State of Vermont
NATURAL RESOURCES BOARD
DISTRICT #1 ENVIRONMENTAL COMMISSION
440 Asa Bloomer State Office
Rutland, Vermont

RE: Saxon Partners, LLC	Application #1R0948-2
25 Recreation Park Drive, Suite 204	Findings of Fact
Hingham, MA	Conclusions of Law, and Order – Act 250 Rule 21 – Criterion 9(L)
02043	10 V.S.A. §§ 6001-6093 (Act 250)

and

Mid-Vermont Properties, LLC
P.O. Box 1012
Rutland, VT
05701

I. INTRODUCTION

Effective June 1, 2014, the Vermont Legislature passed a law which effectively created a new Act 250 criterion 9(L) – Settlement Patterns.[1] On October 9, 2014, Saxon Partners, LLC and Mid-Vermont Properties, LLC filed an application for partial findings under Act 250 Rule 21 to determine whether proposed modifications to a previously approved commercial project located south of the Holiday Inn would comply with the new statute. The tracts of land consist of 19.56 acres and a separate tract of 0.5 acres. Co-applicant Mid-Vermont's legal interest is ownership in fee simple described in deeds recorded on September 21, 2005 at Volume 139, Page 153; and March 26, 2010, at Volume 163, Page 464, in the land records of Rutland Town, Vermont.

The Commission held a Prehearing Conference on this application on November 12, 2014, and conducted a merits hearing on this application on January 15, 2015. At the end of the hearing, the Commission recessed the proceeding pending the submittal of additional information. The Commission adjourned the hearing on April 02, 2015, after receipt of the additional information, an opportunity for parties to respond to that information, and the

[1] Act 147, in pertinent part, reads: (9)(L) Settlement patterns. To promote Vermont's historic settlement pattern of compact village and urban centers separated by rural countryside, a permit will be granted for a development or subdivision outside an existing settlement when it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision:
(i) will make efficient use of land, energy, roads, utilities, and other supporting infrastructure;
(ii)(I) will not contribute to a pattern of strip development along public highways; or
(II) if the development or subdivision will be confined to an area that already constitutes strip development, incorporates infill as defined in 24 V.S.A. § 2791 and is designed to reasonably minimize the characteristics listed in the definition of strip development under subdivision 6001(36) of this title.

completion of Commission deliberations. This application for partial findings under Rule 21 is now ready for decision.[2]

As set forth below, the Commission finds that the Project complies with Criterion 9(L) of 10 V.S.A. § 6086(a).

II. LIMITED SCOPE OF ACT 250 JURISDICTION

Act 250 jurisdiction attaches to the project because the modified main building design, the addition of a members-only gas station and the propane storage/pickup area represent material changes which require review and approval of the Commission pursuant to Act 250 Rule 34.[3] As noted in more detail below, co-applicant Mid-Vermont Properties, LLC has a permit to construct a strip mall on the project site. That permit remains in effect as of the date of this decision.

In the instant case, the Commission has made two preliminary rulings which are presently subject to pending appeals to the Superior Court, Environmental Division ("the Memorandum of Decision"). In summary, the Commission has previously ruled that its jurisdiction on the facts of this case is confined to the narrow question of whether or not the material changes included in the modified project implicate new adverse environmental impacts under criterion 9(L). As noted in the Memorandum of Decision, District Environmental Commissions and the former Environmental Board have consistently held that where an application seeks to amend a project previously approved by the Commission, review by the Commission is limited to new impacts arising from project changes under the Act 250 criteria. *Durward Starr & George Halikas*, #7R0594-1-EB, *Findings of Fact, Conclusions of Law and Order*, 2-3 (April 30, 1986) (noting that, in an amendment application, "our review is limited to project changes and Section 6086(a) impacts arising from those changes"); *Stanmar, Inc.*, #5L0558-EB, *Findings of Fact and Conclusions of Law and Order* 5-6 (December 21, 1979) (stating that, in an amendment application, "the Commission's review is limited to the scope of the effects produced by the proposed changes alone"); *Larkin Tarrant Hoehl Partnership*, #4C1057-1-EB, *Memorandum of Decision*, 4 (January 22, 2002) (reaffirming the Commission's approach in *Stanmar*). If an amendment will not create new impacts under a particular Criterion, the Commission's review of that Criterion in an amendment proceeding is "inappropriate". *Starr*, #7R0594-1-EB at 3 (stating that "[i]t is in the very nature of a permit amendment proceeding that scrutiny is limited to the change in a project's impact on values cognizable under the 10

