



FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

State of Vermont
Natural Resources Board
District 8 Environmental Commission
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Rutland, VT 05701-5903
<https://nrb.vermont.gov/>

CASE NO: 8B0623-1

Jeffrey O. Nyweide
PO Box 1426
Manchester Center, VT 05255

LAW/REGULATIONS INVOLVED

10 V.S.A. §§ 6001 – 6111 (Act 250)

I. INTRODUCTION

On September 8, 2020, Jeffrey O. Nyweide, PO Box 1426, Manchester Center, VT 05255 and BMA Architects/Kirk Moore, Principal, PO Box 1114, Manchester, VT 05254 filed application 8B0623-1 for a project described as the development of a 46-bed, four-season, experiential and educational eco-retreat, wedding and cultural event venue, and corporate conference center. The project is located at 507 Benson Road (aka Boorn Brook Farm), in Manchester, VT. The tracts of land consist of 69.08 acres (the "Project Tract"). The Applicant's legal interest is ownership in fee simple described in deeds recorded in the following Books/Pages as set forth in Exhibit 133 (Lands of Jeffrey O. Nyweide): (PARCEL #1) BK 344/PG 670, BK 59/PG 519, BK 41/PG 279; (PARCEL #2) BK 344/PG 670, BK 65/PG 153; (PARCEL 3) BK 344/PG 670, BK 96/PG 403, in the land records of Manchester, Vermont.

The application was determined to be substantially incomplete under Act 250 Rule 10(D) for reasons stated in a letter from the District Coordinator to the Applicant dated October 23, 2020.

Supplemental information was submitted, and the application was deemed adequately complete on October 26, 2020.

Pursuant to Act 250 Rule 16, the District 8 Environmental Commission ("Commission") convened a Prehearing Conference ("PHC") on November 18, 2020, to identify the parties and the issues. The PHC was conducted remotely via Microsoft Teams videoconferencing software pursuant to Executive Order 01-20 and associated Addenda and Directives issued by Governor Scott based upon the coronavirus ("COVID-19") emergency. The Commission then issued Prehearing Conference Reports and Orders ("PHCROs") on December 23, 2020, March 26, 2021, and April 7, 2021, requiring considerable supplemental information in furtherance of a complete application.

At the PHC, all Parties waived their rights to an in-person hearing and instead agreed to also hold the hearing via Microsoft Teams videoconferencing software; there were no objections to pre-filing testimony. The Commission conducted a site visit on April 15, 2021, and held the hearing on this application on April 30, 2021. At the end of the hearing, the Commission recessed the proceeding pending the necessary submission of still more clarifying information, required in recess orders

issued on May 8, 2021, and July 22, 2021. The Commission adjourned the hearing on October 21, 2022, after receipt of the additional information, an opportunity for parties to respond to that information, and the completion of Commission deliberations.

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

II. JURISDICTION

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

III. OFFICIAL NOTICE

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

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

Accordingly, official notice is hereby taken of the application and Land Use Permit (“LUP”) 8B0623, subject to the filing of an objection on or before thirty days from the date of this decision pursuant to Act 250 Rule 6.

IV. AMENDMENT APPLICATION – RULE 34(E)

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

In this application, the applicant does not seek to amend such a critical permit condition, so the Commission may consider the merits of the amendment application without conducting the rest of the Rule 34(E) analysis.

V. PARTY STATUS AND FRIENDS OF THE COMMISSION

A. Parties by Right

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

The Applicants, by Jeffrey O. Nyweide through Christopher Roy, Esq., Kirk Moore—BMA Architects, and Christopher Ponessi, P.E., Mance Engineering Partners.

The Agency of Natural Resources (“ANR”), by Jennifer Mojo, Regulatory Policy Analyst, Office of Planning & Policy.

Agency of Agriculture, Food & Markets (“AAFM”), by Ari Rockland-Miller.

Division for Historic Preservation, by Scott Dillon, Yvonne Basque, and Elizabeth Peebles.

Bennington County Regional Commission (“BCRC”), by Catherine Bryars, Senior Planner.

The Town of Manchester, not represented.

The Manchester Planning Commission, not represented.

B. Interested Parties

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

i. Preliminary Party Status Determinations

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

Mary (Benson) Herba, Brian and Susan Benson, and Donna and John Benson, Sr., GRANTED party status under criteria 1 - Water Pollution, 1(B) - Waste Disposal, 4 - Soil Erosion, 5(A) & 5(B) – Transportation & Traffic Issues, 7 - Municipal Services, 8 – Aesthetics, 9(K) - Effects on Public Investments, 9(L) – Settlement Patterns, and 10 - Local and Regional Plans.

ii. Final Party Status Determinations

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

C. Friends of the Commission

The District Commission received no requests from nonparties to participate as Friends of the Commission pursuant to 10 V.S.A § 6085(c)(5).

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

1 - Air Pollution

1(A) - Headwaters



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| 1(C) - Water Conservation | 9(A) - Impact of Growth |
| 1(F) - Shorelines | 9(C) - Productive Forest Soils |
| 2 - Water Supply | 9(D) - Earth Resources |
| 3 - Impact on Existing Water Supplies | 9(E) - Extraction of Earth Resources |
| 6 - Educational Services | 9(G) - Private Utility Services |
| 8 - Natural Areas | 9(J) - Public Utility Services |
| 8(A) - Wildlife Habitat & Endangered Species | |

Therefore, the application shall serve as the Findings of Fact on these criteria. The findings of fact are based on the application, Exhibits 001 - 178, and other evidence in the record. Findings made in this decision are not limited to the specific criterion in which they appear and may apply to other sections of the decision. To the extent that any proposed findings of fact are included in this decision, they are granted; otherwise, they are denied.

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

Criterion 1 – Water Pollution:

Criterion 1(B) - Waste Disposal

Criterion 1(D) - Floodways

Criterion 1(E) - Streams

Criterion 1(G) - Wetlands

Findings of Fact

1. The Project is located in a headwaters area based on the lack of intensive development, Bourn Brook's drainage area of ~6.5-7 square miles at the project location, and the Project's location within Zone 3 of the Town of Manchester's water supply source protection area ("SPA"). Exhibit 106.
2. The Project is located within the Town's Aquifer Protection Overlay ("APO") District Zone B. Exhibit 106.

3. If surface contamination were to occur in Zone 3, in which this Project is located, there may be impacts to the public water source. Zone B of the APO is comprised of areas that are within potential impact zones. Exhibit 027.
4. Waste generated by the Project will include sewage, food waste, solid waste, stormwater runoff, and stumps generated by site clearing.
5. The Project will implement the construction waste reduction plan filed as Exhibit 030. All cut timber from the approximately 2.2 acres of trees to be cleared will be re-purposed and used onsite. Inert waste (soil, rock, extracted stumps) will be disposed of at a State-certified inert waste disposal facility. Forest and construction debris will not be burned onsite. Exhibits 002, 028 and 037.
6. There will be no exterior waste storage at the resort, and staff will collect wastes daily from all resort structures and activity areas to be transported to the centrally located onsite waste management facility and composting station at the farmhouse. The central trash storage and recycling area will be enclosed, situated on a hard surface, will provide for adequate deposit, maintenance, and pick-up, will be compatible with buildings served, and will be secured. Exhibits 027 and 028.
7. The existing floor drain in the farmhouse garage (the area proposed for the new commercial kitchen) is a low-risk floor drain that will be abandoned (filled in with concrete and capped). No new floor drains are proposed. Exhibits 131, 152, and 163.
8. The ANR Department of Environmental Conservation issued Wastewater System and Potable Water Supply Permit WW-8-0556-1 on March 10, 2021. Exhibit 113.
9. The estimated 7400 gallons per day of wastewater from the Project will be disposed of through onsite disposal using conventional subsurface wastewater disposal systems. Exhibit 113.
10. The onsite food and beverage facilities will be accessory uses to the resort and not marketed as standalone restaurants/bars open to the public at large. The restaurants will only serve registered guests of the resort in some capacity that avail themselves of the uses of the property. Exhibits 027, 028, 033.
11. The resort is designed to lodge 92 guests and intends to hold events beyond the lodging capacity of the resort. Exhibits 027, 028, and Testimony.
12. The resort intends to host a maximum of six (6) events per year that involve 93 to 150 attendees, and six (6) events per year that involve 150 to 300 attendees. A maximum of two (2) events may exceed 300 attendees. Exhibits 027, 028, and 146.
13. The Applicant believes that small events (between 92 and 150 guests) can be supported by, and would not overload, the onsite systems, so no portable trailers are intended to be provided. Exhibit 146 and Testimony.

14. For the eight large events (150 or more attendees), portable restroom trailers will be provided to supplement the permitted onsite sanitary systems. Exhibit 146 and Testimony.
15. The designed capacity and permitted uses of the onsite wastewater/water supply systems do not include the additional population from events that include [off-site] attendees beyond the resort's lodging capacity. Exhibits 113 and 130.
16. The ANR provided comments that events that exceed the resort's permitted lodging capacity can be hosted onsite without amending the wastewater permit, as long as the events are operated within the conditional exemption in the ANR Chapter 1 Environmental Protection Rules, as follows:

1-304 Permit Exemptions

The following actions are exempt from the permitting requirements of this Subchapter, provided no other action is taken or caused to be taken that under these Rules requires the issuance of a permit or permit amendment:

- 1-304 (26) A periodic and temporary change in use of a building or structure for events, provided:
- (A) the building or structure is served by a potable water supply and wastewater system;
 - (B) each event lasts no more than 4 consecutive days;
 - (C) there are no more than 12 days of events per year;
 - (D) the owner of the building or structure retains records of the dates of each event for at least 3 years following each event and provides them to the Secretary if requested by the Secretary.

Exhibits 130 and 162.

