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June 20, 2025

E-MAIL

Town of Essex Development Review Board
Attn: Ian Carroll, Chair
81 Main Street
Essex Junction, VT 05452

Dear Chair Carroll and Members:

This firm represents Scannell Properties, LLC (the “Applicant”), and we are submitting this letter to address written and oral comments made by the public and the Town of Essex Development Review Board (the “Board”) at the May 29, 2025 Board hearing in connection with the Applicant’s proposal (the “Application”) to develop a 107,000 square foot warehouse facility in Saxon Hill Industrial Park in Essex, Vermont (the “Project”).

First, we wanted to thank the Board for your efforts during the last several months. We know that you are a volunteer board and that you have had to sacrifice a great deal of time and energy to this one Application. Particularly given the public interest and challenging nature of the Application, we truly appreciate your collective service and professionalism.

In addition, we wanted to provide this letter to direct you to the legal framework through which a decision must be made in connection with the Application. Specifically, and as further outlined below, we wanted to emphasize the following:

- The Board cannot consider the identity of the end user in making its decision.
- The Site Plan Review process is a technical review process that evaluates a limited number of discrete standards, all of which the Project plainly meets.
- Under well-established Vermont Supreme Court precedent, the provisions of the Town Plan cited by Project opponents are unenforceable.
- The Board cannot compel the Applicant to build improvements on land it does not own or control.

In addition to the above, we wanted to offer some clarifications as it relates to other issues that have arisen as part of the Application, including traffic, the buffer waiver request and hazardous materials.

Legal Standards

At the outset, it is important to note a few overarching concepts in connection with the review of zoning ordinances. Because zoning ordinances contravene common law development rights, the Vermont Supreme Court has created the following special rules for the interpretation of zoning ordinances. First, “zoning ordinances are to be strictly construed in view of the fact that they are in derogation of common law property rights . . . and when exemptions appear in favor of the property owner, the exemptions shall be construed in favor of the owner.” *Glabach v. Sardelli*, 132 Vt. 490, 494, 321 A.2d 1 (1974). In light of this standard, zoning regulations and restrictions “may not be extended by implication.” *Murphy Motor Sales v. First Nat’l Bank*, 122 Vt. 121, 123-24, 165 A.2d 341 (1960) (citations omitted). Rather, “[a]ny ambiguity or uncertainty must be decided in favor of the property owner.” *Id.* at 124 (citations omitted) (emphasis added); *see also*, *In re Lathrop Ltd. P’ship.*, 2015 VT 49, ¶ 29, 199 Vt. 19, 121 A.3d 630; *In re Champlain Oil Co.*, 2014 VT 19, ¶ 2, 196 Vt. 29, 93 A.3d 139).

I. The Identify of The User Cannot Be Considered in Site Plan Review.

As stated by the Vermont Supreme Court, a municipality’s right to regulate land use through its zoning regulations “refers only to uses and structures, not the identity of the owner.” *Vermont Baptist Convention v. Burlington Zoning Bd.*, 159 Vt. 28, 31, 613 A.2d 710, 711 (1992) (citing 24 V.S.A. 4401(b)(1)). In *Vermont Baptist*, the Supreme Court found that a “permitting regulation of property based on the identity of the owner, not the use of the land . . . would be inconsistent with the Legislature’s grant of authority to adopt zoning regulations.” *Id.*; *see also*, *In re Sardi*, 170 Vt. 623, 625, 751 A.2d 772, 774 (2000) (finding that “[t]his enumeration of [zoning] powers does not rely on the identity of the owner. Instead, it deals only with the use of such areas.”).

These decisions comport with the long-standing legal principle summarized by the United States Supreme Court that “the law cannot, directly or indirectly, give [private biases] effect.” *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984); *see also*, *Marks v. City of Chesapeake, Va.*, 883 F.2d 308, 311 (4th Cir. 1989) (stating that “government officials simply cannot act solely in reliance on public distaste for certain activities, instead of on legislative determinations concerning public health and safety [or otherwise] dealing with zoning”) (citations and internal quotation marks omitted).

Therefore, in making its decision here, the Board must limit its review to issues of land use and refrain from considering the identity of the party that is or may occupy the site in the future.

II. The Site Plan Review Process is a Technical Review Process That Focuses on Compliance with Specific and Discrete Land Use Standards, Which The Project Plainly Meets.