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[2] The Commission notes for the record the pendency of two interlocutory appeals filed in the Superior Court, Environmental Division by party BAI. See Exhibits 41, 41a and 42. Those appeals are made from preliminary rulings by the Commission that the application was appropriately filed under Rule 21, that the applicants retained certain vested rights in the previously-permitted project, and that the Commission's jurisdiction to review conformance with criterion 9(L) was confined to the "material changes" occasioned by the project design changes. See Commission "Memorandum of Decision"), dated January 8, 2015. Exhibit 40. It is the Commission's understanding that the Court has not ruled on those appeals and has indicated to the parties that those appeals will be held in abeyance pending decision by the Commission in the instant case.

[3] In its petition, Saxon requested a determination that the Commission need not review Criterion 9(L) because the proposed modifications to the Approved Project will not create new impacts under Criterion 9(L). For reasons outlined below, the Commission rejected that argument as the addition of the gas station and other project changes are material changes as that term is defined in Act 250 Rule 2(C)(6).

criteria. More simply stated, if project modifications result in no impact on, for example, educational services, scrutiny under Criterion 6 is inappropriate") (quoting *John A. Russell Corporation*, #1R0257-1-EB (11/30/83).

Based upon the legal precedent cited above, and as further described in the Memorandum of Decision, the Commission limited the scope of its review of the Modified Project in this proceeding to determine: (a) whether the Modified Project will result in any cognizable physical changes from the Approved Project that would be considered to be a "material changes" pursuant to Act 250 Rules 2(C)(6) and 34 ; and (b) if so, whether those material changes will conform with Criterion 9(L) as amended by the Legislature.

As further discussed below, the project currently permitted on the tract meets many of the definitional characteristics of "strip development" – including its linear, single-story retail design and its approved use of a new access road onto Route 7. In the Memorandum of Decision, the Commission ruled that its review would be limited to only those physical changes that constitute "material changes" under Rule 2(C)(6)of the Act 250 Rules. A "material change" is defined in the Act 250 Rules as "any change to a permitted development or subdivision which has a significant impact on any finding, conclusion, term or condition of the project's permit or which may result in a significant adverse impact with respect to any of the criteria specified in 10 V.S.A. §§ 6086(a)(1) through (a)(10)." *Act 250 Rule 2(C)(6)*.

The Commission determined that two of the changes proposed by Saxon—the reconfiguration of the retail building and the addition of a gas station[4]—constitute material changes pursuant to the Act 250 Rules.[5]

Because the Commission has previously issued an Act 250 permit for the Approved Project, conformance of the Approved Project with the new Criterion 9(L) is not at issue here. The applicant's legal rights in that permit are vested and cannot now be disturbed by the Commission or the parties. Instead, the Commission concludes that its jurisdiction in the instant case is confined to the question of whether any material changes presented by the Modified Project fail to conform with Criterion 9(L) as recently modified by the Legislature. To conclude otherwise could lead to the absurd result that a permitted strip mall would be constructed on a site that was denied an amendment for a project that represents a net reduction in strip characteristics.[6]

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4 Other changes proposed by Saxon in the Modified Project, such as the addition of a bus stop, electric car charging station, wetlands viewing kiosk, and a propane filling area, are de minimis in nature and do not have the potential to impact Criterion 9(L). *Testimony of Michael Zahner, January 15, 2015*. Other changes, such as the reduction in the number of traffic trips the Modified Project would generate as well as the number of curb cuts used by the Modified Project, will reduce impacts under Criterion 9(L).

5 Because the Petition is limited to Criterion 9(L), the question of whether these changes might have an impact on other Act 250 Criteria is not before the Commission at this time and will be addressed at a later date in Saxon's Permit application.