17. As currently proposed, hosting fourteen (14) events is not exempt as it exceeds the cumulative total of events per year. Operating outside the allowable limits of the exemption would no longer qualify as being exempt, and the total population served and capacity of supporting amenities would need to be re-evaluated. Exhibit 130.
18. The use of an adequate number of portable sanitary facilities to accommodate everyone onsite for an event is encouraged by the ANR to supplement the onsite wastewater systems. Exhibit 130.
19. The ANR Department of Environmental Conservation issued Public Transient Non-Community Water System Source Permit #S-3748-19.0. Exhibit 110.
20. The ANR Department of Environmental Conservation issued Public Transient Non-Community Water System Construction Permit #C-3748-20.0. Exhibit 164.
21. Prior to commencement of construction, the Town of Manchester will select an engineer to confirm the Project construction and on-site wastewater system is fully compliant with any and all state, federal, and local permit requirements imposed on the Project, that the Project

will not impact any public or private water supplies within the APO, and that the Project is also compliant with the Town's Source Protection Plan and the state public water supply permit. Exhibit 027.

22. The applicant will use erosion prevention and sediment control measures approved in the following permits to control stormwater runoff from the Project:
 - a. The ANR Department of Environmental Conservation has issued coverage under General Permit 3-9050 (Stormwater Authorization to Discharge Permit #9118-9050) for the operational phase of the Project. Exhibit 168.
 - b. The ANR Department of Environmental Conservation has issued coverage under Individual Construction Permit (Individual Stormwater Discharge Permit #9118-INDC) for the construction phase of the Project. Exhibit 173.
23. The Project is in a 100-year floodplain. Exhibit 096.
24. No construction is proposed within 50 feet of the top of bank of Bourn Brook. Exhibit 002.
25. There are existing trails within the river corridor, but there will be no new activities, clearing, trimming, removal of vegetation, or installation of infrastructure within the river corridor or at the designated picnic areas. Exhibits 037 and 106.
26. No Stream Alteration General Permit is required for the installation of a headwall on the south side of the existing culvert near the terminus of Benson Road, assuming it is constructed as represented and the volume of material being excavated and replaced is under 10 cubic yards. Alternatively, the extension of that existing culvert and installation of a headwall on both ends would require a Stream Alteration General Permit because material volumes would exceed 10 cubic yards. Exhibits 137, 166, and 167.
27. If the drainage patterns are altered as a result of the upgrades to the intersection of Benson Road and Glen Brook/Lye Brook Wilderness access road, requiring installation of a new culvert, a minimum diameter of 18 inches would apply under the Vermont Municipal Roads General Permit standards. Exhibit 167.
28. The applicant does not propose any form of demarcation of the riparian buffer, indicating it would be un-natural to the environment. LUP 8B0623 included the following conditions in order to achieve positive findings under Criterion 1(E):
 - a. Condition 7: The Permittee shall not clear, cut, mow, or otherwise disturb the land along the Bourn Brook, from the water's edge to the top of bank or top of slope, and between there and the edge of woods. The Permittee shall keep this land as undisturbed and naturally vegetated.
 - b. Condition 8: The edge of the existing woods shall be prominently marked with signage identifying the edge of the riparian buffer. Signs should be spaced no more than 50 feet apart and should state "Stream Buffer Do Not Disturb."

Exhibit 037 and Official Notice.

29. The ANR requests inclusion of the following revised condition in any permit issued in order to ensure there are no project impacts under criteria 1D and 1E:
- a. The Permittee shall maintain an undisturbed naturally vegetated river corridor/riparian zone along Boorn Brook. The river corridor/riparian zone shall be measured inland, perpendicular to and horizontally 50-feet from the top-of-bank/slope and extend to the water's edge as identified by the RC line on Exhibit 161. The term "undisturbed" means no activities that may cause or contribute to ground or vegetation disturbance, or soil compaction, including but not limited to construction; earth-moving activities; storage of materials; tree trimming or canopy removal; tree, shrub or groundcover removal; plowing or disposal of snow; grazing and mowing. Existing trails within this area may continue to be used provided there is no removal of vegetation.

Exhibit 106 and Official Notice.

30. There are Class II wetlands identified on the Project Parcel, including a manmade pond. All Class II wetlands, including a manmade pond, will require a 50-foot buffer. Exhibits 010 and 109.
31. The Project constitutes an activity in a significant wetland, or buffer zone of a significant wetland, protected under the Vermont Wetland Rules.
32. The ANR Department of Environmental Conservation issued Individual Wetland Permit #2020-553. Exhibit 109.

Conclusions of Law

The Commission notes the presence of repeated mischaracterizations, inconsistencies, and contradictions within the body of evidence of the Act 250 application itself, and even more so, with the representations made in the collateral applications filed with the ANR. This appears to be due, though only in part, to continued, evolving design of the Project after initiation of the permitting processes.

Therefore, the Commission finds the body of evidence largely unreliable. However, the Commission accepts the final ANR permits as providing a presumption of compliance pursuant to Act 250 Rule 19, provided the Project is implemented in accordance with the plans approved by ANR and the resultant permits and authorizations issued by the ANR based upon the approved plans. The Commission will incorporate the ANR permits into any Act 250 permit. To the degree that the Permittee and all successors in interest abide by the ANR permits and all other applicable regulations, the Project establishes conformance with the criteria.

In the event that adherence to the ANR permitting requirements implicate any "material changes" to the Project as otherwise represented and approved herein, the Permittee will be obligated,

pursuant to Act 250 Rule 34, to return to the Commission with an application to amend the permit accompanying these findings. At that time, Parties under these criteria (and criterion 4) will have the opportunity to challenge any such changes.

The ANR permit WW-8-0556-1 creates a presumption pursuant to Act 250 Rule 19 that the disposal of wastes through the installation of wastewater and waste collection, treatment and disposal systems authorized by the permits will not result in undue water pollution. Technical determinations made by ANR in issuing the permit are entitled to substantial deference. 10 V.S.A § 6086(d).

The Wastewater System and Potable Water Supply Permit # WW-8-0556-1 will be incorporated into the Act 250 permit.

The Commission will incorporate the following conditions into the permit to ensure there are no Project impacts under criterion 1(B):

- The Project shall implement the construction waste reduction plan filed as Exhibit 030.
- Inert waste (soil, rock, extracted stumps) shall be disposed of at a State-certified inert waste disposal facility.
- Forest and construction debris shall not be burned onsite.
- There shall be no exterior waste storage at the resort, and staff shall collect wastes daily from all resort structures and activity areas to be transported to the centrally located waste management facility and composting station at the farmhouse. The central trash storage and recycling area shall be enclosed, situated on a hard surface, provide for adequate deposit, maintenance, and pick-up, compatible with buildings served, and secured.
- The existing floor drain shall be permanently plugged, abandoned, and closed in a manner that assures compliance with the ANR Underground Injection Control Program. The Permittee shall submit a completed, certified copy of the Closure Form and evidence of closure to the ANR Underground Injection Control Program and District Commission demonstrating conformance with this condition. No new floor drains shall be installed without amending this permit.
- The restaurants and other onsite food and beverage facilities shall only serve registered guests of the resort in some capacity and shall not be marketed to the public at large as 'standalone' facilities.
- The number and duration of events shall not exceed or operate outside the conditional exemption in the ANR Chapter 1 Environmental Protection Rules, as follows, without prior written approval from the Commission or the District Coordinator, whichever is appropriate under the Act 250 Rules:

The following actions are exempt from the permitting requirements of this Subchapter, provided no other action is taken or caused to be taken that under these Rules requires the issuance of a permit or permit amendment:

1-304(26) A periodic and temporary change in use of a building or structure for events, provided:

- (A) the building or structure is served by a potable water supply and wastewater system;
 - (B) each event lasts no more than 4 consecutive days;
 - (C) there are no more than 12 days of events per year;
 - (D) the owner of the building or structure retains records of the dates of each event for at least 3 years following each event and provides them to the Secretary if requested by the Secretary.
- Portable sanitary facilities adequate to accommodate everyone onsite shall be utilized for all events exceeding resort lodging capacity.

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

The Public Transient Non-Community Water System Source Permit #S-3748-19.0 will be incorporated into the Act 250 permit.

The Public Transient Non-Community Water System Construction Permit #C-3748-20.0 will be incorporated into the Act 250 permit.

The Stormwater Authorization to Discharge Permit #9118-9050 will be incorporated into the Act 250 permit.

Individual Stormwater Discharge Permit #9118-INDC will be incorporated into the Act 250 permit.

The Project complies with Criterion 1(B).

The Commission concludes that the applicant will maintain the natural condition of Bourn Brook and will incorporate ANR's suggested condition into the permit to ensure there are no project impacts under criteria 1D and 1E:

- The Permittee shall maintain an undisturbed naturally vegetated river corridor/riparian zone along Bourn Brook. The river corridor/riparian zone shall be measured inland, perpendicular to and horizontally 50-feet from the top-of-bank/slope and extend to the water's edge as identified by the RC line on Exhibit 161. The term "undisturbed" means no activities that may cause or contribute to ground or vegetation disturbance, or soil compaction, including but not limited to construction; earth-moving activities; storage of materials; tree trimming or canopy removal; tree, shrub or groundcover removal; plowing or disposal of snow; grazing and mowing. Existing trails within this area may continue to be used provided there is no removal of vegetation.

- The Permittee shall secure a Stream Alteration General Permit or written confirmation from that ANR that a permit is not required for the installation of a headwall on one or both ends of the existing culvert if material volumes exceed 10 cubic yards.

The Project complies with Criteria 1(D) and 1(E).

Individual Wetland Permit 2020-553, issued by the ANR, creates a presumption pursuant to Act 250 Rule 19 that the Project will not violate the Vermont Wetland Rules relating to significant wetlands. Technical determinations made by ANR in issuing the permit are entitled to substantial deference. 10 V.S.A § 6086(d).

Individual Wetland Permit 2020-553 will be incorporated into the Act 250 permit.

The Project complies with Criterion 1(G).

Therefore, the Commission concludes that the Project will not result in undue water pollution (Criterion 1 – Water).

