



**Testimony of Vermont Chamber of Commerce - H.823  
Senate Natural Resources and Energy Committee  
Michael Zahner, April 3, 2014**

**Introduction**

The Vermont Chamber strongly supports major elements of H.823 including increased clarity for jurisdictional determinations under Act 250 for projects located in designated growth centers and downtowns, as well as a strong incentive package encouraging growth in these areas. These actions provide for more local control and a creative means by which development projects can earn Act 250 exemptions.

However, the Vermont Chamber has serious reservations regarding substantial changes to Act 250's Criterion 9(L) which purports to encourage smart growth; and, the inclusion of a new definition for "strip development" which is sufficiently broad to include the configuration of some industrial and commercial parks planned and implemented by Vermont municipalities including the Towns of Montpelier and Middlebury. In our opinion, both would likely meet the broad definition of "strip development" in those respective areas and could be adversely affected by the new law.

Thus, there is a potential for certain industrial and commercial projects to be denied under the new Criterion 9(L) even though those projects may fully comply with duly adopted local and regional plans. This will lead to increased litigation, strained relationships between local and state officials and a negative impact on local and regional economies.

**I. Definition of Existing Settlement**

Sec. 1. 10 V.S.A. § 6001 is amended to read:

§ 6001. DEFINITIONS

In this chapter:

\* \* \*

~~(16) "Rural growth areas" means lands which are not natural resources referred to in subdivisions 6086(a)(1)(A) through (F), subdivision 6086(a)(8)(A) and subdivisions 6086(a)(9)(B), (C), (D), (E) and (K) of this title.~~

(A) "Existing settlement" means an area that constitutes one of the following:

(i) a designated center; or

(ii) an existing community 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.

(B) Strip development outside an area described in subdivision (A)(i) or (ii) of this subdivision (16) shall not constitute an existing settlement.

***Vermont Chamber Comment:*** *This new definition will be helpful under Criterion 9(H) -- Cost of Scattered Development: "The first step under this criterion is to determine whether the project tract is physically contiguous to an existing settlement. Existing settlement has been defined by case precedent as 'an extant community center similar to the traditional Vermont center in that it is compact in size and contains a mix of uses, including commercial and industrial uses, and, importantly, a significant residential component. It is a place in which people may live and work and in which the uses largely are within walking distance of each other. The term specifically excludes areas of commercial, highway-oriented uses commonly referred to as 'strip development.'* Compatibility in terms of size and use is relevant to determining if an existing group of buildings constitutes an existing settlement in relation to a proposed project." (For more information see the decision in *Re: St. Albans Group and Wal\*Mart Stores, Inc., Application #6F0471-EB, Findings Of Fact, Conclusions Of Law, And Order (Altered)(Jun. 27, 1995)*). *If the project is contiguous to an existing settlement, this criterion is satisfied. If the project is not contiguous to an existing settlement, then applicants need to demonstrate that the additional tax revenues and other public benefits of the project outweigh the additional costs of providing municipal services to the project." Source: Guide to Applying For an Act 250 Land Use Permit (NRB)*

## **II. Definition of Strip Development**

(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, limited accessibility for pedestrians, and lack of coordination with surrounding land uses in terms of design, signs, lighting, and parking. 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.

***Vermont Chamber Comment:*** *This new definition of "strip development" will result in a very complicated analysis for the district commissions leading to extensive litigation due to the implications under the new Criterion 9(L) - Settlement Patterns (below). Three elements would be required to meet the "strip development" definition which will capture some industrial and commercial parks.*

## **III. New Statutory Language for Criterion 5**

Sec. 2. 10 V.S.A. § 6086 is amended to read:

§ 6086. ISSUANCE OF PERMIT; CONDITIONS AND CRITERIA

(a) Before granting a permit, the district commission District Commission shall find that the subdivision or development:

\* \* \*

(5) (A) Will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.

(B) As appropriate, will 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. This subdivision (B) shall not require an applicant to construct an improvement on a tract that the applicant does not own or control. However, the District Commission may require an applicant to contribute to the cost of constructing such an improvement.

***Vermont Chamber Comment:*** *The newly structured Criterion 5 would apply to all Act 250 developments or subdivisions in the state regardless of size, scale, type of facility or location within the community (designated growth centers or the smallest project on a one acre lot in the most rural part of the state). Every project would be required to meet these standards regardless of the economic burden.*

*In addition, these requirements seem to echo the same fact pattern in the 1994 U.S. Supreme Court decision, In re Dolan, where the Court overturned the City Tigard's permit conditions that required the dedication of a 15 foot bike path, similar to the provisions in the new 5(B) above without the required "rough proportionality" test described below. (Dolan, 512 U.S. at 391. (Supreme Court of the United States, No. 93-518, Florence Dolan, Petitioner v. City of Tigard, June 24, 1994)*

### ***Dolan Facts***<sup>1</sup>

*This "essential nexus" requirement of [prior decision] Nollan was refined by the Court in Dolan. Mrs. Dolan operated a store which had a gravel parking lot [in Tigard, Oregon]. A creek traversed part of her property. Mrs. Dolan applied for a permit to increase the size of her store and pave the parking lot. The city conditioned the permit upon a dedication by Mrs. Dolan of a portion of her land for use as a flood control area **and upon the dedication of an additional 15-foot strip of land adjacent to the creek as a bicycle path.** Dolan, 512 U.S. at 385-86. The city claimed that the creek land was necessary to control flooding and **the bicycle path might alleviate congestion on the streets and was necessary for the health, welfare and safety of the public.** Mrs. Dolan complained on appeal that the city had not identified any "special quantifiable burdens" created by her new parking lot or building that would justify the particular exactions from her.*

