

16. Criterion 8 (Aesthetics, Scenic and Natural Beauty)

I. Requirements for Issuance of Permit

Under Criterion 8, before issuing a permit, the Commission must find the proposed project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare or irreplaceable natural areas. 10 V.S.A. §6086(a)(8).

II. Burden of Proof

While the burden of proof under Criterion 8 is on those who oppose the project, 10 V.S.A. §6088(b), an applicant for a permit must provide sufficient information for the Board to make affirmative findings. *Re: Susan Dollenmaier and Martha Dollenmaier Spoor, #3W0125-5-EB*, Findings of Fact, Conclusions of Law, and Order at 9 (Feb. 7, 2005); *Re: Hannaford Brothers Co. and Southland Enterprises, Inc., #4C0238-5-EB*, Findings of Fact, Conclusions of Law, and Order at 13 (Apr. 9, 2002); and *see, Re: Southwestern Vermont Health Care Corp., #8B0537-EB*, Findings of Fact, Conclusions of Law, and Order at 28 (Feb. 22, 2001); *Re: Black River Valley Rod & Gun Club, Inc., #2S1019-EB*, Findings of Fact, Conclusions of Law, and Order at 19 (June 12, 1997) and cases cited therein.

III. Analysis - Aesthetics, Scenic and Natural Beauty

Adverse Effect

The Commission relies upon a two-part test to determine whether a project satisfies Criterion 8. First, it determines whether the project will have an adverse effect under Criterion 8. *Re: Susan Dollenmaier, supra*, at 10, citing *Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership, #8B0444-6-EB* (Revised), Findings of Fact, Conclusions of Law, and Order at 24-25 (Aug. 19, 1996), *citing Re: Quechee Lakes Corp., #3W0411-EB* and *#3W0439-EB*, Findings of Fact, Conclusions of Law, and Order at 17 -19 (Nov. 4, 1985).

[T]he Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will “fit” the context within which it will be located. In making this evaluation, the Board examines a number of specific factors, including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space.

Re: James E. Hand, supra, at 25, *citing, Re: Quechee Lakes Corp., supra*, at 18. In other words, if a project “fits” its context, it will not have an adverse effect. *Re: Talon Hill Gun Club and John Swington, #9A0192-2-EB*, Findings of Fact, Conclusions of

Law, and Order at 9 (June 7, 1995). If the Commission concludes that the project has an adverse effect under Criterion 8, the Commission moves to the second part of the test and evaluates whether the adverse effect is “undue.”

Board precedent notes that application of Criterion 8 does not guarantee that views of the landscape will not change:

Criterion 8 was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from his or her property will remain the same forever. Change must and will come, and criterion #8 will not be an impediment. Criterion #8 was intended to insure that as development does occur, reasonable consideration will be given to the visual impacts on neighboring landowners, the local community, and on the specific scenic resources of Vermont.

Re: Okemo Mountain Inc., #2W5051-8-EB, Findings of Fact, Conclusions of Law and Order at 9 (Dec. 18, 1986); and see, Re: Main Street Landing Company and City of Burlington, #4C1068-EB, Findings of Fact, Conclusions of Law, and Order at 17- 18 (Nov. 20, 2001).

While a built environment is not always adverse, projects that result in the loss of open space and the alteration of vistas can have an adverse effect on aesthetics and scenic beauty. *E.g., Re: Southwestern Vermont Health Care Corp., supra, at 29; Re: Thomas W. Bryant and John P. Skinner, #4C0795-EB, Findings of Fact, Conclusions of Law, and Order at 21 (June 26, 1991). See also Re: Maple Tree Place Associates, #4C0775-EB, Findings of Fact, Conclusions of Law, and Order at 48 - 49 (June 25, 1998); Re: George, Mary, and Rene Boissoneault, #6F0499-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Jan. 29, 1998).*

The context of the Project

To determine whether the project is adverse in terms of aesthetics - whether it will “fit” the context of the area where it will be located - the Commission first must determine what that context is. *Re: Susan Dollenmaier, supra, at 11, citing Re: Hannaford Brothers Co., supra, at 14; Re: The Van Sicklen Limited Partnership, #4C1013R-EB, Findings of Fact, Conclusions of Law, and Order at 36 (Mar. 8, 2002).*

The determination of the project's context is one that is crucial to the Criterion 8 analysis; if the project “fits” its context, then the project, by definition, is not adverse, and the inquiry under Criterion 8 ends. *Re: John J. Flynn Estate and Keystone Development Corp., #4C0790-2-EB, Findings of Fact, Conclusions of Law and Order at 24 n. 6 (May 4, 2004); Re: Hannaford Brothers Co., supra at 14.*

The impact of the Project on its context

Once the Commission determines the context of the project site, the Commission then must consider the scope and extent of the project's impacts on that context.