Criterion 4 - Soil Erosion:

Findings of Fact

33. The Commission readopts and incorporates by reference herein our findings with respect to Criterion 1.
34. The Project parcel slopes from east to west, with steep banks and slopes to Bourn Brook; the easternmost parcel boundary is at an approximate elevation of 1,200 feet. Portions of the Project parcel have a 10 percent slope, but most of the site development is in areas of four to six percent slope. Exhibit 002.
35. The grass overflow parking area (40 spaces) will only be used for large events, several times per year. It has a sub-base and was included in the stormwater permit. Exhibit 028.
36. Approximately 2.2 acres of trees will be cleared. Exhibit 037.
37. The stormwater from roofs and pathways will be disconnected from other impervious surfaces and be sent to treatment within vegetated/wooded areas and stream buffers. The larger impervious areas being proposed will be treated through the use of shallow dry swales, shallow infiltration basins, bio-retention planting areas, and shallow infiltration trenches. Exhibit 002.
38. Erosion measures taken during construction will be a mixture of silt fence, check dams, temporary and permanent swales, brush matting, dust control spraying, seeding, mulching and various surface treatments. Exhibit 002.
39. Erosion control measures will be inspected on a daily basis during ground disturbance activities, and prior to and after all rain events. Exhibit 002.

40. All the modular shelters are elevated above grade with the entire area below their footprints being pervious with dry wells to hold rainwater for infiltration to manage stormwater. Exhibits 131 and 140.
41. The Project will utilize permeable pavement which has been designed to qualify as a conditionally non-jurisdictional surface under the ANR stormwater management rules. To remain unregulated, the permeable surface must be installed as proposed and functionally maintain retention and infiltration characteristics for the life of the project. Exhibits 141, 167, and Testimony.
42. The applicant will use erosion prevention and sediment control measures approved in the following permits to control stormwater runoff from the Project:
 - a. The ANR Department of Environmental Conservation has issued coverage under General Permit 3-9050 (Stormwater Authorization to Discharge Permit #9118-9050) for the operational phase of the Project. Exhibit 168.
 - b. The ANR Department of Environmental Conservation has issued coverage under Individual Construction Permit (Individual Stormwater Discharge Permit #9118-INDC) for the construction phase of the Project. Exhibit 173.

Conclusions of Law

The ANR stormwater permits create a presumption under Rule 19 that stormwater runoff during construction and operation authorized by the permit will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water. In addition, technical determinations are entitled to substantial deference.

The Stormwater Authorization to Discharge Permit #9118-9050 will be incorporated into the Act 250 permit.

Individual Stormwater Discharge Permit #9118-INDC will be incorporated into the Act 250 permit.

The Commission will incorporate the following conditions into the permit to ensure there are no Project impacts under criterion 4:

- Erosion control measures shall be inspected on a daily basis during ground disturbance activities, and prior to and after all rain events.
- The grass overflow parking area (40 spaces) shall only be used for large events; there shall be no parking outside the designated areas.

The Commission concludes that the construction of the Project will not cause unreasonable soil erosion or a reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

The Project complies with Criterion 4.

Criterion 5 – Transportation

Criteria 7 - Municipal Services

Criterion 9(K) – Development Affecting Public Investments

Findings of Fact

43. The Project will have a singular vehicular access, from Glen and Benson Roads off East Manchester Road; the access is shared with the Lye Brook Falls Wilderness access road and three residences. Exhibit 009.
44. Glen and Benson Roads are gravel-surfaced town roads. A portion of Benson Road is town-owned and maintained as a Class 3 roadway. Exhibits 009 and 155.
45. The Lye Brook recreation area has attracted increasing traffic to the area. Trailhead access parking is limited, and users of the Wilderness Area often park along Benson Road. Exhibit 027 and Testimony.
46. Estimated trip generation for the Project at full capacity is (with two trip ends being a round trip):
 - Total one-way trips = 358
 - AM Peak Hour = 23 Trip Ends
 - PM Peak Hour = 27 Trip Ends
 - Saturday Peak Hour = 27 Trip EndsExhibit 039.
47. This estimated peak hour trip generation does not require a full traffic study pursuant to the State of Vermont Agency of Transportation. Exhibit 009.
48. Large events will result in additional vehicle trips and may result in a shifted peak traffic hour on Benson Road. Exhibit 027.
49. Total onsite parking for the Project is 140 spaces, including: 44 parking spaces at the lodge with two reserved ADA-compliant spaces, 15 parking spaces at the farmhouse for guests and employees, 33 parking spaces at the maintenance building for employees and event vendors, and 40 overflow parking spaces for events that exceed resort lodging capacity. The number of parking spaces are adequate for the resort lodging capacity. Exhibits 027, 028, and Testimony.
50. A shuttle service and an offsite parking location will be employed to reduce traffic and parking impacts created by events that exceed resort lodging capacity. Exhibit 027.
51. Traffic control will be procured by the operators of the Project and provided for large events, including parking management by staff and a traffic control officer at the intersection of Glen and East Manchester Roads for special events over 400 persons. Exhibits 009, 028, and 037.

52. The Project will utilize municipal police, fire, ambulance, and road maintenance services. Exhibits 002 and 011.
53. The Project creates additional costs of public services and facilities, primarily with regard to road maintenance services. East Manchester and Glen Roads can accommodate the projected additional vehicular traffic without causing traffic issues, but Benson Road is a narrow dirt road that requires significant improvement to be suitable for the volume of traffic the Project will introduce to the area, and for emergency services access. Exhibits 011, 090, 155.
54. The Applicant and municipality agreed that Benson Road will be upgraded to town specifications in order to accommodate the Project, including widening and paving, upgrading of the culvert near the road terminus, installing 165 feet of guardrail, realigning the intersection where Lye Brook Falls access road intersects with Glen and Benson Roads and adding a paved apron, and other drainage improvements in the vicinity of 1 and 81 Benson Road. Exhibits 027, 127, 128, 136, and 155.
55. The upgrades to Benson Road will be completed before the Project opens for business. Exhibit 028.
56. The Applicant will compensate the town for expenses incurred for road grading and application of calcium chloride or other accepted treatment to the road to mitigate dust prior to completion of paving as a result of construction traffic for the resort and will reimburse the municipality for initial improvements of Benson Road. Benson Road is already town maintained, and while the town will continue the long-term liability for upkeep of Benson Road, the improvements will result in reduced maintenance and costs. Exhibits 028, 127, 128, 155, and Testimony.
57. A short gravel drive will be constructed adjacent to the fire pond for emergency service access and a shuttle bus turn-around area. Exhibits 011.
58. The fire pond contains sufficient volume to serve anticipated fire suppression needs. Exhibit 011.
59. The Town of Manchester determined that the additional costs of public services and facilities caused directly by the Project will not create burdens that are disproportionate to the tax revenue and user fees created. Exhibits 011 and 028.
60. The Project as proposed will use the shuttle bus to provide safe access and connections to adjacent lands and facilities and to existing pedestrian, bicycle, and transit networks and services. These measures are appropriate in light of the type, scale, and transportation impacts of the proposed Project. Exhibit 028.
61. The Project is adjacent to governmental and public utility facilities, services, and lands. It is adjacent to the Lye Brook Falls Wilderness area and Glen and Benson town roads.

62. The Project will not unreasonably or unnecessarily endanger the public or quasi-public investment in the roads or lands, nor materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service or lands, because Benson Road will be upgraded to town standards at the Applicant's expense, there is adequate onsite parking for resort guests and attendees of small events/retreats, and shuttle service and traffic control measures will be employed by the Project to reduce traffic and safety impacts from events that exceed resort lodging capacity.

Conclusions of Law

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

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

Notwithstanding the requirement for a positive finding, the Commission may not deny a permit solely on the reasons set forth under Criterion 7. See 10 V.S.A § 6087(b). The Commission may, however, attach reasonable conditions to alleviate the burdens created. *Id.*

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

The burden of proof is on the opponents under Criterion 7, but the burden of production is on the Applicants.

Criterion 9(K) applies to projects that are adjacent to governmental and public utility facilities, services, or lands. With regard to such projects, the applicant bears the burden of proving that the Project will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of, or access to, the facility, service or lands. 10 V.S.A § 6086(a)(9)(K).

The Commission will incorporate the following conditions into the permit to ensure there are no Project impacts under criteria 5, 7, and 9(K):

- Total onsite parking for the Project shall not exceed the 140 spaces approved herein without amending this permit.
- A shuttle service and an offsite parking location shall be employed to reduce traffic and parking impacts created by events that exceed resort lodging capacity. Guests of the resort and attendees of events shall not park along Benson Road.
- Traffic control shall be procured by the operators of the Project and provided for large events, including parking management by staff and a traffic control officer at the intersection of Glen and East Manchester Roads for special events over 400 persons.
- The Applicant shall adhere to the Road Maintenance Agreement incorporated herein, including the installation of drainage improvements in the vicinity of 1 and 81 Benson Road.
- The Applicant shall compensate the town for expenses incurred for road grading and application of calcium chloride or other accepted treatment to the road to mitigate dust prior to completion of paving as a result of construction traffic for the resort.
- A short gravel drive shall be constructed adjacent to the fire pond for emergency service access and a shuttle bus turn-around area.

The Commission concludes that the Project will not cause unreasonable congestion or unsafe conditions with respect to use of roads, highways, waterways, railways, airports, and other existing or proposed means of transportation. The Project complies with Criterion 5(A). The Project incorporates all appropriate transportation measures and complies with Criterion 5(B).

The Commission concludes that this Project will not place an unreasonable burden on the ability of the municipality to provide municipal or governmental services. The Project complies with Criterion 7.

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

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

FINDINGS OF FACT

Findings of Fact: Aesthetics, Scenic or Natural Beauty

63. The Project Tract shares boundaries with the Green Mountain National Forest to the south, east, and west. The Lye Brook Wilderness is located to the south of the Project within the Green Mountain National Forest.
64. The Project is not visible from the public roadways.
65. The Applicant requested construction hours from 7:00 AM to 6:00 PM Monday through Saturday, with no construction on holidays. The local permit approved construction hours of 7:00 AM to 7:00 PM Monday through Friday, 8:00 AM to 5:00 PM on Saturdays Exhibits 002 and 027.