6 Opponents of the Modified Project have argued that the Modified Project as a whole, including the elements of the development that were approved as part of the Permit for the Approved Project, do not comply with the terms of Criterion 9(L). This, as the Commission noted in the Memorandum of Decision, is not the correct analysis.

Because Criterion 9(L) was newly created at the time the instant application was filed, both the Commission and the attorneys and other experts who contributed to the record in this case were obligated to address a "case of first impression." In cases of first impression, the Commission and all parties do not have the benefit of any court precedent specific to the interpretation of the new statute. Here, the Commission expert, Julie Campoli,[7] and the Agency of Natural Resources expert, Jennifer Mojo, testified at the hearing and provided written reports which were reviewed carefully by the Commission. See Exhibits 19, 20, 21, 26, 27, 28, 33 and 40. As noted in this decision, the Commission ultimately ruled that on the facts of this case, its jurisdiction was confined to the material changes proposed to be made to the previously-permitted strip mall project. The experts had no way of knowing prior to submittal of their reports that the Commission would be narrowing the scope of 9(L) in this manner. Accordingly, and understandably, their excellent analyses were presented as though the Commission's jurisdiction was *de novo*[8] and that the revised project would be reviewed as though no underlying permit existed. For this reason, and in the interest of brevity, the Commission will not address the excellent arguments made by those experts that – if reviewed *de novo* – made compelling arguments that the project would fail to conform with Criterion 9(L).

III. FINAL PARTY STATUS [9]

The following preliminary party status grants were made to statutory parties, adjoining and neighboring property owners in the Commission's Prehearing Conference Report and Order ("PHCRO"). The grants were preliminary in accordance with 10 V.S.A. § 6085. Prior to the close of hearings on this proceeding, 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 makes the following final party status rulings:

Statutory Parties:

1. Applicant Saxon Partners, LLC by Robert Rushford, Esq., Tim Eustace, Esq., Gene Beaudoin, Donald Smith and Nicole Kesselring, P.E.

2. The Rutland Regional Planning Commission, by Ed Bove and Susan Schriebman.

3. The Rutland Town Selectboard, not represented.

4. The Rutland Town Planning Commission, not represented.

5. The State of Vermont, Agency of Natural Resources, by Elizabeth Lord, Esq. and Jennifer Mojo.

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[7] At the outset of the case, the Natural Resources Board offered the services of a planning expert to the Commission, as authorized in the Rules. The Commission accepted that offer and heard from Ms. Campoli at the merits hearing and reviewed her report. Exhibit 19.
[8] Hearing the matter for the first time, as though the hearing and decision on permit #1R0948 had not occurred.
[9] Unless stated otherwise, party status grants below for criterion 9(L).

Adjoining Landowners pursuant to Act 250 Rule 14:[10]

6. BAI Rutland, LLC (Diamond Run Mall) by C. Daniel Hershensen, Esq. and David Grayck, Esq.

7. Holiday Inn, by Bill Gillam. As noted in the PHCRO, the grant of party status under criterion 9(L) was preliminary. Mr. Gillam cited criteria 5(A), 5(B), 8 and 9(L) in his oral request. The Commission noted that Mr. Gillam had not had an opportunity to review the new criterion 9(L) and accorded Holiday Inn, in the PHCRO, the opportunity to submit a written party status request on that criterion. No such written party status request was received. Accordingly, the request under criteria 5A, 5B, and 8 is **granted,** and party status under criterion 9(L) is **denied**.

There were no other appearances by statutory parties or requests for party status under criterion 9(L) from any other prospective party.[11]

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the application, Exhibits # 1 - 54, and other evidence in the record. 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. In this case, the applicant sought partial findings pursuant to Act 250 Rule 21. The burden of proof under Criterion 9(L) is on the applicant. The applicant has indicated an intention to submit evidence on the balance of the relevant criteria following the issuance of the decision on criterion 9(L). At such time as that new evidence is submitted, the burden of proof will shift to the opponents under Criteria 5 through 8, and 9A if the municipality does not have a duly adopted capital improvement program.[12]

General Findings:

1. On March 12, 2009, the District #1 Environmental Commission (the "Commission") issued Land Use Permit #1R0948 (the "Permit") for the Rutland Commons development, which is located on two parcels of land at the northwest corner of the intersection of U.S. Route 4 and U.S. Route 7 in the Town of Rutland, Vermont (the "Project Site").

