

8. Criterion 1(F) (Shorelines)

The purpose of Criterion 1(F) is to preserve the shorelines of Vermont's lakes and ponds and rivers and streams. *West River Acres, Inc., et al.* #2W1053-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Jul. 16, 2004)

I. Requirements for Issuance of Permit

A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other criteria, the development or subdivision of shorelines must of necessity be located on a shoreline in order to fulfill the purpose of the development or subdivision, and that the development or subdivision will, insofar as possible and reasonable in light of its purpose:

- (i) retain the shoreline and the waters in their natural condition,
- (ii) allow continued access to the waters and the recreational opportunities provided by the waters,
- (iii) retain or provide vegetation which will screen the development or subdivision from the waters, and
- (iv) stabilize the bank from erosion, as necessary, with vegetation cover.

10 V.S.A. § 6086(a)(1)(F).

II. Burden of Proof

The burden of proof is on the applicant. 10 V.S.A. §6088(a).

III. Important definitions

“Shoreline”

Because Criterion 9(F) applies only to projects which are on a “shoreline,” any analysis of the criterion must begin with a determination as to whether a “shoreline” is implicated by the project.

The statute defines "shoreline" as:

the land adjacent to the waters of lakes, ponds, reservoirs and rivers. Shorelines shall include the land between the mean high water mark and the mean low water mark of such surface waters.

10 V.S.A. § 6001(17); *In re Woodford Packers, Inc.*, 2003 VT 60 ¶18 (2003).

While it is usually easy to determine if land is “between the mean high water mark and the mean low water mark,” is more difficult to determine if a project involves the “development or subdivision of shorelines” and what is meant by the term “adjacent.”

Early Board decisions and problems in defining “shoreline”

Early Board decisions held that the term “shorelines” are not limited to the area located between the mean high water mark and the mean low water mark of such surface waters, but rather, “may include lands that are adjacent to and a considerable distance from the water body itself.” *Re: Josiah E. Lupton, Quiet River Campground, #3W0819 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 15 (May 18, 2001). citing S.G. Phillips Corporation, Declaratory Ruling #152, Findings of Fact, Conclusions of Law, and Order (June 13, 1984); Re: Mill Lane Development Co., Inc., #2W0942-2-EB, Findings of Fact, Conclusions of Law, and Order (Dec. 17, 1999); and Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact, 4 Conclusions of Law, and Order (Oct. 5, 1990). "The Board's precedent indicates that the word 'adjacent' is a relative term that must be considered in the scale of a project;" Re: L & S Associates, #2W0434-8-EB, Findings of Fact, Conclusions of Law, and Order at 37 (June 2, 1993). The *Lupton* decision noted that, “The Board, therefore, has not established specific horizontal limits which define a shoreline, especially when considering river shorelines.*

The problem with a definition of “shorelines” that was determined based on the scale of the project is that, in some instances, the Board extended the “shoreline” several hundred feet back from the water’s edge. See, *Re: Mill Lane Development Co., Inc., #2W0942-2-EB, Finding 19:*

The property line of the Project closest to the Reservoir is located in the recreation area of Lot 23, approximately 100 feet from the shoreline of the Reservoir based on the scaled distances depicted in Exhibits A-25 and A-3 1. The property lines of Lots 20, 21, 22 and Parcel D are approximately 200 feet or more from the shoreline based on the scaled distances depicted in Exhibits A-25 and A-3 1.

This led, as noted below, to some twisting and turning when it came to the question of whether the project met the “of necessity” test.

Reframing the definition

The Board began to frame the question of whether a project was on a “shoreline” in a more manageable fashion when it wrote in *Re: Josiah E. Lupton, Quiet River Campground, #3W0819 (Revised)-EB, Findings of Fact, Conclusions of Law and Order at 15 (May 18, 2001),*

“However, the Board concludes that shorelines should be defined by the goals of Criterion 1(F); one of which is to maintain the natural condition of the shoreline and water.”

Lupton and a number of subsequent cases continued to refine the concept of a “shoreline.”

Lupton, involved a proposed RV campground on the White River south of Sharon village. Much of the *Lupton* project was proposed to be located in the floodplain, with the lowest portions of the septic fields below the floodplain elevation. Fill and rip-rap were proposed within the floodplain, with the result that, if flooding continued to occur, the fill and rip rap would have changed flood characteristic, thus affecting the natural condition of the shoreline. The project proposed to construct a direct access way from the Project Area to the river, and would have been visible from the river. The Board thus concluded that the project was on the shoreline of the White River because, “The Project is located at the top of the river bank immediately adjacent to the water of the White River and also located within the floodplain of the river.”