Section 4416 of Title 24 of the Vermont Statutes and Section 5.6 of the Zoning Regulations establish the scope of the Board’s review in connection with the Application. In addition, the Town’s staff report lays out those standards of the Zoning Regulation that are applicable to Site Plan Review. As noted in the Zoning Regulations, those “[s]tandards specifically relate to the internal layout of a site, its physical design, and the functional integration of the site with adjoining properties, uses and infrastructure.” Furthermore, the Zoning Regulations state that “[i]n reviewing site plans, the Planning Commission shall consider and may impose conditions and safeguards only with respect to criteria specified [in the Zoning Regulation].” *Emphasis added.* Considering other criteria outside the provisions of the Site Plan Review process, including economic or employment considerations, is not permissible under Vermont law. *See* 24 V.S.A. § 4416(a) (setting forth the scope for Site Plan review).

As the Board knows, a Site Plan permit is one of several permits that the Applicant needs to develop the Project. For the Project to proceed, the Applicant requires not one, but two stormwater permits (one for construction and another for long-term operation), a wastewater and potable water systems permit, and, importantly, Act 250 Permit approval. During the Act 250 review process, the District Environmental Commission will consider impacts such as stormwater, traffic, wildlife habitat, areas of critical environmental concern and aesthetics. Participating in these proceedings will be the State experts in these subject areas, including the Vermont Agency of Transportation, the Vermont Agency of Natural Resources and other State agencies. In addition, the public will again have an opportunity to voice their concerns. Indeed, while it is plain to see that some of the public’s concerns are outside the scope of your review, these future permit proceedings will provide a more appropriate forum to address some of the concerns identified by the public and the Board. There, the District Environmental Commission (the Act 250 decision-makers) and others can further address these concerns in the appropriate setting with the State experts on such issues such as traffic, stormwater and wildlife habitat.

Members of the Board have recognized that the Applicant has provided a full and complete application. Few, if any, of the standards articulated in the Zoning Regulation have warranted discussion in the Board proceedings thus far, as the Project clearly meets the standards outlined in the Zoning Regulations. As further discussed in the next section, the portions of the Town Plan cited by opponents cannot be enforced in these proceedings. Therefore, in the words of zoning staff at the last hearing: “I believe that the only design issue at this point relates to their stormwater system design within the 50-foot buffer along the roadway.” *May 29, 2025 Board Hearing at 9:15.*¹

¹ <https://www.youtube.com/watch?v=cT0kCNqhm94>.

Because the Project meets every standard in the Site Plan Review criteria, the Board must focus on the only remaining issue: the buffer waiver request, which is addressed in greater detail below.

III. The Board Cannot Make Decisions Based on Vague and Standardless Provisions in The Town Plan.

Section 5.6(a) of the Zoning Regulations require that the “Board ensure that development proposals . . . [c]onform to the duly adopted Essex Town Plan.” The Project complies with the Town Plan. For example, several provisions of the Town Plan, including General Policy 2, Goal 1f and Specific Policy 2(S).1, state the importance of focusing economic development within discrete designated areas, including the Saxon Hill Industrial Park. By proposing the Project in the Saxon Hill Industrial Park, among a number of other similar but also diverse site uses, the Project is complying with these key future land use provisions of the Town Plan. In addition, the Applicant has spent considerable time and effort refining its development plan, with input from the Board, Trails Committee, Town Staff and the public, in order to preserve certain areas of the property, thereby also furthering Goal 1f of the Town Plan, which provides that “[e]conomic development is carried out in the Saxon Hill Industrial Park with consideration and respect for the natural surroundings.”

Not only does the Applicant believe it complies with the Town Plan, but Town staff have also stated that the Project complies with the Town Plan, as noted in the most recent Staff Notes for the Project (in anticipation of the May 29, 2025 Board meeting) (the “Staff Notes”). The Staff Notes provide the following:

(A) ZR Section 5.6(A), General Requirements

1. Conformance with the Essex Town Plan

The project complies with the following goals and policies of the 2024 Essex Town Plan:

General Policy 2: *Economic growth shall be diversified, with development occurring in and around the Essex Town Center, the Susie Wilson Road Corridor, and the Saxon Hill/RPD-I district.*

Goal 1f: *Economic development is carried out in the Saxon Hill Industrial Park with consideration and respect for the natural surroundings.*

Specific Policy 2(S).1: *Assure that new industrial and commercial development occurs within existing industrial and commercial zoning districts.*

The Town Plan is an important visionary, guiding document, which plays a critical role in land use planning in Essex. While it is important as a guide in drafting, updating and adopting zoning regulations, the role of the Town Plan in Site Plan Review is limited, given that town plans are generally “stated in broad, general terms” and are “abstract and advisory” in nature. *In re Moody Subdivision Appeal*, No. 2015-341, 2016 WL 562914, at *2 (Vt. Feb. 11, 2016). The Vermont Supreme Court has stated that, in order for a provision to be enforceable, it “must contain ‘specific standards’ to guide enforcement to be given regulatory force” in a municipal proceeding. *In re Appeal of JAM Golf, LLC*, 185 Vt. 201, 209 (Vt. 2008) (citing *In re John A. Russell Corp.*, 176, Vt. 520, 523 (Vt. 2003)) (citation and quotation marks omitted). The provisions of the Town Plan cited by Project opponents do not contain these “specific standards.” Therefore, those provisions not enforceable.