66. There will be approximately 2.2 acres of tree clearing for the onsite construction of the lodge building, cabins, perimeter drive lodge parking area, overflow parking area, and maintenance building and car charging area. Exhibits 027, 028, and 037.
67. The Project will utilize existing buildings, and the exterior will remain as is. Most new buildings are small and are Vermont vernacular or modern barn style architecture with earth tone color palettes. The modular shelters are contemporary but will be earth tone colors. Exhibits 002, 016, 017, and 119.
68. The resort intends to host a maximum of six (6) events per year that involve 93 to 150 attendees, and six (6) events per year that involve 150 to 300 attendees. A maximum of two (2) events may exceed 300 attendees. Exhibit 027.
69. The number, duration, and size of events are restricted by the allowances in the wastewater permit and relevant conditional exemption (relevant findings under criterion 1(B) are incorporated herein), as well as the local permit. Exhibit 154.
70. Wedding events will occur from May through October and will typically occur on one of the weekend days. Most weddings will be of a size that can be accommodated at the resort (i.e., 92 people or less). Exhibit 027.
71. Corporate events will typically occur on the “shoulder” season, outside of the season for wedding events. Most corporate events will be attended by guests already staying at the resort. Exhibits 027 and 028.
72. Written notification to all abutting landowners will be provided at least 48 hours in advance of all events exceeding the resort’s lodging capacity. Exhibit 027.
73. There will be no outdoor concerts as a ‘standalone’ type of event. There will only be music ancillary to the events. Exhibit 037 and Testimony.
74. For resort events that include recorded or live music, a limit of 60 dB measured during the daytime (7:00 AM to 11:00 PM) at any point on the Project Tract boundary is proposed to mitigate sound impacts. The resort will own and control its own sound system that will be programmed by an acoustical engineer to ensure these levels are not exceeded. All events at the resort will utilize the programmed sound system and no third-party sound systems will be allowed. An acoustical engineer will calibrate the sound system prior to each event to account for the weather and physical effects on sound attenuation from activities at the resort that generate outdoor sound and will set the system to not exceed the dB levels. Exhibits 002 and 027.
75. There will be restrictions on the duration of events because of overnight guests. There will be no music after 11:00 PM. Testimony.
76. No fireworks are proposed or allowed per the local permit. Testimony.

77. The Project proposes two fire pits, an existing pit adjacent to the lodge building and a new pit at the remote “summit outpost pavilion” in the Forest, Conservation, and Recreational Land Use District. Use of the fire pits by resort guests is to be monitored by resort staff at all times to avoid fire danger; use of the fire pit at the outpost pavilion is to be scheduled and monitored by resort staff. Exhibits 027, 028, and Testimony.
78. There will be no electricity or plumbing at the remote “summit outpost pavilion” in the Forest, Conservation, and Recreational Land Use District and no planned resort activities at that location. Testimony.
79. Exterior lighting will be LED, direct cut-off, mounted at 12 feet above grade on metal poles attached to a concrete base. All site lights will be controlled by timer that will extinguish them at 11:00 P.M. each night. The ground-mounted flood lights directed into the tree canopy by the pond will be disconnected and will not be functional or used. The paths will not be lighted; only the road access and parking areas will be lighted. Flashlights will otherwise be in the modular shelters to be used by guests to navigate the property at night. Exhibit 002 and Testimony.
80. The Commission readopts and incorporates by reference herein our findings with respect to Criterion 5 (traffic).

Findings of Fact: Historic Sites

81. Boorn Brook Farm dates to the 18th century, but the historic integrity of the structures has not been maintained and are no longer eligible for the State Register of Historic Places. Exhibit 105.
82. The Project as proposed will not impact the remains of an early mill foundation located onsite and identified in the Vermont Archaeology Inventory as an archaeologically sensitive area. Exhibit 105.
83. The VDHP requests inclusion of the following condition in any permit issued in order to ensure there are no project impacts under criterion 8 – Historic Sites:
 - a. The property contains archaeologically sensitive areas. As such, any future work on the grounds should be reviewed by the Division for Historic Preservation. No change shall be made to the design, operation, or use of this project without first obtaining a jurisdictional opinion.

Findings of Fact: Rare and Irreplaceable Natural Areas

84. A deer wintering area and two state significant natural communities (Rich Northern Hardwood Forest and Hemlock Forest) are located within the upper (eastern) portion of the Project parcel. Exhibit 106.

85. The Project parcel does not qualify as a rare or irreplaceable natural area. Exhibits 027 and 106.
86. The ANR determined there would be no impacts to either the deer wintering area and its 300-foot buffer or the two state significant natural communities. The deer wintering area will be adequately protected by the inclusion of the condition suggested to mitigate impacts under criteria 1(D) and 1(E). The hemlock Forest is located on the adjacent Green Mountain National Forest parcel. Exhibit 106.
87. Clearing for the Project will result in less than the acreage threshold that requires mitigation measures for the state endangered Northern Long Eared Bats. Exhibit 106.

CONCLUSIONS OF LAW

Prior to granting a permit, the Commission must find that the subdivision or development under Criterion 8 "will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." 10 V.S.A § 6086(a)(8). This Project involves concerns under Criterion 8 related to [aesthetics, noise, odors, historic sites, 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. Env'tl. 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. Env'tl. Bd. Nov. 4, 1985); *In re Halnon*, 174 Vt. 514 (mem.).

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. Env'tl. Ct. May 17, 2010) (citing *Re: Susan Dollenmaier*, #3W0125-5-EB, Findings, Conclusions and Order at 8 (Vt. Env'tl. Bd. Feb. 7, 2005); *In re Eastview at Middlebury, Inc.*, No. 256-11-06 Vtec, slip op. at 5 (Vt. Env'tl. Ct. Feb. 15, 2008), *aff'd*, 2009 VT 98. "Either party's burden, however, may be satisfied by evidence introduced by any of the parties or witnesses" *In re McShinsky*, 153 Vt. 586, 589 (1990) (quoting *In re Quechee Lakes Corp.*, 154 Vt. 543, 553-54 (1990)).

1. Adverse Effect

To determine whether a project will have an adverse aesthetic effect, the Commission looks to whether the project will "fit" the context in which it will be located. In making this evaluation, the Commission examines a number of specific factors, including the following: the nature of the project's surroundings; the compatibility of the project's design with those surroundings; the suitability of the colors and materials selected for the project; the locations from which the project can be viewed; and the potential impact of the project on open space. *Quechee Lakes Corp et al.*

#3W0411-EB and #3W0439-EB *Findings of Fact, Conclusions of Law and Order at 18 (Vt. Env'tl. Bd., Nov. 4, 1985) (cited in Rinkers, No. 302-12-08 Vtec, Decision and Order at 12-13).*

The Project is located in an area characterized by rural residential uses and previously functioned as a small farm.

The Project Tract is not *visible* to the general public; however, the Project, a commercial resort, is inconsistent with the quiet, undeveloped and residential character of the surrounding area, and therefore does not 'fit the context in which it is located'.

The Project seems to consist of two distinct yet interrelated components—the onsite guest accommodations and events that may draw significant numbers of attendees from offsite. The greatest chance for noise, traffic, water pollution, and other impacts to the neighboring residential area will primarily arise from the events, though even certain uses of the “summit outpost pavilion” can impact the wilderness area. While the Lye Brook Wilderness area already exposes the neighborhood to a certain level of activity and traffic, additional and cumulative impacts will be created by the Project.

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

2. Undue Adverse Effect

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

(a) Clear, Written Community Standard

In evaluating whether a project violates a clear written community standard, the Commission looks to town plans, open land studies, and other municipal documents to discern whether a clear, written community standard exists to be applied in review of aesthetic impacts of a project. *Hannaford Brothers Co. and Southland Enterprises, Inc., #4C0238-5-EB, Findings of Fact, Conclusions of Law, and Order at 18 (Vt. Env'tl. 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. Env'tl. Bd. 12/21/00).*

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

The Commission has reviewed relevant portions of the municipal and regional plans. The Plans identify no specific standard relating to the aesthetics of the area in which the Project is located.

Therefore, the proposed Project does not violate a clear community standard.

(b) Offensive or Shocking Character

Criterion 8 "was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from their property will remain the same forever." *Re: Okemo Mountain, Inc. #2S0351-S-EB Findings of Fact, Conclusions of Law, and Order (Dec. 18, 1986)*. Criterion 8 was intended to ensure that as development occurs, reasonable consideration will be given to visual impacts on neighboring landowners, the local community, and on the special scenic resources of Vermont. *Rinkers, No. 302-12-08 Vtec, Decision and Order at 11-12; Horizon Development Corp., #4C0841-EB, Findings of Fact, Conclusions of Law, and Order (Vt. Env'tl. Bd. Aug. 21, 1992)*.

Noise occurring during the daytime hours (i.e., typical 'business hours') is often distinctly different from noise occurring during the very early and very late (or overnight) hours because of ambient conditions. An adverse sound level that is not undue at 7:00 PM could very well be undue at 7:00 AM.

The Project creates undue adverse impacts from a variety of sources:

- Construction hours are proposed to extend for eleven hours per day, six days per week, for the two or more years construction period, and will necessarily include ongoing heavy truck traffic on Benson Road during those hours.
- Events may exceed the lodging capacity of the resort, and some may even exceed 300-400 attendees; no limit to size of those very large events is proposed.
- Large gathering events will generate low-level continuous noise in a quiet, rural residential and wilderness area.
- There is also no clear end time for events. Vehicular traffic on a currently quiet, single-lane dirt road with minimal residential development will create undue aesthetic impacts (from noise and headlights), especially if occurring during very early or very late hours.
- Events may include amplified sound from voices and music (recorded or live), proposed to occur during the hours of 7:00 AM to 11:00 PM, and proposed to only be limited to 60 dB at the property line.
- Events will include fire pits, one of which is intended to be located at the remote "summit outpost pavilion" in the Forest, Conservation, and Recreational Land Use District.
- Large gatherings at the "summit outpost pavilion" will create noise and smoke impacts, and general disturbances, in a remote forested area.