In *Re: Robert B. and Deborah J. McShinsky*, #3W0530-EB, Findings of Fact, Conclusions of Law and Order (Apr. 21, 1988), *aff'd*, *In re McShinsky*, 153 Vt. 586 (1990), the applicants proposed a seasonal recreational vehicle campground on a site bounded by the White River on its west and south sides. The project would have been within view of two public swimming and recreation areas on the river. Some RV sites were to be within 20 feet from the top of the river bank, with the elevation of the lots closest to the river within 13 feet of the river elevation. Only a 15 foot undisturbed buffer strip along the river was proposed. While the Board’s decision does not specifically find that the project would be located on a shoreline, its conclusions leave this in little doubt, as the Board held that the project must fail because it would not meet subcriteria (iii) or (iv) or Criterion 1(F).

In *Re: Woodford Packers, Inc.*, #8B0542-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 5, 2001), an analysis of Criterion 1(F) led, among other reasons, to a denial of a proposed housing project. There, the Secretary of the Agency of Natural Resources had “determined that, for purposes of Act 250, the entire Project site is in the floodway of the Roaring Branch” River. A large part of the site was also within the 100 year floodplain, and a smaller portion within the 500 year floodplain. Filling and developing the project site would have restricted and diverted the flow of flood waters. Findings of Fact 9, 16, 52); 10 V.S.A. §6086(a)(1)(F)(i). The Board thus found that the project would be on the shoreline of the Roaring Branch River.

The present definition

In *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, Findings of Fact, Conclusions of Law, and Order at 23 (Nov. 24, 2004), the Board attempted, once and for all, to read the above precedent establish a standard to be used when determining whether a project is on a “shoreline” and therefore triggers review under Criterion 1(F). The Board held that a project involves the “development or subdivision of shorelines,” if one, or both, of the following two questions is answered affirmatively:

a. Does the project involve construction on or the use of “the land between the mean high water mark and the mean low water mark of such surface waters?” 10 V.S.A. §6001(17). Certainly, projects such as dams, mills, and marinas, or those which involve the construction or use of swimming areas and launch sites (*e.g.*, *West River Acres*), are located on a “shoreline.” Accordingly, those aspects of such projects must meet Criterion 1(F)’s requirements.

or

b. Does the project, or an element of it, have the potential to adversely affect the values which Criterion 1(F) seeks to protect? Projects on lands adjacent to the water’s edge - even those which do not involve the physical development of the line between earth and water - may also trigger review under Criterion 1(F) if they may have adverse impacts on the criterion’s four subcriteria: maintenance of the shoreline and the waters in their natural condition, continuing access to the waters and their recreational opportunities; the retention of vegetation for aesthetic purposes, and bank stabilization to prevent erosion. Shorelines, and the extent to which they encompass lands at some distance from the water’s edge may vary, but the key qualities to be protected do not.

Thus, aspects of a project implicate Criterion 1(F) to the extent that they (a) touch the water or (b) could have some negative impacts on the values which the criterion seeks to protect, as those values are stated in the subcriteria.

Is a project “on” a shoreline because one of its elements is?

The Board has realized that, merely because a project tract might border a shoreline, this does not mean that the project (or all aspects of the project) is “on” the shoreline such that Criterion 1(F) is implicated. In *Re: West River Acres, Inc., et al.*, #2W1053-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Jul.16, 2004), the Board stated, “[T]here is no bright-line rule regarding where a shoreline begins and ends. Rather, the Board determines whether a project is located on a shoreline by considering the facts on a case-by-case basis.” It found that three aspects of the project, a swimming area and a canoe launch site, and a

carriage-driving training area were located on the shoreline of the West River, which, “given the moderately sloping meadow towards the top of the river bank, ... extends beyond the high water mark and includes the land immediately adjacent to the top of the river bank.” *Id.* at 12. *The Board refused to conclude that all lands within the project site would be considered to be on the shoreline of the river, merely because the site bordered the river. As in Lupton, the Board, in making this determination, focused on the elements of shoreline protection that form the basis of Criterion 1(F):*

The Project Tract is 54.2 acres and only a fraction of that is on the shoreline. The purpose of Criterion 1(F) to protect shorelines is not served by imposing restrictions on portions of a Project Tract that are not adjacent to the river. *Therefore, the Board will only apply the Criterion 1(F) test to those components of a Project that it determines are on the shoreline.*

Id. at 11 -12 (emphasis added).

“Of necessity”

If a project is located on a shoreline, the applicant must show that the project “must of necessity be located on a shoreline in order to fulfill the purpose of the development or subdivision.” Thus, if a project is, but need not be on the shoreline, it can be denied. *Re: Woodford Packers, Inc., d/b/a WPI, #8B0542-EB, Findings of Fact, Conclusions of Law, and Order at 24 (Oct. 5, 2001), aff’d, In re Woodford Packers, Inc., 2003 VT 60 (2003) (“of necessity” is a threshold question); Re: Pathway Ministries, Ltd. and Charles L. Rubner, #5W1336-EB, Findings of Fact, Conclusions of Law, and Order at 8 (Jun. 2, 2000); Re: Mill Lane Development Co., Inc., #2W0942-EB, Findings of Fact, Conclusions of Law, and Order (Dec. 19, 1999).*