*After concluding that there was a "nexus" between the exactions [permit conditions] and the claimed state interest, the United States Supreme Court framed the following additional question: **"What is the required degree of connection between the exactions [permit conditions] imposed by the city and the projected impacts of the proposed development?"** Dolan, 512 U.S. at 375. The Court answered as follows:*

*We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. Dolan, 512 U.S. at 391 (emphasis added).*

***The exactions [permit conditions] were stricken because less invasive measures than taking Mrs. Dolan's land would have accomplished the same stated goals. Read together, Nollan and Dolan***

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<sup>1</sup> Reprinted from: Texas City Attorneys Association, Terrence S. Welch, Brown & Hofmeister, L.L.P., 740 E. Campbell Road, Suite 800, Richardson, Texas 75081. 2007 Summer Conference, Radisson Resort Hotel, June 13 - 15, 2007, South Padre Island, Texas.

*appear to inquire first whether the government imposition of the exaction [permit condition] would constitute a taking if done without the corresponding application for a permit by the landowner. If the question is answered affirmatively, the Court then applies the two part "rough proportionality" test which asks whether the exaction demanded is roughly proportional both in nature (nexus) and extent (proportionality) to the impact of the proposed development. **Dolan appears to place the burden of proof squarely upon the governmental entity to show compliance with the rough proportionality test.** Dolan, 512 U.S. at 391. (Supreme Court of the United States, No. 93-518, Florence Dolan, Petitioner v. City of Tigard, June 24, 1994) (emphasis added)*

Criterion 5(B) will also authorize the district commissions to require the payment of an impact fee which should be governed by same legal parameters in a new Act 250 subchapter proposed in H.740 which will authorize the district commissions to impose impact fees for new traffic related infrastructure under the "rational nexus and rough proportionality" test described above and incorporated into H.740 by the House Transportation Committee. The new 5(B) reads in part: "This subdivision (B) shall not require an applicant to construct an improvement on a tract that the applicant does not own or control. However, the District Commission may require an applicant to contribute to the cost of constructing such an improvement."

#### **IV. New Criterion 9(L) - Settlement Patterns**

(9) Is in conformance with a duly adopted capability and development plan, and land use plan when adopted. However, the legislative findings of subdivisions 7(a)(1) through (19) of Act 85 of 1973 shall not be used as criteria in the consideration of applications by a district commission District Commission.

~~(L) Rural growth areas. A permit will be granted for the development or subdivision of rural growth areas when it is demonstrated by the applicant that in addition to all other applicable criteria provision will be made in accordance with subdivisions (9)(A) "impact of growth," (G) "private utility service," (H) "costs of scattered development" and (J) "public utility services" of subsection (a) of this section for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage.~~

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) is designed in a manner consistent with the planning goals set forth in 24 V.S.A. §

4302(c)(1);

(iii) will conform to the land use element, map, and resource protection policies included in the municipal and regional plans applicable to the proposed location of the development or subdivision;

(iv) will not establish, extend, or contribute to a pattern of strip development along public highways;

(v) if the development or subdivision will be located in an area that already constitutes strip development, incorporates infill as defined in 24 V.S.A. § 2791<sup>2</sup> and is designed to avoid or minimize

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<sup>2</sup> 24 V.S.A. § 2791 (20) "Infill" means the use of vacant land or property within a built-up area for further construction or development.

the characteristics listed in the definition of strip development under subdivision 6001(36) of this title; and

(vi) if the development or subdivision will be adjacent to an area that already constitutes strip development, is designed to avoid or minimize the characteristics listed in the definition of strip development under subdivision 6001(36) of this title.