Given all of these considerations, particularly in the context of the immediate surrounding area and its uses, the Commission finds that the Project is offensive and shocking.

(c) Generally Available Mitigating Steps

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

To mitigate the aesthetic impacts of the Project, the Applicant has agreed to:

- Limit construction hours to 7:00 AM to 6:00 PM Monday through Saturday. There will be no construction on holidays.
- Restrict the number and duration of events in accordance with the conditional allowances in the wastewater rule exemption.
- Provide written notification to all abutting landowners at least 48 hours in advance of all events exceeding the resort’s lodging capacity.
- Not hold outdoor concerts as a ‘standalone’ type of event. Music will only be ancillary to the 12 conditionally allowed events.
- Limit the duration of music at events. There will be no music after 11:00 PM.
- Limit the sound level to 60 dB at any point on the property line.
- Not have fireworks displays.
- Not have electric, plumbing, or events at the remote “summit outpost pavilion”.
- Extinguish all exterior site lighting by 11:00 PM each night.
- Provide traffic control measures.

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

However, despite the generally available mitigating steps to be undertaken by the Applicant, the Commission still finds that the Project, if permitted to operate as requested and intended, will continue to cause undue adverse aesthetic impacts on the neighboring area.

The Project will create loud construction noise, including from heavy truck traffic, for 11 hours per day Monday through Saturday over the course of two or more years. This schedule offers little relief and quietude for the adjoining neighbors.

Amplified voices and/or music over an extended period of time, beginning early morning and extending late into the evening, even at 60 dB sound level, does not sufficiently ensure no impact on a rural residential and forested, wilderness area. Further, unlimited hours for an event involving up to, and possibly far exceeding, 300 attendees certainly contribute to at least low-level continuous noise in quiet ambient conditions. Unlimited event hours also necessitate vehicle traffic on a quiet rural road through a residential area during the overnight hours to transport attendees back to their accommodations or designated parking area.

Of equal, if not greater, concern for more significant impacts, the “summit outpost pavilion” sited along the property boundary with the federally-designated Lye Brook Wilderness Area is intended to include a fire pit, which cannot reasonably be monitored by resort staff, and which will inevitably invite gatherings that could generate noise and disturbances over an extended period of time, which in the context of the surrounding ambient conditions, would be impactful. Wilderness areas are defined as having minimal impacts from human activity so that the land be in a wild, natural state. The introduction of extended periods of human noise, smoke, and/or light on the boundary with the Wilderness Area would disturb this critical refuge for wildlife.

Similarly, any future introduction of fireworks displays, commonly desired and requested at events and weddings, would be both visually and audibly shocking and offensive, and incompatible with the surroundings.

Therefore, the Commission will incorporate the following conditions into the permit to ensure there are no Project impacts under criterion 8 (Aesthetics):

- Hours of construction will be further reduced by one hour each weekday, to 7:00 AM to 6:00 PM Monday through Friday, and by two hours on Saturdays, to 8:00 AM to 5:00 PM, with no construction activity allowed on Sundays or federal holidays.
- Amplified sound (e.g., voices and/or music) will be limited to the hours of 9:00 AM to 11:00 PM. to further mitigate noise impacts.
- Fireworks displays will be prohibited and subject to Stowe Club Doctrine and Act 250 Rule 34.
- Events shall end no later than 11:00 PM and shall begin no earlier than 7:00 AM.
- There shall be no fire pit at the “summit outpost pavilion” (as well as no plumbing, electric, music or planned resort events). This condition will be subject to Stowe Club Doctrine and Act 250 Rule 34.

- Additionally, any future request to expand events to increase the size, number, duration, and/or types of events, or extend the hours of exterior lighting and/or amplified sound or music, will require a permit amendment.

For any such request, the Commission will consider whether the operation has been successful at not causing aesthetic issues for the residential neighbors and surrounding area.

(d) Conclusion

Based on the above, 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

The Commission uses a three-part test to determine whether the Project meets the portion of Criterion 8 relating to historic sites. The Commission determines:

- Whether the Project site is or contains a historic site;
- Whether the proposed Project will have an adverse effect on the historic site; and
- Whether the adverse effect will be undue.

Re: Steven L. Reynolds and Harold and Eleanor Cadreact, #4C1117-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Vt. Env'tl. Bd. May 27, 2004); Re: Manchester Commons Associates, #8B0500-EB Findings of Fact, Conclusions of Law, and Order at 18 (Vt. Env'tl. Bd. Sept. 29, 1995).

1. Whether the proposed project site is or contains a historic site.

“Historic site” is defined as “any site, structure, district or archeological landmark which has been officially included in the National Register of Historic Places and/or the State Register of Historic Places or which is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant.” 10 V.S.A § 6001(9).

Listing on the National and State Registers is a question of fact. *Re: Manchester Commons, supra, at 19.* If a structure is listed on the State Register as a historic site, Act 250 has no discretion to declare such structure not to be historic. *Re: Stonybrook Condominium Owners Association, Declaratory Ruling #385, Findings of Fact, Conclusions of Law, and Order at 9 (Vt. Env'tl. Bd. Sep. 18, 2001); Re: OMYA, Inc. and Foster Brothers Farm, Inc., #9A0107-2-EB, Findings of Fact, Conclusions of Law, and Order at 39 (Vt. Env'tl. Bd. May 25, 1999), aff'd, OMYA Inc. v. Town of Middlebury, 171 Vt. 532 (2000).*

Even if a site has not been listed on the National or State Register, 10 V.S.A § 6001(9) allows the Commission to declare it to be a “historic site” if it is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant. Accordingly, the Commission must consider whether such testimony establishes a site, structure, district, or archeological landmark as historically significant. The Commission is not bound by the opinion provided by the Council, but rather, must weigh the testimony and make the determination. *Re: Manchester Commons, supra, at 20.*

Boorn Brook Farm dates to the 18th century and contains the remains of an early mill foundation located onsite and identified in the Vermont Archaeology Inventory as an archaeologically sensitive area.

2. Whether the proposed Project will have an adverse effect on the historic site

The next question is whether the Project will have an adverse effect on the historic site, or whether the Project is in harmony with or fits the historic context of the site.

Important guidelines in evaluating this fit include the following: (1) whether there will be physical destruction, damage, or alteration of those qualities which make the site historic, such as an existing structure, landscape, or setting; and (2) whether the proposed project will have other effects on the historic structure, landscape, or setting which are incongruous or incompatible with the site's historic qualities, including, but not limited to, such effects as isolation of an historic structure from its historic setting, new property uses, or new visual, audible or atmospheric elements. *Re: Middlebury College, #9AO177-EB, Findings of Fact, Conclusions of Law and Order at 10 (Vt. Env'tl. Bd. Jan. 26, 1990); cited in Re: OMYA, Inc. and Foster Brothers Farm, Inc., #9A0107-2-EB, Findings of Fact, Conclusions of Law, and Order at 39 (Vt. Env'tl. Bd. May 25, 1999), aff'd, OMYA Inc. v. Town of Middlebury, 171 Vt. 532 (2000).*

The historic integrity of the structures has not been maintained and are therefore no longer eligible for the State Register of Historic Places.

The VDHP requests inclusion of the following condition in any permit issued in order to ensure there are no project impacts to the remains of the early mill foundation or otherwise under criterion 8 – Historic Sites:

- The property contains archaeologically sensitive areas. As such, any future work on the grounds should be reviewed by the Division for Historic Preservation. No change shall be made to the design, operation or use of this project without first obtaining a jurisdictional opinion.

3. Whether the adverse effect will be undue.

An adverse effect is undue if any of the following factors exists:

1. the applicant has failed to take generally available mitigating steps which a reasonable person would take to preserve the character of the historic site;
2. the proposed project will interfere with the ability of the public to interpret or appreciate the historic qualities of the site;
3. the cumulative effects on historic qualities of the site by the various components of a proposed project, when taken together, are so significant that they create an unacceptable impact;
4. the project violates a clear, written community standard which is intended to preserve the historic qualities of the site.

Middlebury College, supra at 10; cited in Re: OMYA, Inc. and Foster Brothers Farm, Inc., #9A0107-2-EB, Findings of Fact, Conclusions of Law, and Order at 40 (May 25, 1999), aff'd, OMYA Inc. v. Town of Middlebury, 171 Vt. 532 (2000); see also, Manchester Commons, supra at 22.

The Commission concludes that the Project will have no effect on any historic sites, and will incorporate VDHP's suggested condition into the permit to ensure there are no project impacts to archaeologically sensitive areas under criterion 8.

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):

- 1) whether the Project is located in a natural area;
- 2) whether the natural area is rare and irreplaceable;
- 3) whether the Project will have an adverse effect on the rare and irreplaceable natural area; and
- 4) whether the adverse effect, if any, is undue.

There are two guidelines for identifying natural areas as follows:

- a. an area which contains an identifiable type of ecological community; and
- b. an area in which natural conditions predominate over human influences.

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 a project is not located in a natural area, then the project complies with Criterion 8, Rare & Irreplaceable Natural Areas.

If the Project is located in a natural area, ask if the natural area is rare and irreplaceable. There are several examples of rare areas:

- a. a community type which occurs infrequently in Vermont and usually occurs further south (or in any direction at a significant distance from Vermont);
- b. hosts rare plants; or
- c. is a valuable educational and scientific resource.

The Project parcel does not qualify as a rare or irreplaceable natural area. The deer wintering area will be adequately protected by the inclusion of the condition suggested to mitigate impacts under criteria 1(D) and 1(E). Therefore, the Project complies with Criterion 8, Rare & Irreplaceable Natural Areas.