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[10] For the purposes of the Act 250 proceeding on this application, the Commission is applying the Rules effective October 1, 2013.

[11] The Commission notes for the record the submission of a party status request from the Rutland County Audubon Society under criteria 1 (water pollution), 1B (waste disposal), 1G (wetlands) and 8 (natural areas)(see Exhibit 24). That request will be held in abeyance until such time as the Commission receives an application for review under those criteria.

[12] See 10 V.S.A. § 6088.

2. The Permit approved the construction of an 82,575 square foot development consisting of a 70,175 square foot retail commercial mall, comprised of seven (7) connected tenant spaces, and a 7,400 square foot satellite restaurant on a 19.56 acre parcel, and a 5,000 square foot commercial restaurant building on an adjoining 0.5 acre parcel (the "Approved Project"). On February 13, 2013, the Commission issued an Administrative Amendment to the Permit which extended the construction completion date for the Approved Project from October 15, 2013 to October 15, 2017. Administrative Amendment #1R0948-1, dated February 13, 2013. Accordingly, the Act 250 permit to construct the approved project remains in effect.

3. Mid-Vermont has not, to date, constructed the Approved Project and has entered into an agreement to sell the Project Site to Saxon. Exhibit 2. After purchasing the Project Site, Saxon intends to modify the Approved Project design by consolidating the seven (7) tenant spaces into a single tenant space for use as a retail wholesale club and adding a members-only gas station ("Modified Project"), a propane storage/pickup area, and electric vehicle recharge stations. Id. The Modified Project will be sited wholly within the originally approved development area. Id.; Testimony of Nicole Kesselring.

Findings of Fact on Criterion 9(L):

Introduction:

As noted above, a review of conformance with Criterion 9(L) that involves a new project on a previously unpermitted tract would be subject to full review or analysis, similar to Act 250's *Quechee Analysis* for Criterion 8.[13] Beginning with the plain language of the 9(L) statute, and using a framework similar to the *Quechee Analysis* for criterion 8 review, Commission review of a project proposed on *an undeveloped, unpermitted tract,* might look something like this:[14]

9(L) Analysis:

a. If the project is proposed to be located within an "existing settlement" or formally designated area for development, then it is not adverse under 9(L) and the project conforms;
b. If the project is proposed to be located in an existing strip as "infill", it may be permitted if it is found to sufficiently mitigate or minimize strip development design characteristics

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[13] The *Quechee Analysis* was adopted by the Environmental Board over 30 years ago to review aesthetic impacts under criterion 8 and has been subsequently upheld on judicial review since the mid 1980's. The analysis involves two prongs:

a. If a project doesn't fit into its surroundings aesthetically, it's considered "adverse";
b. If it's adverse, then does it violate a clear written community standard on aesthetics, or would it offend the sensibilities of an average person; or has the applicant failed to take reasonable steps to mitigate the impacts? If the project fails under one or more of the three prongs, then the project is considered "unduly adverse" and fails to conform with Criterion 8.

[14] The Commission notes that a "Criterion 9(L) Procedure" was adopted by the Natural Resources Board pursuant to 3 V.S.A. § 801(b)(8) on October 14, 2014, effective October 17, 2014. The procedure superseded the "Criterion 9(L) Guidance" adopted effective August 25, 2014. While the Procedure was made effective after the filing of the instant application, the Commission believes that its criterion 9(L) analysis is consistent with both the guidance and procedure.

and shall be found by the Commission to make efficient use of land, energy, roads, and utilities or other supporting infrastructure; or

c. If the project is not in an existing settlement (or other designated center), and if it does not qualify as "infill" into existing "built up" area, then it may only be approved upon a finding by the Commission that it will "not contribute to a pattern of strip along public highways" and that it meets the design parameters described above.

In the instant case, however, the analysis is attenuated or limited to material changes being proposed to a previously permitted strip development such as the building design and the addition of the gas station. Applying the Commission's 9(L) analysis to the unique facts of this case follows:

Is the project located in an "Existing Settlement"?