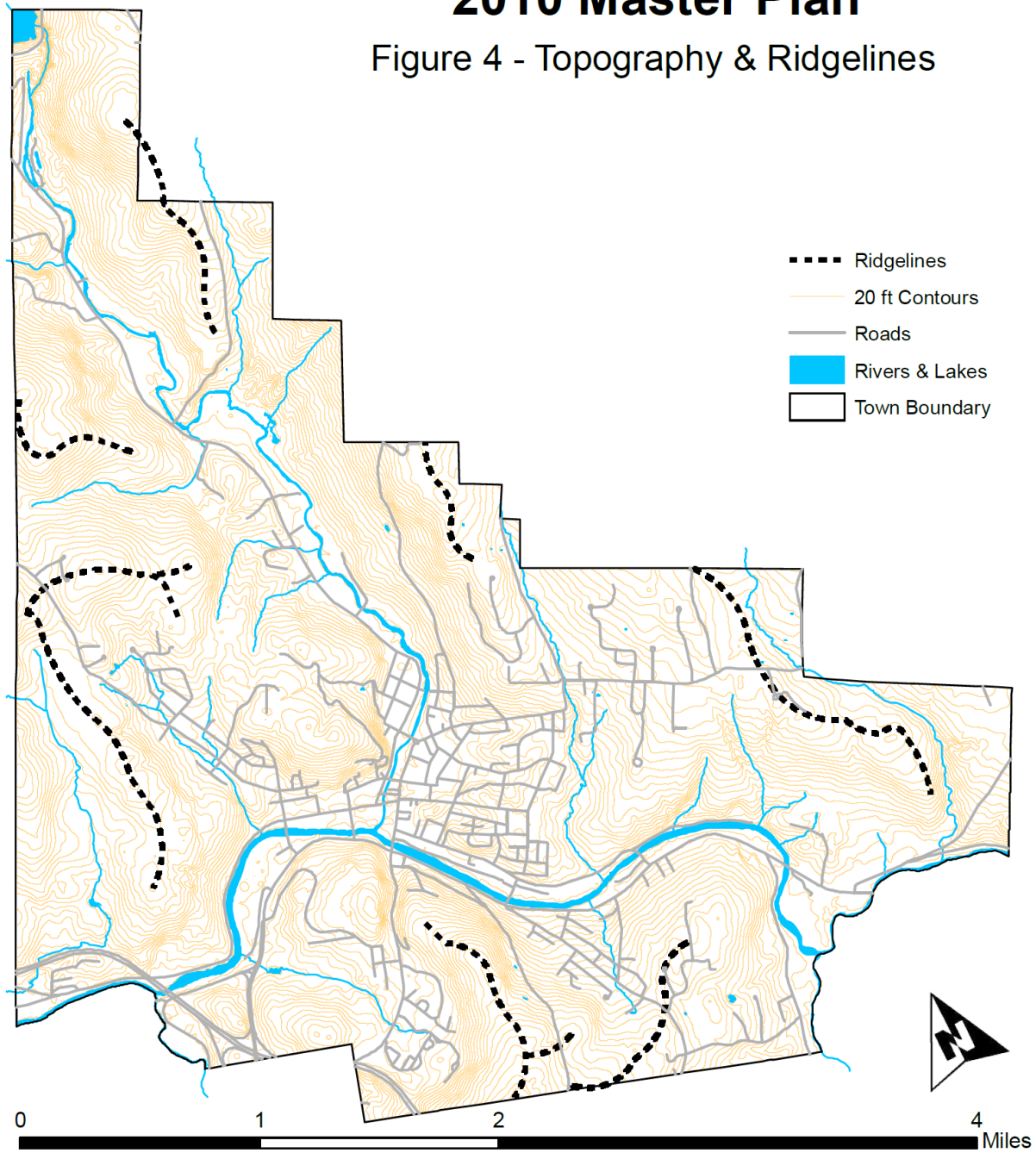
***Vermont Chamber Comment:** It is not clear how a new or expanding automobile dealership, plumbing supply house, a Cabot cheese warehouse or an expanding transfer station in a limited use industrial or general business district on a small lot would be able to "avoid or minimize the characteristics listed in the [new] definition of strip development." Under the new law, the applicant would be required to "avoid or minimize:" 1) broad road frontage, 2) predominance of single-story buildings, 3) limited reliance on shared highway access, 4) lack of connection to any existing settlement except by highway, 5) limited accessibility for pedestrians, and 6) lack of coordination with surrounding land uses in terms of design, signs, lighting, and parking, or risk denial even though the project is in strict conformance with duly adopted local and regional plans. None of these concepts are defined in law and may be impossible for an individual applicant to achieve due to any number of variables beyond the applicant's control.*

*Again, this will lead to more litigation. See Montpelier and Middlebury examples below.*