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

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. The Project complies with Criterion 8, Aesthetics, Historic Sites and Rare & Irreplaceable Natural Areas.

Criterion 9(B) - Primary Agricultural Soils:

Findings of Fact

88. The Project Tract contains 9.35 acres of NRCS mapped agricultural soils in two distinct areas, including 6.41 contiguous acres of NRCS Berkshire fine sandy loam soils ranked as Prime and 2.94 contiguous acres of NRCS Berkshire fine sandy loam soils ranked as Statewide. Exhibits 026 and 031.
89. The Agency of Agriculture, Food, and Markets ("AAFM") holds the opinion that, due to previous disturbance, 0.35 acres of the mapped soils no longer meet the statutory definition of prime agricultural soils. Exhibit 031.
90. The AAFM also holds that the Project will either directly or indirectly impact 3.76 acres of the NRCS mapped soils, including 1.70 acres of NRCS Prime Berkshire fine sandy loam soils and 2.06 acres of NRCS Statewide Berkshire fine sandy loam soils. Exhibit 031.
91. Because of the statutory multipliers, 8.37 acres of mitigation are warranted. Exhibit 031.
92. The Project will not interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agriculture or forestry potential. Exhibit 037.
93. The Project is not located in a downtown development district, growth center, new town center designated, or a neighborhood development area associated with a downtown development district pursuant to 24 V.S.A. chapter 76A and as referenced in 10 V.S.A. § 6093(a)(1).
94. The Applicant owns no other lands reasonably suited to this Project. Exhibit 037.
95. The Project was not planned to minimize the reduction of agricultural potential of the primary agricultural soils through innovative land use design resulting in compact development patterns so that the remaining primary agricultural soils on the Project Tract are capable of supporting or contributing to an economic or commercial agricultural operation. Because of the nature of the Project, compact development is not suitable. There are two 'hubs' of guest areas/activities: the farmhouse compound, and the lodge and shelter area. The Project has been designed to disperse the modular shelters throughout the site to provide a connection with the natural environment and a sense of remoteness, away from the events for privacy. Both parking lots were sited on prime agricultural soils to keep parking adjacent to the buildings, prevent impacts to viewshed, and to prevent vehicular traffic from accessing modular shelters while still remaining accessible to guests. Exhibit 037 and Testimony.

96. The Applicant proposes to mitigate impacts to the PAS with off-site mitigation if appropriate circumstances are found by the District Commission. Exhibits 031, 037, and Testimony.
97. The Project has limited impact on the primary agricultural soils suitable for a commercial agricultural operation. Approximately 5.24 acres of primary agricultural soils will remain undeveloped/undisturbed on the Project Tract. Exhibit 037.
98. Of the remaining 5.24 acres of primary agricultural soils that will remain undeveloped/undisturbed, approximately one-third (0.84 contiguous acres) of the statewide soils are located in the middle of the Project Tract and will remain unfragmented by Project trails and infrastructure, and available for possible onsite mitigation. Testimony.
99. Any prime agricultural acreage set aside for onsite mitigation must be capable of supporting commercial farming. Two contiguous acres of prime agricultural soils, devoid of buffers, is considered the minimum to preserve onsite to be able to contribute to farming uses. Testimony.
100. The agricultural soils are not capable of supporting an agricultural operation. The remaining ~5.24 acres of undeveloped/undisturbed prime and statewide soils on the Project Tract are broken up and do not leave sufficiently large contiguous mapped units in each location suitable for commercial farming and are therefore not suitable for onsite mitigation. The prime rated soils are located in a wooded area along the access road and are partially bisected by 2.8 acres of wetland and wetland buffer and maps over the area of the existing falconry school. Of the statewide soils located in the middle of the Project Tract, ~0.25 acres are within the river corridor buffer. Exhibits 026, 037, 107, 108, and Testimony.
101. The Project Tract is characterized by areas of steep slopes (15%), which reduces the accessibility of the NRCS Prime soils. Exhibit 026.
102. The AAFM has determined that the appropriate mitigation ratio for the primary agricultural soils affected by the Project is 2:1 for the 2.06 acres of statewide soils and 2.5:1 for the 1.7 acres of prime soils. Exhibit 031.
103. The AAFM has determined that the recent, per-acre cost to acquire conservation easements for primary agricultural soils in the geographic region of the Project is \$1,577.00.
104. The Project will require 8.37 acres of off-site mitigation because of statutory multipliers. The off-site mitigation fee will total \$13,199.49. Exhibits 031 and 037.

Conclusions of Law

Presence of Primary Agricultural Soils

Under criterion 9(B), a subdivision or development may not result in any reduction in the agricultural potential of the primary agricultural soils or significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry

potential. Act 250 defines primary agricultural soils as either (1) an important farmland soils map unit identified by the Natural Resources Conservation Service of the United States Department of Agriculture (NRCS) as prime, statewide, or local importance, or (2) "soils on the Project Tract that the District Commission finds to be of agricultural importance, due to their present or recent use for agricultural activities..." 10 V.S.A. § 6001(15).

The Commission finds that 9.35 acres of primary agricultural soils on the site have been identified by the NRCS as prime, statewide, or local importance.

Although 9.35 acres of soils have been identified by NRCS as prime, statewide, or local importance the Agency of Agriculture confirms that 0.35 acres of the identified soils have lost their agricultural potential due to pre-existing impacts.

Based on the District Commission's evaluation of the factors above, the Commission concludes that 0.35 acres of mapped primary agricultural soils have lost their agricultural potential.

In summary, the Commission concludes that 9.0 acres of soils on the Project Tract meet the Act 250 definition of primary agricultural soils at 10 V.S.A § 6001(15).

Reduction in Agricultural Potential of Soils

The Commission finds that the Project will result in a reduction in the potential of 3.76 acres of the 9.0 acres of primary agricultural soils through direct or indirect impacts to the soils. Because there will be a reduction in the agricultural potential of 3.76 acres of primary agricultural soils, the District Commission must conduct a review under the sub-criteria of Criterion 9(B).

Sub-criterion (i)

Sub-criterion (i) is met through a representation that the proposed Project will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential. The Project will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential for the following reasons. Therefore, the Commission concludes that the applicant has met sub-criterion (i).

Sub-criterion (ii)

Sub-criterion (ii) is met if the Applicants do not own or control any non-agricultural soils which are reasonably suited for this Project. The applicant does not own or control other lands that do not contain primary agricultural soils and which are reasonably suited to the purpose of the development or subdivision. Therefore, the Commission concludes that the applicant has met sub-criterion (ii).

Sub-criterion (iii)

For projects located outside designated growth centers, applicants, in most instances, are required to provide "on-site" mitigation through the use of "innovative land use design resulting in compact development patterns which will preserve primary agricultural soils on the Project Tract for present

and future agricultural use.” The remaining soils must be capable of supporting or contributing to an economic or commercial agricultural operation.

The Project is located outside of a designated growth center, but permanent preservation of the remaining undisturbed primary agricultural soils on the Project Tract is not feasible. Due to the nature of the development, compact development is not suitable. As such, the balance of undisturbed primary agricultural soils results in small, fragmented mapped units, not capable of supporting or contributing to an economic or commercial agricultural operation, and therefore not worth preserving onsite towards the 8.37 acres of mitigation warranted.

Therefore, the Commission concludes that the applicant has met sub-criterion (iii).

Mitigation Flexibility

The Commission has the flexibility to approve alternate mitigation proposals both inside and outside of designated centers in appropriate circumstances. In appropriate circumstances, the District Environmental Commission may, in lieu of the provisions of 10 V.S.A § 6093(a)(1) or (2), require payment of an off-site mitigation fee; or, in the alternative, the Commission may require a combination of on-site or off-site mitigation. In all instances, however, the applicant must demonstrate that the Project has been planned to minimize the reduction of agricultural potential of the primary agricultural soils through innovative land use design resulting in compact development patterns. If the Commission concludes that the applicant has used such innovative design, it must also find that the remaining primary agricultural soils on the Project Tract are capable of supporting or contributing to an economic or commercial agricultural operation or that the applicant qualifies for mitigation flexibility based on appropriate circumstances.

The applicant has asked for a finding of appropriate circumstances, which the commission discusses below.

Appropriate Circumstances

In accordance with the Statement of Procedure on Protection of Primary Agricultural Soils adopted by the Land Use Panel of the Natural Resources Board on September 11, 2012, appropriate circumstances may be based on a finding of the following:

- a) the tract of land containing primary agricultural soils is of limited value in terms of contributing to an economic or commercial agricultural operation and devoting the land to agricultural uses is considered to be impractical based on the size of the land or its location in relationship to other agricultural and nonagricultural uses; or
- b) the Project Tract is surrounded by or adjacent to other high-density development with supporting infrastructure and, as a result of good land design, the Project will contribute to the existing compact development patterns in the area; or
- c) the area contains a mixture of uses, including commercial and industrial uses, and a significant residential component, supported by municipal infrastructure, and

- d) the District Commission determines that payment of an offsite mitigation fee, or some combination of onsite or offsite mitigation, will best further the goal of preserving primary agricultural soils for present and future agricultural use with special emphasis on protecting prime agricultural soils thus serving to strengthen the long-term economic viability of Vermont's agricultural resources.

The Commission must also determine that such action is consistent with the agricultural elements of local and regional plans, as well as the pertaining goals of section 4302 of Title 24.

The Commission concludes that the Project Tract containing primary agricultural soils will be of limited value in terms of contributing to an economic or commercial agricultural operation and that payment of an off-site mitigation fee will best further the goal of preserving primary agricultural soils for present and future agricultural use with special emphasis on protecting primary agricultural soils, thus serving to strengthen the long-term economic viability of Vermont's agricultural resources.

Sub-criterion (iv)

The Project is located outside of a designated area and suitable mitigation will be provided for any reduction in the agricultural potential of the primary agricultural soils caused by the development or subdivision, in accordance with 10 V.S.A § 6093. The findings under sub-criterion 9(B)(iii) above are hereby incorporated by reference.

