable future. (Town Plan, page 22)
105. The Project does not present a risk to the nearby aquifer recharge area, Well-Head Protection Area, and Source Protection Area above and beyond any risks presented by other nearby Forest District uses, including private commercial timber operations and the local sand/gravel/concrete operations of J.P. Carrara & Sons.
106. The "use" proposed by this application – clearcut and ongoing routine maintenance of ±6-acres of land in support of state airport operations – is for state purposes, not for commercial or residential development purposes, as defined by the Act 250 statute and rules.
107. The Project does not propose a change in use and under Act 250, is considered construction of improvements for state purposes.
108. The issuance of an Act 250 permit is not dependent upon municipal zoning or subdivision approval.
109. To the extent the Town Plan Forest District section references Zoning Regulations, they are not relevant to the Commission's analysis under Criterion 10 in this instance.
110. Wetlands on the Project tract will continue to be protected by a wetland buffer.
111. As established in Findings and Conclusions above, the project will not adversely impact any natural resources or wildlife habitat.

112. The project is unlikely to be developed for commercial purposes in the foreseeable future.
113. The Town Plan acknowledges that most of the Forest District consists of commercial timberlands and National Forest Lands.
114. The type of timber harvesting proposed by the Applicant is less invasive than gravel pit and concrete operations.
115. There is no conflict between the relevant provisions of the Town and Regional Plan in this matter.
116. The Addison County Regional Planning Commission (ACRPC) did not file comments on this matter and Mike Winslow, ACRPC Transportation Planner, stated that ACRPC supports the project at the Pre-hearing Conference in this matter.
117. To the extent that the portion of the Project tract on the north side of Munson Road may or may not have been legally re-zoned and re-districted from Airport to Forest District, the Commission finds that outside the scope of review in this matter and does not address that issue in this Decision.
118. The Middlebury Town Plan and Zoning and Subdivision Regulations do not contemplate or directly address airport maintenance uses and activities in the Forest District.
119. The Project does not conflict with any language or provisions in the Town Plan as it relates to the proposed Project use of airport maintenance for State purposes.
120. Mr. Ploof argues that, “[c]lear-cutting would also unduly harm the natural aesthetic beauty of the area and the natural resources on the Project Site and run contrary to the many policy statements in the Town Plan regarding conservation and stewardship of forest resources and canopy cover.” (Exhibit #068). The following Town Plan provisions were provided:

"Our natural resources are the foundation of a diverse economy and healthy environment that supports a high quality of life. Protecting and conserving our natural resources is integral to maintaining and enhancing Middlebury's community character." Page 21.

"Our native flora and fauna depend upon an interconnected network of habitat areas to support all stages of their life history and to facilitate migration over the short and long term." Page 36.

"As land develops, contiguous areas of forest land are interrupted causing fragmentation of wildlife habitat and disruption of movement corridors." Page 34.

"[An objective under the Town Plan is to [i]mprove and maintain the tree canopy in town, and find ways to engage the public in tree stewardship." Page 39.

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. The Commission has reviewed the Project against the Addison County Regional Plan and has determined that it complies with Criterion 10.

Determining whether a project conforms with a municipal plan is a two-step inquiry. First, the Court must determine whether language is “mandatory rather than aspirational.” If the language is mandatory, the Court then determines whether the provision is specific, or “general in nature or ambiguous.” *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 3 (Motion for Reconsideration) (3/15/2018), quoting *In re Twin Pines Hous. Trust & Dismas of Vermont Conditional Use*, Nos. 95-7-11, 96-7-11 Vtec, slip op. at 11-12 (Vt. Super. Ct. Env'tl. Div. Sep. 20, 2012) (Walsh, J.) (citing *In re John J. Flynn Estate & Keystone Dev. Corp.*, #4C0790-2-EB, slip op. at 27-28 (Vt. Env'tl. Bd. May 4, 2004)).