\* \* \*

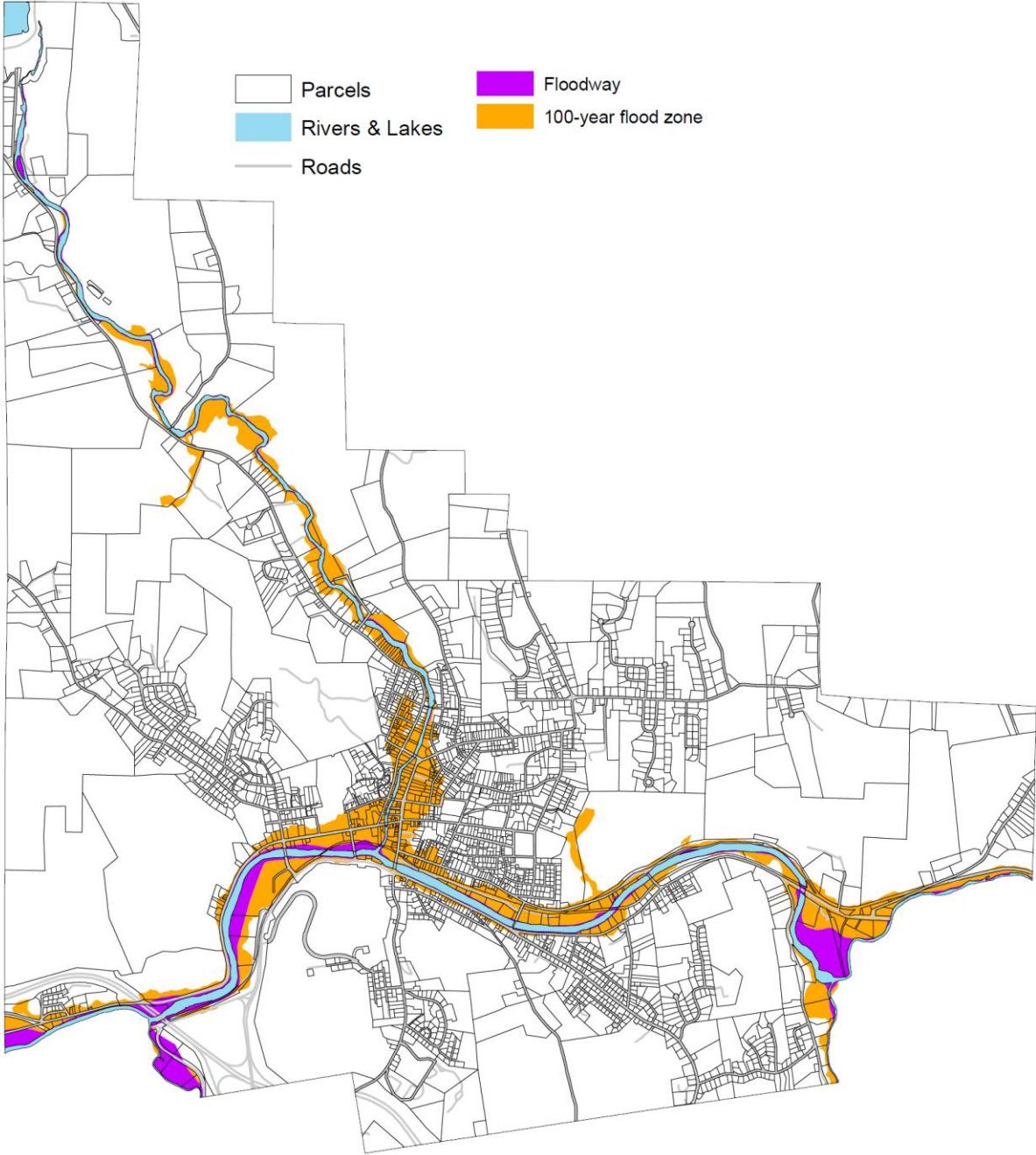
# CITY OF MONTPELIER 2010 Master Plan

Figure 4 - Topography & Ridgelines



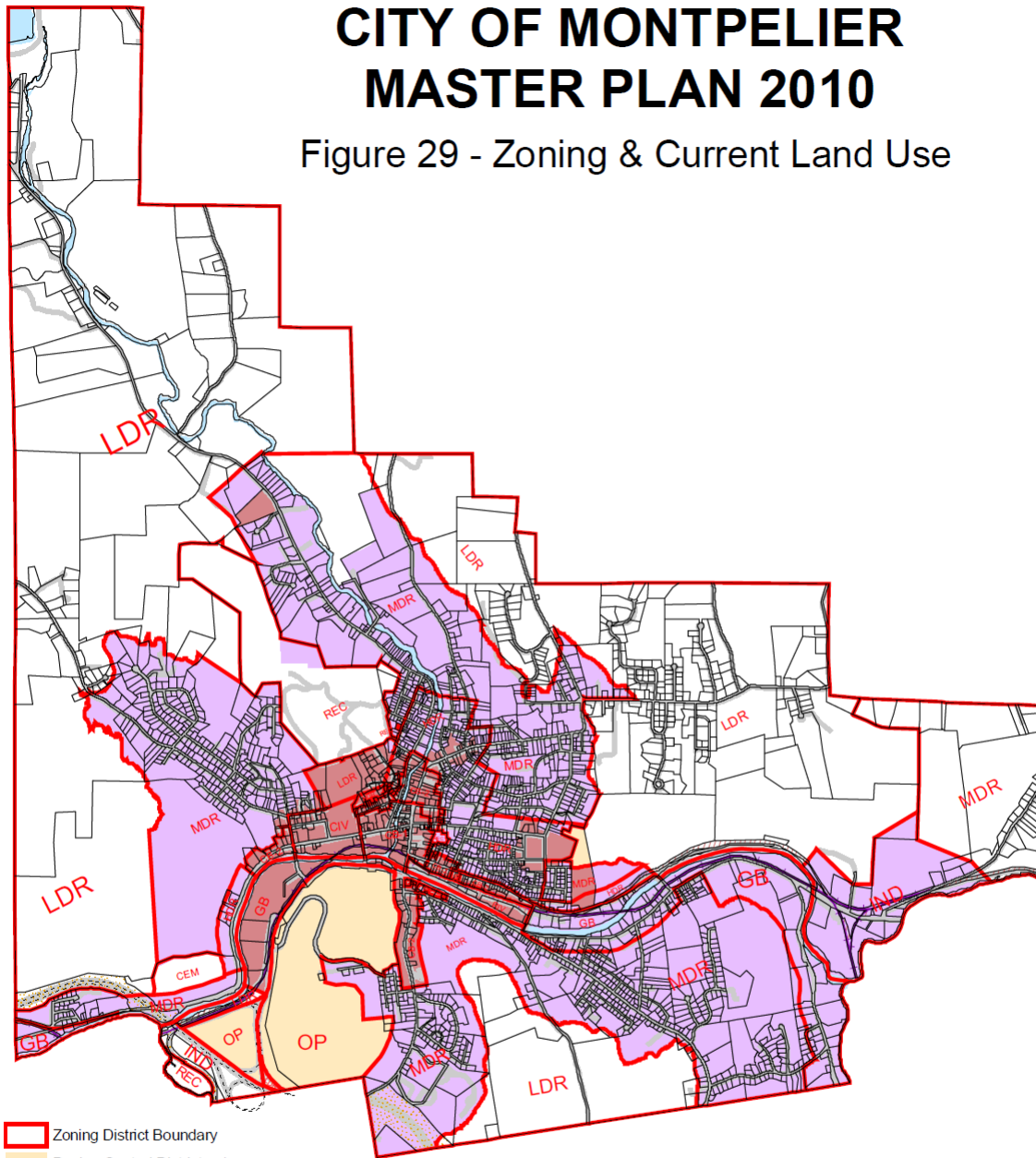
# CITY OF MONTPELIER FLOOD ZONE AND FLOODWAY

UPDATED SEPTEMBER 4, 2012



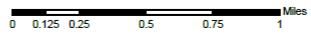
# CITY OF MONTPELIER MASTER PLAN 2010

Figure 29 - Zoning & Current Land Use



- Zoning District Boundary
- Design Control District only
- DCD and Growth District
- Growth District only
- Parcel Boundary
- railroad
- Railroad Right-of-Way
- State Road ROW
- I-89 Interchange
- Rivers-Lakes