Conclusions of Law

The District Commission concludes that the Project will result in a reduction in the agricultural potential of primary agricultural soils on the Project Tract, however the applicant has satisfied the applicable provisions of sub-criteria (i) – (iv). The Commission further concludes that appropriate circumstances exist to allow for flexibility for off-site mitigation to further the goal of preserving primary agricultural soils for present and future agricultural use.

The Commission will include a condition in the Land Use Permit requiring an off-site mitigation fee payment be made prior to commencement of construction. 10 V.S.A § § 6086 and 6093.

Therefore, the Project complies with Criterion 9(B).

Criterion 9(F) - Energy Conservation:

Findings of Fact

- 105. The applicant will construct and operate the modular shelters and any buildings that are part of the Project in accordance with the Residential Building Energy Standards issued by the Vermont Department of Public Service pursuant to 30 V.S.A. § 51(e) (RBES Stretch Code) and/or the Commercial Building Energy Standards issued by the Vermont Department of Public Service pursuant to 30 V.S.A. § 53 (CBES) effective at the time of construction. Exhibits 002 and 037.
- 106. The Project's planning and design incorporates the following energy conservation measures, which will reduce the Project's greenhouse gas emissions from the use of energy:

- a. The modular shelters (cabins) and proposed new buildings connected to the water supply system will utilize low-flow plumbing fixtures. Exhibit 002.
 - b. The modular shelters will be heated and cooled with air-to-air heat pumps. Exhibits 027 and 037.
 - c. Electric carts will be utilized for onsite transportation and four electric car charging stations will be installed. Exhibits 028 and 037.
 - d. All exterior light fixtures will be LED.
 - e. Shuttle service will be provided.
 - f. Electric vehicle charging area will be installed. Exhibit 161.
107. The modular shelters incorporate sustainable technology and energy conservation methods. The design intent is to encourage guests to be outdoors by minimizing the interior conditioned space and providing generous open-air porches. The cabins will be covered by secondary superstructure tent roofs to shade the cabin units, reducing the amount of active cooling needed from mechanical equipment. Conditioned space will be heated and cooled by a high-efficiency, ductless split air-conditioning unit. The efficient thermal envelope in combination with efficient mechanical equipment will allow the cabin to meet or exceed the CBES/RBES. Proposed energy conservation measures are as follows:
- a. The roof and floor will be insulated to R-49, with continuous roof/floor and exterior insulation.
 - b. The walls will be insulated to R-38, with continuous wall and exterior insulation.
 - c. The exterior thermal envelope contains a continuous, durable air barrier.
 - d. All windows will be thermally broken aluminum frames with insulated double-glazed glass and will meet or exceed the code requirement.
 - e. All doors will be thermally broken aluminum frames with insulated double-glazed glass and will meet or exceed the code requirement.
 - f. All lighting will be dimmable LED fixtures. Occupancy sensors will be installed where suitable.
 - g. To reduce greenhouse gas emissions, the cabins will be accessed using a site-wide strategy of walking paths leading to the cabins to reduce the need for vehicles once on the property. Additionally, no fossil fuels will be used in the heating or cooling of cabins. The building envelope will be well insulated, and air sealing measures will be used during construction for a tight envelope.
- Exhibit 131.

Conclusions of Law

Criterion 9(F) requires the Applicant to show that the planning and design of the Project “reflect the principles of energy conservation, including reduction of greenhouse gas emissions from the use of energy, and incorporate the best available technology for efficient use or recovery of energy.” 10 V.S.A § 6086(a)(9)(F).

Criterion 9(F) requires that the Applicant “provide evidence that the subdivision or development complies with the applicable building energy standards under 30 V.S.A. §51 (e)(RBES-Stretch Code) or 53 (CBES).”

“Substantial and reliable evidence of compliance with the RBES ...stretch code established and updated under this section shall serve as a presumption of compliance” with Criterion 9(F), except with regard to electric resistance space heating. 30 V.S.A. § 51(e). The RBES Stretch Code is effective as of September 1, 2020.

The Applicant will construct and operate the modular shelters and any buildings that are part of the Project in accordance with the Residential Building Energy Standards issued by the Vermont Department of Public Service pursuant to 30 V.S.A. § 51 (RBES Stretch Code) and/or the Commercial Building Energy Standards issued by the Vermont Department of Public Service pursuant to 30 V.S.A. § 53 (CBES) and will follow the Natural Resources Board Criterion 9F Procedure effective at the time of construction. The presumption of compliance applies, and the Commission will incorporate the following conditions into the permit to ensure there are no project impacts under criterion 9(F):

- Pursuant to 30 V.S.A. Section 51(e) and/or 30 V.S.A. § 53, the energy design and construction shall comply with Vermont’s Residential Building Energy Standards (RBES) Stretch Code and/or Vermont’s Commercial Building Energy Standards (CBES) in accordance with the NRB Criterion 9(F) Procedure effective at the time of construction.
- The Permittee shall install and maintain only low-flow plumbing fixtures in any buildings and the energy and/or water conservation measures represented in Exhibits 002, 027, 028, 037, and 131. Any failed energy and/or water conservation measures shall be promptly replaced with products of equal or better performance.
- An electric vehicle charging area will be installed.

Therefore, the Project complies with Criterion 9(F).

Criterion 9(H) - Costs of Scattered Development:

Findings of Fact

108. The Project is not contiguous or proximate to an existing settlement or developed area.
109. The Project will attract new visitors to the area, generating municipal tax revenues of approximately \$114,000 annually, and benefiting other local businesses and surrounding venues. Exhibits 002 and 028.
110. The Project will create 30 to 35 employment opportunities. Exhibit 002.
111. The Project creates additional costs of public services and facilities, primarily with regard to road maintenance services. Benson Road is a narrow dirt road that requires significant improvement to be suitable for the volume of traffic the Project will introduce to the area, and for emergency services access. Exhibits 011, 090, 155.

112. The Town of Manchester determined that the additional costs of public services and facilities caused directly by the Project will not create burdens that are disproportionate to the tax revenue and user fees created. Exhibits 011 and 028.
113. The Applicant will contribute to expenses incurred by the town for road grading as a result of construction traffic for the resort and will reimburse the municipality for initial improvements of Benson Road and emergency service access, and while the Town of Manchester will continue the long-term liability for upkeep of Benson Road, the improvements will reduce the overall maintenance. Exhibits 011, 028, 155, and Testimony.

Conclusions of Law

Criterion 9(H) applies only to projects that are not located within or immediately contiguous to an existing settlement. An “existing settlement” is defined as a designated center pursuant to 24 V.S.A. Chapter 76A, or:

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

10 V.S.A § 6001(16).

Criterion 9(H) requires a demonstration that:

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

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

The proposed Project is not physically contiguous to an existing settlement. The additional costs of public services and facilities caused directly or indirectly by the proposed project are offset by the tax revenue and other public benefits of the development, such as increased employment opportunities and tourism. While there are additional costs of public services, the Commission concludes these costs will not create any undue burdens upon the Town of Manchester.

The Project complies with Criterion 9(H).

Criterion 9(L) – Settlement Patterns:

Findings of Fact

Existing Settlement

114. The Project Tract is not in a village center, downtown development district, growth center, new town center, Vermont neighborhood or neighborhood development area designated pursuant to 24 V.S.A. Chapter 76A.
115. The Project Tract is not located in an existing center, or an area that includes the following characteristics: a compact, walkable, community center with a mix of uses and substantial residential component, that has significantly higher densities than outside that center, and/or that is served by the following municipal infrastructure: water, wastewater, sidewalks, paths, transit, parking areas, and public parks or greens. Testimony.
116. The Project is located at the end of a Class 3 town road in the Rural and Forest Districts and is not in proximity to existing developed areas; it is surrounded by undeveloped lands and minimal residential development. The closest public business is located approximately one mile away from the Project Tract. Exhibit 090.

Efficient Use

117. The Project is commercial and does not include a residential component.
118. The Project makes efficient use of land, energy, roads, utilities, and other supporting infrastructure as follows:
 - a. The commercial resort will not require extension of municipal infrastructure or utilities; the Project will utilize its own onsite water supply and wastewater systems rather than connect to municipal water or sewer systems, which are not in proximity to the Project. Exhibit 027.
 - b. The Project will use utility poles that already extend to the Project Tract.
 - c. Existing buildings onsite will be redeveloped.
 - d. New structures will be energy efficient.

Strip Development

119. The Project is not a linear commercial ("strip") development and is not located along a public highway. It will have limited visibility from the nearest public highway.
120. The Project is not in an area of existing strip development.
121. There is no evidence that the Project will establish or contribute to a pattern of strip development.

Conclusions of Law

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

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

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

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

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

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

10 V.S.A § 6001(36).

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

Criterion 9(L) requires that projects:

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

Applying the Criterion 9(L) guidance established by the Natural Resources Board, it is possible to conclude, depending on one's perspective and interpretation of "efficient use", that this Project is in a 'gray area' and could just as easily comply, as not comply, with Criterion 9(L).

The Project is located on a dead-end rural town highway adjacent to the Green Mountain National Forest lands, and agricultural and rural residential properties. Yet, the Project is not farming use, nor can it conceivably be considered a "campground" in the traditional sense. The Project is by and large a hospitality enterprise with predominantly indoor uses, having what can be considered two almost distinct components—events, and a resort with individual onsite luxury guest accommodations—that will create a substantial impact on this remote, rural and forested region. The purported outdoor recreational uses are subordinate to the primary use as an event and corporate retreat venue.

The Project might be considered to include a certain efficiency of design and clustering by virtue of the grouping of the modular shelters and lodge within the wooded area of the Project Tract and the event space being limited to the open area of the existing farmhouse compound, and yet it could still be reasonably difficult to site such a project in an existing settlement, in part due to its expansive scale and design, and in part because such an intense use of a site located in a more populated area would have likely introduced different significant impacts under other criteria which Act 250 seeks to protect.