Zoning ordinances are not considered at the first step of the Criteria 10 analysis in determining whether a Town Plan provision is mandatory or merely advisory. *Diverging Diamond Interchange SW Permit* No. 50-6-16 Vtec at 3 (Motion for Reconsideration) (3/15/2018). Moreover, weak language in a Town Plan cannot serve as a bar to deny a project. *See, Re: The Van Sicklen Limited Partnership*, #4C1013R-EB, Findings of Fact, Conclusions of Law, and Order at 55 (Mar. 8, 2002). A project only conflicts with a town plan when the plan's standards are stated in clear, unqualified language that creates no ambiguity. *In re Chaves A250 Permit Reconsider and Chaves Londonderry Gravel Pit A250 Permit*, 2014 VT 5 ¶38 (01/17/14)(citing *In re John A. Russell Corp.*, 2003 VT 93 ¶16 (mem.)). If a Town Plan's provisions are specific, they are applied to the proposed project without any reference to the zoning regulations. *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 20 (4/13/04) [EB #814].

The town plan speaks for itself; “the town plan *itself is the evidence*, and the Board must make its independent judgment” about whether a project conforms to a plan. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 40 (11/24/04) [EB #838]; *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 20 (4/13/04); *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, MOD at 6 (10/8/03). [EB #831], quoting *J. Philip Gerbode*, #6F0396R-EB-1, FCO at 17 (29/92) (but Board considers opinion testimony from towns and other parties concerning whether a particular project conforms with the town plan).

The Supreme Court has cautioned that to support a conclusion that a proposed project conflicts with a town or regional plan, the plan language relied upon must be “stated in language that is clear and unqualified, and creates no ambiguity.” *Re: Chaves Londonderry Gravel Pit, LLC Jurisdictional Opinion #2-257 and Re: Chaves Londonderry Gravel Pit, LLC, and David Chaves Act 250 App.*, Nos. 267-11-08 and 60-4-11 Vtec at 27 (1/17/13) (citing *In re Appeal of JAM Golf, LLC*, 2008 VT 110, ¶ 17, 185 Vt. 201; *In re John A. Russell Corp.*, 2003 VT 93, ¶ 16, 176 Vt. 520), *aff'd In re Chaves A250 Permit Reconsider and Chaves*

Londonderry Gravel Pit A250 Permit, 2014 VT 5 (01/17/14); *In Re Union Bank (Appeal from District #5 Environmental Commission Decision)*, No. 7-1-12 Vtec at 4 (E.O. on Mot. to Dismiss) (11/8/12).

Here, there is indeed language in the Forest District section of the Town Plan that is clear, unqualified, and creates no ambiguity; that language is in regard to gravel pits and concrete operations, with the remainder of the language in the Forest District purely descriptive in nature. There is no such language regarding the type of project or use the Commission is contemplating in this permit application that supports the conclusion that that the Project under review in this instance conflicts with the Forest District section. Moreover, there is no language in the Forest District section of the Town Plan that indicates the Project is contrary to the direction that it appears the Town wants to take in terms of its development in the Forest District. Lastly, in light of other evidence on the record and identified and discussed in this Decision, the Commission concludes that the Project, as conditioned, also does not conflict or run contrary with other environmental-related goals and policies established in the Town Plan, such as natural resources, water source protection areas, wetlands, wildlife habitat and scenic protection. It is clear to the Commission that none of these resources will be at risk of significant adverse impacts as a result of the Project as the Commission will require it to be implemented.

Alas, with all of these things in mind, after its review of the Middlebury Town Plan, 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. Env'tl. 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)*. Accordingly, the Commission concludes that the Project, as will be conditioned, conforms with the Town Plan and therefore complies with Criterion 10.

For the reasons stated above, the Commission concludes that the Project complies with Criterion 10.

VI. 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 #9A0158-11, will comply with the Act 250 criteria. 10 V.S.A § 6086(a).

VII. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, Land Use Permit #9A0158-11 is hereby issued.

DATED this 8th day of April 2021.

By /s/ Fred Baser
Fred Baser, Chair
District 9 Environmental Commission

Commissioners participating in this decision:

Allen Karnatz, Vice Chair

Warren Van Wyck

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.