	ADDITIONS	ADOPTION DATE	EFFECTIVE DATE
CB-I Central Business I	Boundary Change (Greenwood Ter.)	6-14-1995	7-05-1995
CB-II Central Business II	Boundary Change (Berlin and Northfield Sts.)	6-12-1996	7-03-1996
CIV Civic	Boundary Change (46 East State Street)	11-12-1997	12-03-1997
OP Office Park	Boundary Mapping Correction (Putnam St.)		2-10-1998
RIV Riverfront	District Creation (Riverfront District)	1-10-2001	1-31-2001
GB General Business	Interim Restricted Development District	8-06-2003	8-06-2003
IND Industrial	Boundary Change (GB to CBII & Design Control)	9-24-2003	10-15-2003
LDR Low Density Residential			
MDR Medium Density Residential			
HDR High Density Residential			
REC Recreation			
CEM Cemetery			



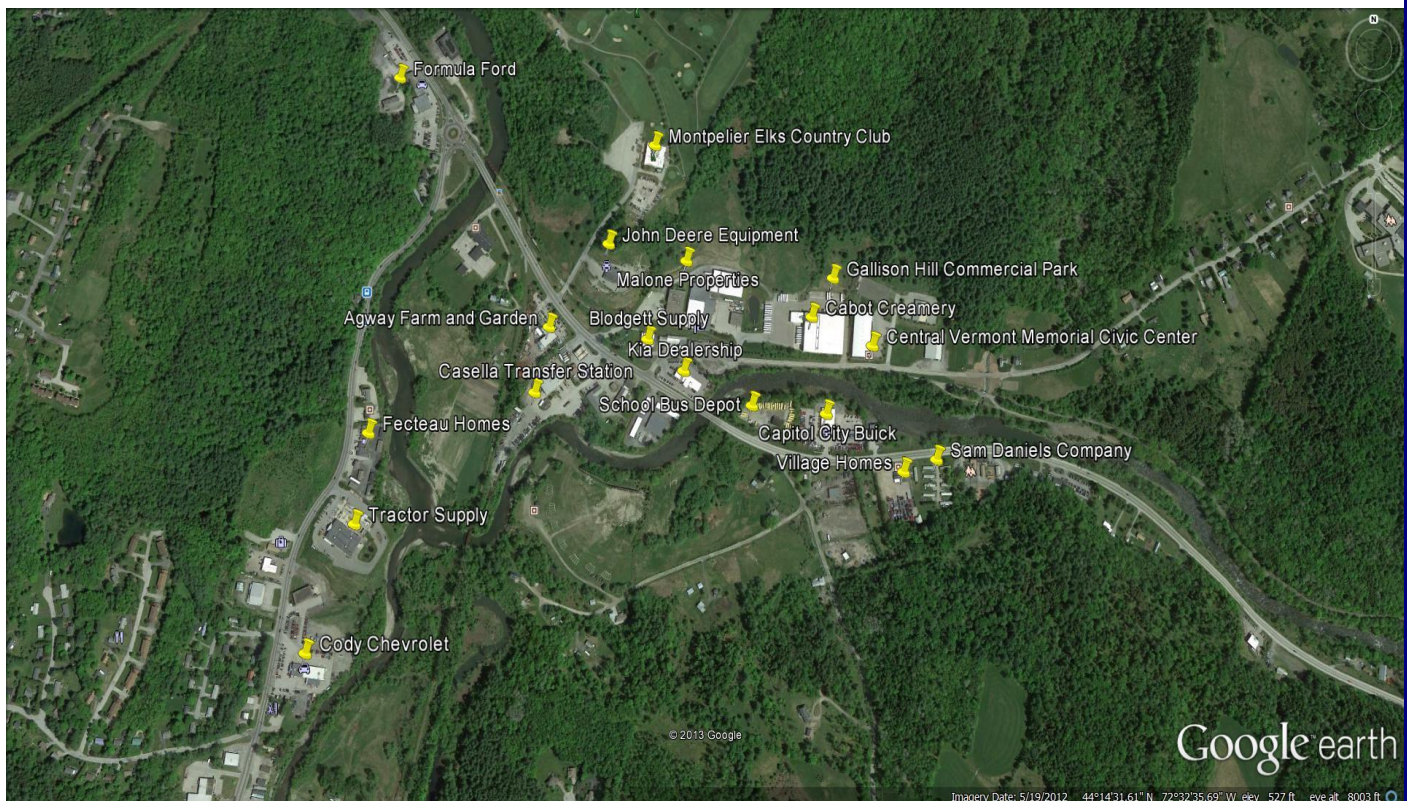
Prepared by:  
City of Montpelier GIS  
Dept. of Planning & Community Development  
March 2010

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IT IS NOT TO BE USED  
FOR DESCRIPTION, CONVEYANCE, OR  
DETERMINATION OF LEGAL TITLE,  
OR AS A CONSTRUCTION DRAWING.