For many years, the Board either ignored this aspect of Criterion 1(F), see, *In re McShinsky*, 153 Vt. 586, 589-90 (1990), or read the word “necessity” to mean “desire.” For example, in *Re: Bernard and Suzanne Carrier, #7R0639-EB (Reconsideration) Findings of Fact, Conclusions of Law, and Order at 11 (Oct. 5, 1990)*, the Board concluded that the purpose of building a subdivision in its specific location was “clearly for the landowners to enjoy the pleasures of living on a shoreline.” This alone led the Board to conclude that the project must be located on the shoreline to fulfill its purpose. Similarly, in *Re: Mill Lane Development Co., Inc., #2W0942-2-EB, Findings of Fact, Conclusions of Law, and Order (Dec. 17, 1999)*, the Board found that the project’s purpose – “to provide residential housing in a classic Vermont setting, with views of the Reservoir and distant mountains set off by close pastoral settings,” Finding 22, was sufficient to satisfy the criterion’s requirements, Findings of Fact, Conclusions of Law, and Order at 23.

Beginning in 2001, however, the Board began to read some teeth into the phrase. In *Josiah E. Lupton, Quiet River Campground, #3W0819 (Revised)-EB*, Findings of Fact, Conclusions of Law, and Order at 16 (May 18, 2001), the Board wrote:

In analyzing the "of necessity" requirement of Criterion 1(F), the Board now concludes that its earlier decisions may have not given the "of necessity" requirement of Criterion 1(F) the weight it deserves and that the legislature's inclusion of the "of necessity" language evinces a clear mandate that the project must serve a water-related purpose. The phrase "of necessity" is not a soft requirement lending to compromise, but rather, the plain meaning of these words requires a finding beyond the fact that the project's purpose in locating on the shore is simply desirable. In the future, the Board will consider whether the project's location on the shoreline serves as an integral part of the developmental scheme.

Subsequent decisions reaffirmed this new approach, see, e.g., *Re: Woodford Packers, Inc., d/b/a WPI, #8B0542-EB*, Findings of Fact, Conclusions of Law, and Order at 24 (Oct. 5, 2001), an approach which the Supreme Court sanctioned. *In re Woodford Packers, Inc.*, 2003 VT 60 ¶20 (2003) (no error where Board's emphasis on the "threshold question" of whether the project must "of necessity" be located on a shoreline to fulfill its purpose application represented a change in the Board's interpretation of the statute). Since *Lupton*, the Board has found that some projects meet the "of necessity" test, *Re: Alodium Church, #3W0637-5-EB*, Findings of Fact, Conclusions of Law, and Order at 7 (Jun. 23, 2005); *Re: West River Acres, Inc., et al. #2W1053-EB*, Findings of Fact, Conclusions of Law, and Order at 13 (Jul. 16, 2004); and some have not. *Re: Woodford Packers, Inc., d/b/a WPI, #8B0542-EB*, Findings of Fact, Conclusions of Law, and Order (Oct. 5, 2001), *aff'd*, *In re Woodford Packers, Inc.*, 2003 VT 60 (2003).

Note that the Supreme Court has held that the phrase, in Criterion 1(F), "insofar as possible and reasonable in light of its purpose" does not mean that the Board must accept every proposed shoreline development project, regardless of its purpose and impact on the shoreline, merely because the applicant is doing what he or she feels is possible or reasonable. *In re McShinsky*, 153 Vt. 586, 591 (1990).

IV. Analysis

The four subcriteria

If the project is on a shoreline and meets the "of necessity" test, then it must also meet the four subcriteria to satisfy Criterion 1(F). An analysis under each of these subcriteria is

fact-specific; thus, while there are a number of cases which discuss these subcriteria relative to particular facts; there is little general law that exists as to each subcriteria.

(i) retain the shoreline and the waters in their natural condition

A project does not retain shoreline and waters in their natural condition where fill and construction is proposed in floodplain and rip-rap will be added to river banks. *Re: Josiah E. Lupton, Quiet River Campground, #3W0819 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 17 (May 18, 2001); and see cases noted under Enote 629.2.2.1*

(ii) allow continued access to the waters and the recreational opportunities provided by the waters

The Board has held that this subcriteria does not require a landowner to create a public access; *Re: Josiah E. Lupton, Quiet River Campground, #3W0819 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 18 (May 18, 2001); the subcriteria merely prohibits a landowner from restricting an already existing access. Re: Mill Lane Development Co., Inc., #2W0942-2-EB (Dec. 17, 1999)*

(iii) retain or provide vegetation which will screen the development or subdivision from the waters, and

See fact-specific cases under Enote 629.2.2.3

(iv) stabilize the bank from erosion, as necessary, with vegetation cover.

See, *Re: Josiah E. Lupton, Quiet River Campground, #3W0819 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 19 (May 18, 2001) (project with a vegetated buffer which is too narrow to protect against erosion does not stabilize bank from erosion); Robert B. & Deborah J. McShinsky, #3W0530-EB, Findings of Fact, Conclusions of Law, and Order (Apr. 21, 1988), aff'd, In re Robert and Deborah McShinsky, 153 Vt. 586 (1990)*

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