4. As a threshold issue in review of compliance with the new statute, the Commission must decide whether or not the project is located within "an existing settlement." If a project is so located, it complies with criterion 9(L) and the compliance review is concluded affirmatively. In this case, the applicant urged the Commission to conclude that the project was located within an existing settlement. Exhibits 2 and 30. Both the Commission witness, Ms. Campoli, and Agency of Natural Resources expert Jennifer Mojo urged the Commission to reject that argument because the project site, among other things, "lacked a substantial residential component." Exhibits 19 and 26. The Commission concurs with the ANR and Commission experts and finds on the facts of this case that the Project tract and surrounding area lacks a substantial residential component and the modified project is therefore not within an existing settlement. We further find that the project is not located in a village center, downtown development district, growth center, new town center, Vermont neighborhood or neighborhood development area designated pursuant to 24 V.S.A. Chapter 76A. Exhibit 7. Accordingly, we find the potential impacts of the material changes to be adverse under Criterion 9(L).

Is the project confined to an area that already constitutes strip development?

5. As defined in 10 V.S.A. §6001(36): "Strip development" means linear commercial development along a public highway that 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, and limited accessibility for pedestrians. In determining whether a proposed development or subdivision constitutes strip development, the District Commission shall consider the topographic constraints in the area in which the development or subdivision is to be located.

6. Applying the statutory definition of "strip development" recited above, the Commission finds in this case that the currently permitted project (approved prior to the implementation of the new statutory 9(L) provision, and which has current Act 250 approval for construction) clearly constitutes strip development insofar as it is, among other things, linear commercial development with a predominance of single story buildings with limited accessibility for pedestrians and with multiple accesses for commercial traffic. The Commission finds in addition that a number of existing

businesses along the Route 7 South corridor share three or more of the characteristics of strip such as single-story, limited reliance upon shared access and lack of coordination with surrounding land uses.

7. Accordingly, the Commission finds that the project tract constitutes approved "strip development" and the surrounding area has significant characteristics of strip development.

Is the Proposed Project "Infill" into Existing Strip Development?

Having found the project site and area to constitute strip development, the Commission looks at whether or not it constitutes "infill" as required by the statute.[15]

Is it located in a "built-up area"?

8. Immediately to the north of the Project Site are two hotels (a 151-room Holiday Inn and a 90-room Hampton Inn), a 9,000 square foot multi-tenant retail building, a fast food restaurant, a distribution warehouse and the 207,000 square foot Green Mountain Plaza mall (with over 1,000 parking spaces). Exhibit 7; Testimony of Nicole Kesselring, January 15, 2015.

9. U.S. Route 4 is located immediately south of the Project Site, beyond which are a variety of commercial developments including three car dealerships, a building supply center, a tractor supply store and a 400,000 square foot General Electric manufacturing plant. Exhibit 7.

10. The area in the vicinity of the Project Site is serviced by existing municipal infrastructure, which includes a 16" water main that runs along U.S. Route 7 servicing areas north, east and south of the Project Site and municipal sewer that currently serves properties that abut the Project Site to the north, east, and south. Additional public utilities are also located along U.S. Route 7, both north and south of the Project Site. Testimony of Nicole Kesselring, January 15, 2015.

11. The Commission also notes for the record that following the approval of the strip mall permit issued to co-applicant Mid-Vermont, a number of other developments have been built in the project area. Exhibit 7. Immediately north of the Project Site, a retail building housing Aspen Dental and an AT&T store has been constructed while four commercial buildings occupied by Vermont State Employees Credit Union, Hobby Lobby, Panera Bread and Aldis were constructed farther north of the Project Site. *Id.* In addition, the Alderman's Kia car dealership has been constructed south of the Project Site since the Permit for the Approved Project was issued. *Id.* The area in the vicinity of the Project Site has become even more "built-up" since the Mid-Vermont permit was issued.

12. The Town of Rutland Planning Commission, which "wholeheartedly support[s]" the Modified Project, has also recognized that the Modified Project represents "infill

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[15] Pursuant to 24 V.S.A. § 2791(20), infill is defined as "use of vacant land or property <u>within a built-up area</u> for further construction or development." (Emphasis added).

development" and that the Project Site is located within "an already built-up portion of the Town." Exhibits 6 and 36; Testimony of Joseph Zingale, January 15, 2015 (explaining that the Town has constructed public infrastructure, such as water and sewer lines, specifically to encourage development in the Project Site area).