**Example:** Cabot Creamery has large refrigerated warehouses in the Malone Commercial Park on a 94 acre tract of land along Gallison Hill Road in Montpelier's Industrial District. This agricultural related business with large volume tractor trailer truck traffic may need to expand its 50,000 sq. ft. warehouse to augment its shipping capabilities to the East Coast. Gallison Hill Road meets the definition of "strip development" - "broad road frontage, predominance of single-story buildings, limited reliance on shared highway access." With the new Criterion 9(L) language in place, the Cabot expansion may be denied by the district commission since it will "extend and contribute to a pattern of strip development along a public highway" and by its very nature will not be able to "avoid or minimize:" 1) broad road frontage, 2) predominance of single-story buildings, 3) limited reliance on shared highway access, 4) lack of connection to any existing settlement except by highway, 5) limited accessibility for pedestrians, and 6) lack of coordination with surrounding land uses in terms of design, signs, lighting, and parking "

This denial will occur even though the project meets all environmental criteria including conformance with duly adopted local and regional plans. This scenario will likely be repeated throughout the industrial and general business districts of Montpelier, Middlebury and throughout the state with obvious negative economic consequences and strained relationships between local and state officials.



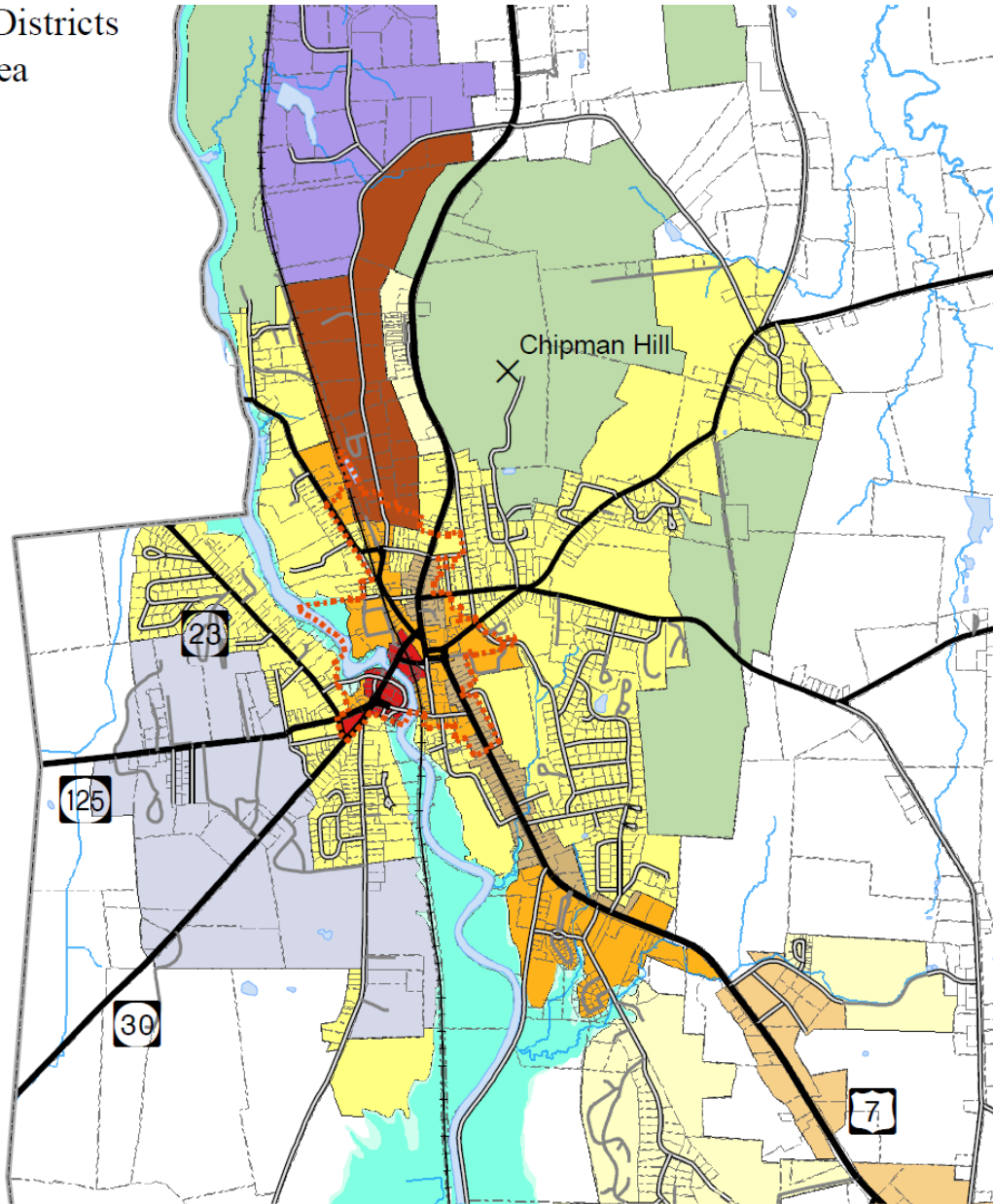
## **MONTPELIER ZONING DISTRICTS AND REGULATIONS - DISTRICT OBJECTIVES**

**GENERAL BUSINESS (GB):** In recognition of the demand by the traveling public, the city provides for these activities in especially designated areas. They are designed for accommodating automotive activities, overnight accommodations and uses generally associated with the traveling public. (emphasis added)

**INDUSTRIAL (IND):** The Industrial District provides areas which encourage the location of industrial development and uses through the provision of transportation and other utility infrastructure, and appropriate buffering from residential and commercial uses.(emphasis added)