The Project is a visitor-reliant recreational resort/retreat with ancillary food and beverage facilities and services that will primarily serve only resort guests. While the Project has been permitted by the Town of Manchester due to the specific allowances provided by its zoning bylaws, specific operations of the Project—in particular the Applicant's intended use of the proposed restaurants as standalone restaurants open to the public at large (even if by reservation only)—were rejected based on the assertion that conditional uses should be considered based on the scale of their effects on the area, and that conditional use was not appropriate for this location.

While being sited approximate to Lye Brook Falls Wilderness, an existing significant regional attraction for visitors creating its own traffic impacts, the Project will certainly attract more visitors that will compound those traffic impacts. And any use of the restaurants/bar to serve the public at large would only serve as an additional draw to the area, expanding the scope and scale of undue adverse impacts in the region.

So, while the Project may not technically meet the statutory definition of strip development in the context of this geographic area, it also does not promote Vermont's historic settlement patterns. Further, it is indeterminate whether its sporadically intensive commercial uses will be complementary to the nearby existing settlement or whether it will change current patterns by bringing large numbers of people to the area, creating or contributing to a pattern of scattered, strip or strip-like development akin to 'urban sprawl', general sequential growth that 9L was intended to prevent. Ample consideration was given to the fact that the onsite food and beverage amenities, in particular, are not permitted as stand-alone amenities, and are unable to serve the public at large as originally intended by the Applicant.

Therefore, while this Commission has ultimately determined that this Project complies with Criterion 9(L), it does so as a matter of connotation. It is for this reason that we envisage that this Project should not serve as precedent under Act 250's criterion 9L to allow similar development throughout the region's rural areas.

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

Criterion 10 – Town and Regional Plans:

Findings of Fact

122. The municipal plan that applies to this application is the Manchester Town Plan adopted May 8, 2017. Exhibits 002 and 124.
123. The Project parcel is located within two municipal land use areas: 1) the Rural Residential and Agricultural/Working Lands zoning district; and 2) the Forest, Conservation, and Recreation Lands zoning district. Exhibits 129 and 143.
124. There are no mandatory provisions in the town plan. The town plan does include strong instructional language for the town to consider when considering development. For instance:
 - a. Under Part 1, Section 1 of the Manchester Town Plan that addresses Economic Development, the mission statement is to "...create a vibrant economic environment...". The multi-town Northshire Economic Development Strategy was completed to achieve this mission, and includes goals to "cultivate tourism, food, arts, and culture industries" and to "support entrepreneurship and business development". Further, it includes a policy to "ensure needed land area and infrastructure are available in appropriate areas for various industries", for example, to "allow microenterprises within agriculturally zoned areas".

However, the town plan goes on to instruct:

- b. Under Part 1, Section 2 that addresses Energy, natural Resources & Flood Resilience:
 - i. "the town must take the long view, and protect and conserve its natural resources";
 - ii. "[w]ith regard to lower slopes and hillsides, the intent is not to prohibit all development; rather, that development and structures be sited sensitively and appropriately, in ways that fit into the landscape";
 - iii. "Uses in [the Forest, Conservation, and Recreation Lands zoning district] are limited to those requiring a forested landscape" and "[d]evelopment of buildings serving these uses is allowed only at a very low density"; and
 - iv. Since "[a]griculture...remains essential to Manchester's working landscape", "[i]t is important to conserve agricultural lands", and "[t]herefore, the town

will pursue all available tools to protect agriculture as a viable use of land, and to ensure that high quality soils for agricultural use will be available in the future”.

- c. Under Part 1, Section 3 that addresses Services:
 - i. “The remainder of Zone 3 east of Route 7, consisted of national forest lands and rural residential properties with limited potential for development that were therefore not considered likely to threaten the aquifer.”;
 - d. Under Part 2, Section 7 that addresses Working Lands and Rural Residential:
 - i. “the mission for working lands and rural areas is to protect open blocks of land for working lands uses and for conservation purposes”, and is “intended to encourage and preserve agriculture and similar working lands uses, discourage sprawl, preserve open space, and encourage efficient provision of public services”; accordingly, the plan instructs that land development should be clustered and situated to protect existing natural resources and provide for continued working land uses in perpetuity.
 - e. Under Part 2, Section 8, referring to Forest, Conservation, and Recreational Lands, the town plan stresses the importance of maintaining natural conditions and protection of forested mountain lands.
- Exhibits 027 and 124.
- 125. A 500-square-foot ‘Outpost’ pavilion with fire pit is proposed in the Forest, Conservation, and Recreational Lands area. The pavilion will not have any utilities. Exhibit 027.
 - 126. The Project is not agricultural use, but rather is hospitality use. Exhibit 148.
 - 127. The Manchester Development Review Board issued a conditional approval for the project on October 15, 2020. Exhibit 027.
 - 128. The Regional Plan that applies to this application is the Bennington County Regional Plan, adopted on March 19, 2015. Exhibit 002.
 - 129. The Regional Plan distinctly states that:
 - a. New development should be concentrated in and around established growth centers; scattered development that is remote and has little relationship to existing settlement patterns should be avoided (page 76).
 - b. In rural areas, emphasis should be placed on the conservation and use of natural resources, and the avoidance of costly scattered development that is disruptive of the region's rural character. Low-density residential, commercial (small general/convenience stores, home occupations) and compatible recreational uses also

are appropriate in rural areas. Development should reflect historic settlement patterns and preserve important resources, including productive agricultural soils (page 76).

- c. Land use in upland forest areas should emphasize the conservation and wise use of natural resources. The development of permanent improvements and structures for year-round use is generally not appropriate in upland forest areas, although certain important public service facilities may be permitted with proper controls. Forestry and outdoor recreation also are appropriate activities in these areas, and facilities associated with national or state parks are consistent with these uses (pages 76-77).
- d. The intensity of commercial development needs to be consistent with the character of the land and surrounding area (page 77).

Exhibits 033, 090, 129, 144, 176.

- 130. The vast majority of the Project parcel is located within the Regional Rural Area Land Use District. A lesser portion at the eastern extreme of the Project parcel falls in the Upland Forest Land Use District. Exhibits 033, 090, 144, 153.
- 131. Uses such as “agriculture, forestry, recreation, and...uses that rely on the region’s natural resources” are appropriate for Rural Land Use Areas, and limited commercial development is allowed in the form of “outdoor recreation centers” such as ski areas, golf clubs, state parks, and sites whose primary use is for outdoor, nature-based activities and that feature open space and very low-density development. Any commercial and residential uses affiliated with these types of developments should be ancillary to the primary outdoor recreation use of the site, and examples identified in the Regional Plan include the Merck Forest and Farmland Center, Equinox Preserve, Hildene, and the region’s three state parks. Exhibits 033, 090, 129.
- 132. Most permanent development is prohibited in the remote Upland Forest Land Use Areas to avoid impacts to environmentally sensitive features, but outdoor recreational activities and “limited commercial natural resource based facilities” such as campgrounds, ski centers, and lodging and commercial uses associated solely with national or state parks are well suited for Upland Forest Land Use areas. Sprawling private commercial lodging facilities are not suitable in either Rural or Upland Forest Land Use Areas. Exhibits 033, 090, 129, 176.
- 133. The Project area falling in the Upland Forest District includes three to five of the planned modular cabins served by individual potable water supply and wastewater infrastructure, an 800-square-foot pump house, and a 500-square-foot “summit outpost pavilion” with fire pit. Exhibits 027 and 090.
- 134. The Regional Planning Commission defers to the municipality’s plan of development when minor discrepancies between the Town Plan and Regional Plan exist but do not alter the overall consistency with the regional planning policies and goals. Exhibits 090 and 129.

135. The Manchester Town Plan is largely compatible with the Regional Plan policies and goals, though the Manchester Town Plan appears to conflict with the Manchester Zoning Bylaws. For example, resorts are allowed by the Town of Manchester's zoning regulations; in this instance, the town has imposed restrictions and limitations through the municipal zoning permit. Exhibits 090 and 129.
136. The Project triggers multiple thresholds for "substantial regional impact" as defined in the Regional Plan. Exhibit 090.

Conclusions of Law

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

The Commission has determined that the Town Plan is sufficiently specific. *Re: The Mirkwood Group #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Vt. Envtl. Bd. August 19, 1996).*

Because the Town Plan is clear and unambiguous it is unnecessary to review the zoning bylaws. See *In re Frank A. Molgano Jr. 163 Vt. 25 (1994).*

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

- (1) the provisions of the regional plan shall be given effect to the extent that they are not in conflict with the provisions of a duly adopted municipal plan;
- (2) to the extent that such a conflict exists, the regional plan shall be given effect if it is demonstrated that the project under consideration in the proceedings would have a substantial regional impact. 24 V.S.A. § 4348(h).

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

The Project complies with Criterion 10.

VII. SUMMARY CONCLUSION OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes that the Project, if completed and maintained as represented in the application and other representations of the Applicant, and in accordance with the findings and conclusions of this decision and the conditions of Land Use Permit 8B0623-1, will comply with the Act 250 criteria. 10 V.S.A § 6086(a).

VIII. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, Land Use Permit 8B0623-1 is hereby issued.

Dated in Rutland, Vermont this 21st day of October 2022.

By /s/ Richard Kobik

Richard Kobik, Chair
District 8 Commission

Members participating in this decision: Don Miller and Michael McDonough

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

Any appeal of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings. The appellant must file with the Notice of Appeal the relevant entry fee required by 32 V.S.A. § 1431. The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings. Decisions on minor applications may be appealed only if a hearing was held by the district commission. Please note that there are certain limitations on the right to appeal, including appeals from Administrative Amendments and interlocutory appeals. See 10 V.S.A. § 8504(k), 3 V.S.A. § 815, and Vermont Rule of Appellate Procedure 5. For additional information on filing appeals, see the Court's website at:

<http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 951-1740. The Court's mailing address is: Vermont Superior Court, Environmental Division, 32 Cherry Street, 2nd Floor, Suite 303, Burlington, VT 05401.