The Vermont Supreme Court’s decision in *JAM Golf* is particularly instructive and relevant here. In that case, a housing project was denied by a development review board because it did not satisfy § 26.151(g) of the zoning ordinance, which required that project designs “protect important natural resources including streams, wetlands, scenic views, wildlife habitats and special features such as mature maple groves or unique geologic features.” *JAM Golf, LLC*, 2008 VT at ¶ 12.

The Vermont Supreme Court found that the development review board’s denial of the project was impermissible because the board relied on provisions that were “essentially standardless.” *Id.* To enforce a provision against an applicant, the Court explained that such provisions must “specify sufficient conditions and safeguards to guide applicants and decisionmakers to be enforceable” and that “[w]e will not uphold a statute that fail[s] to provide adequate guidance, thus leading to unbridled discrimination by the court and the planning board charged with its interpretation.” *Id.* (citations and internal quotation marks omitted).

The Vermont Supreme Court has also rejected enforcing Town Plans that include “broad policy statements phrased as nonregulatory abstractions.” *Chaves*, 2014 VT 5, ¶ 38, 195 Vt. 467, 93 A.3d 69 (quotation omitted). In addition, the Court has found that “provisions that ‘recommend’ or ‘encourage’ certain uses are generally insufficient to create an enforceable obligation.” *In re B & M Realty, LLC*, 2016 VT 114, ¶ 35, 203 Vt. 438, 455–56, 158 A.3d 754, 766–67 (2016).

None of the provisions in the Town Plan referenced by the public can come close to providing the required “specific standards to guide enforcement to be given regulatory force” as required by the Vermont Supreme Court. Therefore, the Project cannot be denied on the basis of the Town Plan provisions cited by the public.

IV. The Board Cannot Compel the Applicant to Build Improvements on Land It Does Not Own or Control.

While the Applicant is under contract to purchase Lot 13 of the Saxon Hill Industrial Park development, it does not have control over other portions of Saxon Hill Industrial Park, including Kimo Drive. Therefore, the Board cannot impose a condition on the Applicant requiring off-site improvements on land owned by third parties. Notwithstanding the foregoing, the Applicant recognizes that construction of Kimo Drive is important to the Town, and the Applicant wishes to point out that, if this Project is approved, a substantial portion of the Kimo Drive roadway will be constructed and the presence of that roadway may enable or advance the development of future phases of the roadway.

Other Matters

The Applicant also wanted to take the opportunity to respond to several matters brought up at the recent Board meetings.

I. The Traffic Study Was Prepared by Traffic Experts and Reviewed and Approved by Professional Engineers at The Town and State.

As you know, Wall Consultant Group prepared a Transportation Impact Study dated September 5, 2024 (the “Subdivision Traffic Study”) for the five-lot subdivision approved by the Board pursuant to its Final Major Subdivision Approval, 2025-05 dated March 20, 2025 (the “Subdivision”). The Subdivision Traffic Study evaluates all five (5) lots in the subdivision, assuming that those lots, at full build-out, will generate 180 new external vehicle trip ends in the AM and PM peak hours. The Subdivision Traffic Study concludes that the traffic impacts from all five (5) lots “is not expected to impact the condition or capacity of the affected roads and associated infrastructure,” “will not cause or exacerbate any unreasonable congestion or unsafe conditions on the local roadway network and will not unnecessarily or unreasonably endanger the public's investment in any local roads, highways, or related infrastructure.”

As part of the Act 250 process for the Subdivision, the Vermont Agency of Transportation (“VTrans”), the State agency delegated to independently review traffic on behalf of the State of Vermont, reviewed the Subdivision Traffic Study. In preliminary comments by Christopher Clow, PE, VTrans noted: “I wanted to let you all know that I had completed my review of the traffic impact study, and the data analysis and methodology look good.” E-mail from Christopher Clow

to Bryan Curren, dated August 27, 2024.² In addition, VTrans later provided its formal comments³ (the “VTrans Comments”), in which it said: “VTrans concurs with the analysis and methodology of the Wall Consulting Transportation Impact Study.”