# Middlebury's General Commercial District and Industrial District

## Land Use Districts Village Area



- |                                  |                                  |                                  |
|----------------------------------|----------------------------------|----------------------------------|
| Downtown District                | (CBD) Central Business District  | (HDR) High Density Residential   |
| (GC) General Commercial District | (PHD) Protected Highway District | (MDR) Medium Density Residential |
| (VRC) Village Res/Com District   | (AR) Agricultural/Rural District | (FOR) Forest District            |
| (OFA) Office/Apartment District  | (FLD) Flood Hazard Area          |                                  |
| (IND) Industrial District        |                                  |                                  |
| (AIR) Airport District           |                                  |                                  |
| (INS) Institutional District     |                                  |                                  |

**Sources:**

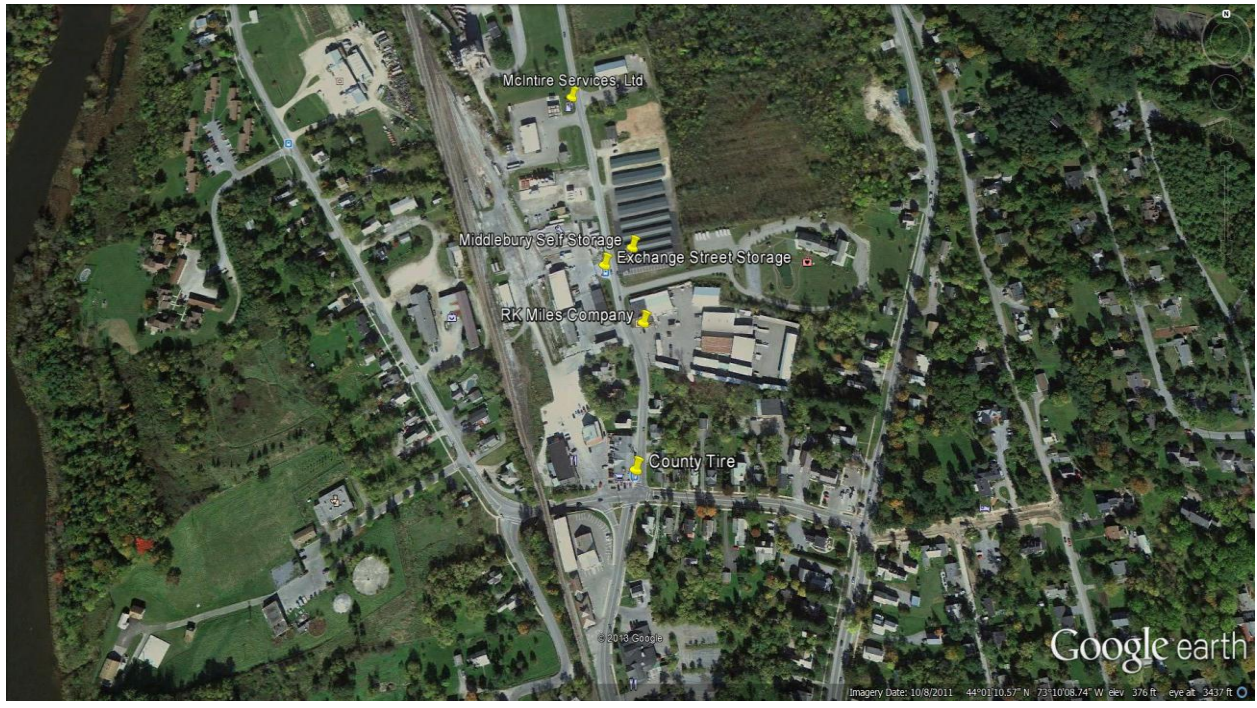
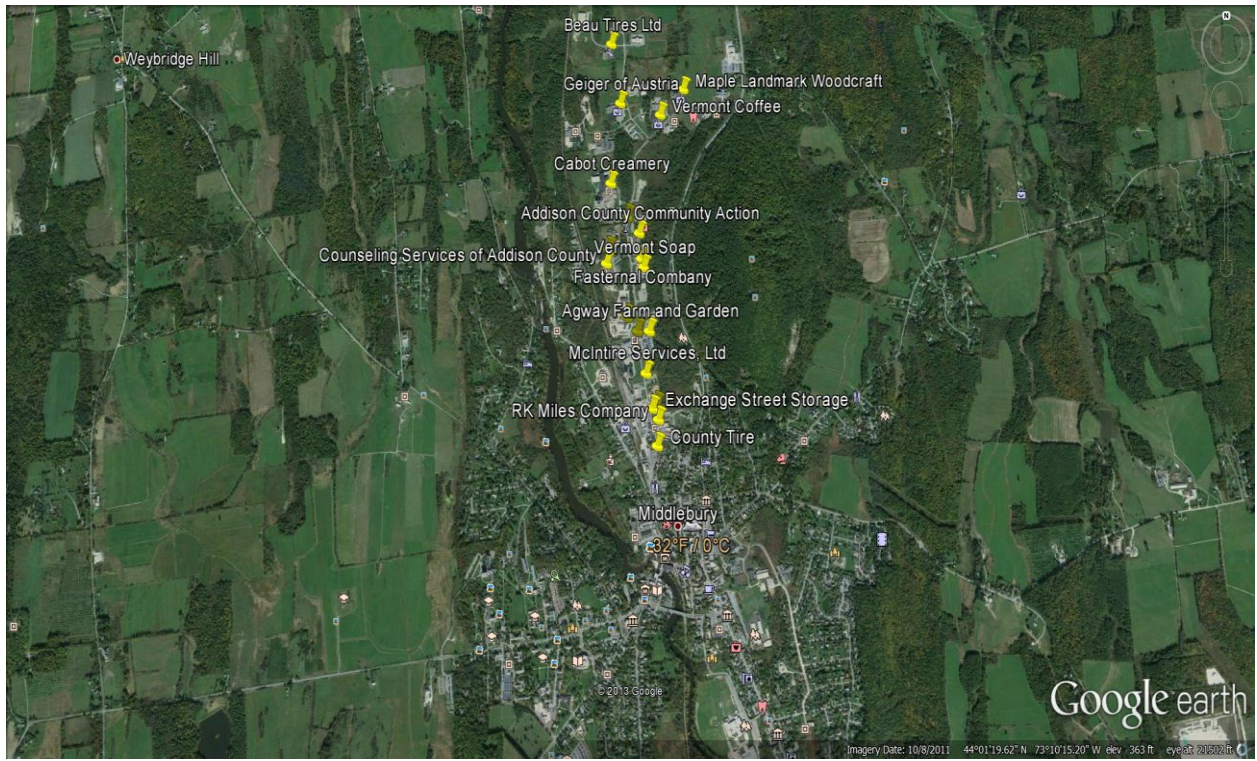
**Land Use:**  
Planning Commission changes proposed 6/28/2012 and adopted by the Select Board 12/11/2012.