13. Based upon our findings above, the Commission finds and concludes that the project is confined to an area that already constitutes strip development and that it is located in a "built up area" as that term is used is used in 24 V.S.A. § 2791(20).[16]

Has the project been shown to sufficiently mitigate or minimize strip development design characteristics and to make efficient use of land, energy, roads, and utilities or other supporting infrastructure?

Retail Building Reconfiguration

14. Saxon proposes to reconfigure the retail building at the Project Site from a group of seven (7) linear tenant spaces (the "Approved Retail Building") to one consolidated rectangular building serving one tenant (the "Modified Retail Building").

15. The Modified Retail Building occupies roughly the same building footprint as the Approved Retail Building and is located entirely within the development area of the Approved Project. Exhibit 5. Furthermore, the Modified Retail Building will use the same roads, utilities and supporting infrastructure as the Approved Retail Building.[17] Testimony of Nicole Kesselring, January 15, 2015. The construction of the Modified Retail Building will not increase the impervious development area at the Project Site, and the number of traffic trips generated and curb cuts used by the Modified Project will be reduced when compared to the Approved Project. Id.

16. The Modified Retail Building will also employ a variety of energy-efficient features, including energy efficient insulation, specially-designed LED lighting, skylights that reduce the lighting and heating use, water-saving fixtures and conduit for an electric car charging station. Exhibit 1; Testimony of Michael Zahner, January 15, 2015.

17. The modified plan proposes to eliminate the previously-approved new entrance from U.S. 7 and to share access with the Holiday Inn and other commercial developments accessed through Holiday Inn Drive.

18. The design and shape of the Modified Retail Building is significantly less characteristic of "Strip Development" than the Approved Retail Building, which had been characterized in the Permit as a "retail commercial mall." Unlike the Approved Retail Building, the Modified Retail Building will be constructed at a two-story height and will

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[16] That statutory provision appears in criterion 9(L) and is defined in Title 24 as follows: "Infill" means the use of vacant land or property within a built-up area for further construction or development.

[17] It is also important to note that, rather than requiring the construction of new infrastructure, the Modified Project was designed to efficiently use a variety of existing infrastructure including a municipal sewer line, 16" water main, other public utilities, and an existing road to access the Project Site, which provides access to several different properties from U.S. Route 7. *Testimony of Michael Zahner, January 15, 2015*. In addition, the curb cut along U.S. Route 7 proposed in the Approved Project will be eliminated as part of the Modified Project.

include two horizontal rows of windows on the façade of the structure in order to provide the look of a two-story building.

19. Saxon has changed the shape of the retail building from a strip of seven (7) tenant spaces to one consolidated tenant space in a rectangular-shaped structure. The legislative history of Act 147 makes it clear that "[t]he proposed definition of 'strip development' only applies to larger scale 'linear commercial development along a public highway' with broad road frontage and without shared road access" Exhibit 10. In the instant case, Saxon has proposed to convert the "linear commercial development" of the Approved Retail Building into a commercial development that has fewer characteristics of "strip development."

20. The Commission finds that the Modified Retail Building makes more efficient use of land, energy, roads, utilities, and other supporting infrastructure than the Approved Retail Building. The Modified Project will conform to a greater extent with the new Criterion 9(L) than the Approved Project. Moreover, the Modified Retail Building will exhibit fewer Strip Characteristics than the Approved Retail Building and will therefore act as a net reduction in significant adverse impacts with respect to Criterion 9(L) when contrasted with the strip development presently approved on the site.

Gas Station

21. Saxon proposes to construct a gas station in the area immediately east of the Modified Retail Building. The above-ground features will include fuel pump islands, a kiosk, and a canopy located over the fuel pump islands.

22. The proposed gas station area will not increase the amount of impervious development area since it will be located in an area that was either occupied by the Approved Retail Building or was planned for parking on the east side of the Approved Retail Building. Testimony of Nicole Kesslering, January 15, 2015; Exhibits 5, 43 and 44.