In terms of the five (5) lots in the Subdivision, only one project in the five-lot subdivision has been approved by the Board thus far (the warehouse on Lot 11), and the applicant for that project has estimated their traffic impacts to consist of only 6 peak hour trips during each peak hour, leaving 174 peak hour trips for the remaining four (4) lots in the Subdivision.

A second Traffic Impact Statement by Langan dated January 30, 2025, was prepared in connection with the Project (the “Project Traffic Study”). The study estimated that the Project will generate 90 AM peak hour trips and 81 PM peak hour trips. This estimate was derived from widely accepted traffic engineering methodology using Institute of Transportation Engineers (ITE) data for a comparable land use. The ITE trips were further increased by 20 percent accounting for any potential variability in the data. Assuming this conservative estimate for the trips associated with Lot 11, there are still 84 and 93 AM and PM peak hour trips, respectively, in reserve for the remaining three (3) lots in the approved Subdivision. Future development of these three (3) lots will require addressing the Site Plan Review and Act 250 processes, along with the attendant evaluation of traffic, before any construction can proceed.

It is important to note a few more things about traffic as it relates to the Subdivision and the Project.

First, we understand that the Board was considering requiring post-approval monitoring to ensure that the actual traffic is generally consistent with what was proposed in the Project Traffic Study and Subdivision Traffic Study. In its comments, VTrans recommends:

traffic monitoring studies for the subsequent developments of this subdivision. Specifically, VTrans would want post monitoring to include turning movement counts, Level of Service (LOS), queuing, and delay analysis for the new access of Kimo Drive and the VT-117 intersection. VTrans would want this intersection analyzed to make sure that there are no congestion or safety issues. The post

² <https://anrweb.vt.gov/PubDocs/ANR/SPTemp/047%20-%20VTrans%20Traffic%20Study%20Comments%208-27-24.pdf>.

³ [https://anrweb.vt.gov/PubDocs/ANR/SPTemp/083%20VTrans%20Comments%20and%20COS%20\(5-29-25\).pdf](https://anrweb.vt.gov/PubDocs/ANR/SPTemp/083%20VTrans%20Comments%20and%20COS%20(5-29-25).pdf).

monitoring study would also check that the constructed development trips align with the trip generation projections

We understand that the applicant in the Act 250 proceedings for the Subdivision, Allen Brook Development Incorporated, has consented to a condition proposed by VTrans implementing the policy above.

Second, the VTrans comments also note that:

future Traffic Impact Studies or Traffic Memorandums should not be needed as subsequent developments are proposed for these subdivision parcels unless the following instances occur:

- The daily volumes and peak hour volumes approved for the subdivision are exceeded by the future developments.
- The connector road from Kimo Drive to Thompson Drive has been constructed

Therefore, VTrans is taking appropriate actions to account for not only differences in actual traffic counts but also other conditions that may impact traffic patterns.

Finally, as illustrated in the VTrans comments, the Project and the remainder of the Subdivision will provide a meaningful contribution towards certain intersection improvements through the Act 145 fees implemented as part of the Act 250 process. Importantly, funds from the Project will directly go towards five (5) VTrans capital projects in the vicinity, including the traffic signal at VT-117 and North Williston Road. The Subdivision, as a whole, would contribute a total amount of \$167,474.00 based on the 180 PM peak hour trips the subdivision is projected to create. Using the cost allocation proposed in the VTrans comments, approximately \$92,110.70 from this Project alone will be contributed to the State of Vermont for local traffic improvements, including the traffic signal at VT-117 and North Williston Road.

A summary of the above is as follows:

- The Subdivision Traffic Study was prepared for the full build out for all five (5) lots in the Subdivision for a total of 180 traffic trips.
- The Subdivision Traffic Study prepared by a Professional Engineer specializing in traffic, and approved by the traffic professionals at VTrans, notes that traffic from the Subdivision, or 180 peak traffic trips (costing of nearly double of the trips that the Project will generate), “will not cause or exacerbate any unreasonable congestion or unsafe conditions on the local roadway network.”

- Conservative estimates of traffic from the Project traffic report note that the Project will only use up to 93 of the 180 peak hour trips estimated in the approved traffic study for the entire Subdivision.
- The traffic report prepared for the Project, also drafted by a Professional Engineer specializing in traffic, found that: “the existing roadway infrastructure within the project vicinity has the capacity to accommodate the traffic generated by the site.”
- VTrans, as part of the Act 250 proceedings, is taking an active role in ensuring that future traffic conditions, now and in the future, are accounted for as part of the Act 250 approvals.
- Fees associated with the Project will help fund important traffic mitigation measures in the area.