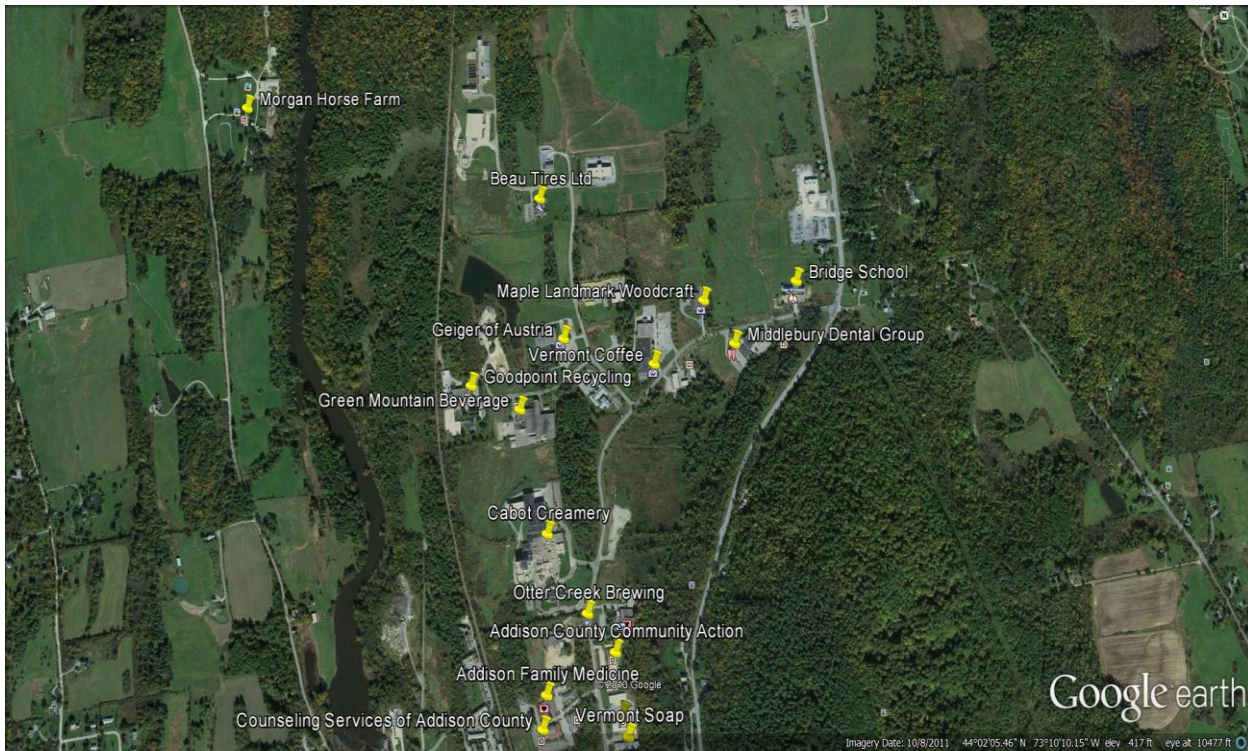
**Parcel Boundaries:** Digitized from tax maps current as of April 1, 2011. Contact Town Clerk for current information.

**Flood Hazard District:** Includes Floodway and Flood Fringe from FEMA Flood Insurance Rate Map, 1985. Advisory 500 yr flood area shown in lighter color.

Adopted as part of Town Plan, 2012







**GC - Middlebury General Commercial District:** This District provides for general commercial or light industrial uses which are not possible or desirable in [other] districts due lack of space, the need for loading/unloading facilities or aesthetic concerns in those areas. These uses include equipment and vehicle sales and service, lumber or farm supply establishments, and machine shops. New residential development should not be permitted in the GC District. Where development in this district abuts residential areas, extensive landscaping and screening should be required.

**IND - Industrial District:** This District has been created to encourage the best and fullest use of the Town's prime industrial land for manufacturing jobs and other economic benefits for the community and surrounding area. The IND is designed to attract clean industry of a diverse nature for manufacturing with accessory warehousing and offices, research and other uses.