23. The Commission finds that the proposed members-only gas station involves efficiencies under Criterion 9(L).[18] The gas station is located entirely within the development area of the Approved Project. The Commission notes that the proximity of the members-only gas station to the Modified Retail Building will reduce the number of traffic trips because, rather than having to drive up or down U.S. Route 7 from the Project Site to the nearest off-site gas station, members of the retail club can purchase fuel at the Project Site either before or after they shop at the retail store.

24. The Commission further finds that the addition of a gas station to the Project Site will not significantly exacerbate strip characteristics, as consumers will use the same access road and curb cuts to access the gas station as they would to access the retail building. Moreover, because of the topography of the development site (significantly below the grade of Route 7) the gas station presents fewer strip-related visual impacts to motorists on Route 7.

[18] Both the Modified Retail Building and the gas station will be operated by a member's only wholesale club. Therefore, customers are likely to consolidate their fueling and shopping at the Modified Project.

25. Therefore, because the addition of the gas station makes efficient use of land, energy, roads, utilities, and other supporting infrastructure and because it does not significantly contribute to a pattern of strip development, the addition of gas station to the site will not result in significant adverse impacts under Criterion 9(L).

Topographic Constraints?

26. In determining whether or not project constitutes "strip development", the Commission is obligated by statute to consider "topographic constraints in the area in which the development or subdivision is to be located." 10 V.S.A. §6001(36).

27. While the present co-applicants do not seek to develop outside the footprint of the area previously-approved for construction, the Commission nevertheless notes that there are a number of topographic constraints near the proposed development including U.S. Routes 4 and 7 that immediately abut the Project Site to the south and east. Furthermore, a wetland is located west and northwest of the Project Site while railroad tracks confine the Project Site area to the west and north. Exhibit 30 (noting that "[d]evelopment along the U.S. Route 7 Corridor has been constrained by the existence of two significant rail lines on the east and the west which has significantly contributed to the historical pattern of commercial development along Route 7"); Testimony of Michael Zahner, January 15, 2015.

28. The existence of these topographic constraints suggests that it is unlikely that the Modified Project will further "contribute to a pattern of strip development". Testimony of Michael Zahner, January 15, 2015.

29. The Modified Project Site constitutes a distinct gap in development in the U.S. Route 7/Route 4 intersection area, as areas located north, south[19], and east of the Project Site are currently developed with large malls, hotel chains, restaurants, car dealerships and other commercial uses. Even if the Commission were to review the Modified Project as a whole, because the Modified Project contemplates development within a built-up area, the Modified Project would be infill development and, therefore, will not have an adverse impact on Criterion 9(L).

30. The Commission finds that the proposed modified project arguably represents a net reduction in strip characteristics insofar as the singular large, faux two story building design, the elimination of the new access from Route 7 and the addition of a sidewalk on the Route 7 side of the project tract are factors considered less characteristic of strip development.

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[19] Analyzing the entire project as a whole and not the material changes to the Approved Project, the opponents argued that U.S. Route 4, which is located immediately south of the Property, should be considered "open space" and, therefore, the Project is only bordered by development on two sides. This argument, taken to its logical conclusion, would mean that development on any parcel located at the corner of two streets would be bordered by open space on two sides and could not be considered infill development under Criterion 9(L).

V. 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, complies with Criterion 9(L) of 10 V.S.A. § 6086.

DATED at Rutland Vermont, this 3rd day of April, 2015.

By /s/ John S. Liccardi
John S. Liccardi, Chair
District #1 Environmental Commission

Commissioners participating in this decision:

Michael J. Henry
Amanda Beraldi

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 of this decision, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (VRECP). The appellant must file with the Notice of Appeal the $265.00 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, National Life Dewey Building, Montpelier, VT 05620-3201, and on other parties in accordance with VRECP 5(b)(4)(B).

For additional information on filing appeals, see the Court's website at: http://www.vermontjudiciary.org/GTC/environmental/default.aspx or call (802) 828-1660. The Court's mailing address is: Vermont Superior Court, Environmental Division, 32 Cherry Street, 2nd Floor, Suite 303, Burlington, VT 05401.