II. The Buffer Waiver Request Is Reasonable, Is Consistent with Past Waiver Requests and Would Represent a More Effective Buffer Than The Existing Vegetation.

The Applicant is proposing the buffer waiver request for several reasons, as follows:

- Access drives and the sidewalk are required to be located in the buffer to provide safe and efficient access to the Project. In fact, the Applicant is proposing the removal of certain existing vegetation at the request of Zoning staff to improve intersection line distances to improve safety.
- Stormwater infrastructure is required in the buffer because the site slopes to the southwest towards the location of the buffer. The high groundwater table also limits the ability to construct underground detention basins.
- Street trees are required in the buffer due to the lack of space in the Town right of way.
- The Applicant must perform grading work due to the proposed height of Kimo Drive (located several feet above Lot 13 in many places).

Before filing its application and then again after getting feedback from the Board in March, the Applicant has endeavored to minimize its impact on the buffer, as demonstrated by the revised plans submitted as part of the most recent hearing. The remaining areas of the buffer needed for clearing exist mainly out of necessity, either for safety purposes or as a result of topographic or spacing constraints, including the grade of the Kimo Drive as established by the Town or the narrowness of the right of way, which requires the placement of street trees on Lot 13.

The buffer waiver request should be approved for several reasons.

First, it is important to note that Zoning Regulations on their face contemplate development within this buffer. The Zoning Regulations do not allow the DRB to waive the 100- or 200-foot

buffers, but they do allow the DRB to waive the 50-foot buffer. Also, the Zoning Regulations provide that “parking areas, access drives and components of stormwater management systems may not be located within the 100- or 200-foot buffers but may be allowed within the 50-foot buffers.” Zoning Regulations, Section 3.2.(A)(3)(c).

Second, the Board (and the Planning Commission before it) has previously approved waiver requests for similar developments in this zoning district, including a recent (March 20th) request for a very similar waiver in the lot directly across the street from this site. Notably, the Board approved a blanket waiver for all five (5) lots as part of the Subdivision only to retract that waiver at a later date, determining the waiver requests should be done on a case by case basis. *See*, Subdivision at page 8. In addition to the site across the street (Lot 11), the following waiver requests have been approved in connection with the 50-foot buffer in the RPD-I district:

- 35 Thompson Drive (PC Approval # 2022-7)
 - This decision was reaffirmed by the DRB on March 20, 2025 (DRB Approval # 2025-3).
- 22 Corporate Drive (PC Approval 2022:15)
- 65 Red Pine Circle – Lot 6 (PC Approval # 2018-35)
- 131 Red Pine Circle – Lot 5 (PC Approval # 2018-34)
- 16 Corporate Drive (PC Approval # 2019-14)

There is considerable value in relying on previous waiver decisions. The concept of precedential value furthers elements of fairness and provides guidance to future applicants. Importantly, as acknowledged by Zoning staff, the waiver request here is similar to the request approved by the Board on March 20th and to other developed sites within the Saxon Hill Industrial Park. *See* May 29, 2025 Board Hearing at 10:01

In addition, the Board, and the Planning Commission before it, approved past waiver requests for good reason, in part because the past waiver requests, like this Application, would actually result in furthering the purpose of the buffer. Section 2.14 of the Zoning Regulations states that the buffer is maintained “in order to provide visual screening between industrial development and adjacent streets and residential areas.”

There are no residential areas near the Project, so the purpose of the buffer is to provide visual screening between industrial development and the residential streets. Here, the site is characterized by long linear rows of mature pine trees, which, on their own, do not provide effective screening. The revegetation conducted as part of the Project would actually represent an improvement in screening once the vegetation is mature, as a variety of native species would be planted to provide screening at eye level.

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However, the Applicant is willing to consent to a condition that would retain vegetation in undisturbed areas (i.e. those that do not require the removal of vegetation for access ways/sidewalks, grading, stormwater or street trees required by the Town) until a decision can be made from the Town as to whether to retain the existing vegetation or proceed with the revegetation plan. As we noted earlier, we would be happy to incorporate input from the tree warden and Town officials regarding the species selection in the revegetation plan.

III. Hazardous Materials.

As we noted during the last hearing, the Project will not include gas pumps, and the site use will be consistent with that of other warehouses. In addition, the Applicant does not anticipate that hazardous materials will be stored at the Property with the exception of small quantities of regulated materials included in household and other commonly-used products (e.g. aerosols, batteries, etc.) temporarily stored in the Property warehouse before those materials are delivered to customers.

Please let me know if you have any questions. Thank you.

Sincerely,

GRAVEL & SHEA PC

Jeffrey O. Polubinski

JOP:jeh

Enclosure