Assessing the impacts of a project is a fact-specific inquiry. On the one hand, the Board has found that a project would have an adverse impact on aesthetics because size and density of its units would differ from surrounding structures. *Re: Brewster River Land Co., LLC., #5L1348-EB, Findings of Facts, Conclusions of Law, and Order at 15 (Feb. 22, 2001).* On the other hand, the Board has found that a large-scale residential development in a rural area (on Dorset Street in South Burlington along the Shelburne Town line) would not have undue adverse effect. *Re: MBL Associates, #4C0948-EB (Altered), Findings of Fact, Conclusions of Law, and Order (Jan. 30, 1996), aff'd, In re MBL Associates, Inc., 166 Vt. 606 (1997).*

Undue Adverse Effect

If the Commission concludes that the project has an adverse effect under Criterion 8, the Commission must evaluate whether the adverse effect is "undue." The Commission will conclude that adverse effect is "undue" if it reaches a positive finding with respect to any one of the following factors:

Does the Project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?

Does the Project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings?

See, Re: Quechee Lakes Corp., supra, at 19 -20. And see, Re: Black River Valley Rod & Gun Club, Inc., supra, at 19 -20; Re: James E. Hand, supra, at 25 -29.

Written Community Aesthetic Standard

Under this first factor, the Commission must determine whether the project violates a clear, written community standard "intended to preserve the aesthetics or scenic beauty of the area" where the project would be located. *Re: Southwestern Vermont Health Care Corp., supra, at 33 – 34; Re: Josiah E. Lupton, Quiet River Campground, Land Use Permit Application #3W0819 (Revised)-EB, Findings of Fact,*

Conclusions of Law, and Order at 24 (May 18, 2001); *Re: Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action, #2WO694-I-EB*, Findings of Fact, Conclusions of Law, and Order at 36 (Dec. 21, 2000).

In evaluating whether a project violates a clear written community standard, the Commission routinely looks to town plans, open land studies, and other municipal documents to discern whether a clear, written community standard exists and should be applied in the review of the aesthetic impacts of a project. *See, Re: Burlington Broadcasters, Inc. d/b/a WIZN, Charlotte Volunteer Fire and Rescue, & John Lane, #4C1004R-EB*, Memorandum of Decision at 10 - 11 (Nov. 25, 2003); *Re: Hannaford Brothers Co., supra*, at 18; *Re: Raymond and Centry Duff, #5W0952-2-EB*, Findings of Fact, Conclusions of Law, and Order at 9 (Jan. 29, 1998); *Re: Herbert and Patricia Clark, supra*, at 35 – 37; *Re: Thomas W. Bryant, supra*, at 22; and *see Re: Nile and Julie Dupstadt & John and Deborah Alden, #4C1013-EB*, Findings of Fact, Conclusions of Law, and Order at 34 (Apr. 30, 1999) (town plan can be an authoritative source of clear community aesthetic standards, and it is therefore appropriate for the Board to rely upon such a Plan “in determining whether [a] Project violates the community standard.”)

The Board explained the intent of the clear, written community standard in the *Re: Town of Barre, #5W1167-EB*, Findings of Fact, Conclusions of Law, and Order (June 2, 1994):

In adopting the first standard in the Quechee analysis, the Board intended to encourage towns to identify scenic resources that the community considered to be of special importance: a wooded shoreline, a high ridge, or a scenic back road, for example. These designations would assist the district commissions and the board in determining the scenic value of specific resources to a town, and would guide applicants as they design their projects.

Id. at 21.

At issue in *Barre* was the following portion of a town plan discussing scenic resources:

In the 1989 planning survey dealing with future growth, preservation of visual beauty was the highest priority of the residents polled. Eighty-nine percent of those responding said that planning to retain visual beauty was necessary. . . . Barre Town's visual beauty is an asset which the Town has to offer to any prospective resident or employer who is considering relocating to the community. . . . [T]he Town of Barre's policy regarding aesthetics is one of encouraging enhancement and preservation of natural areas, views, and vistas.

Id. at 13 -14.

In *Barre*, the Board ruled that the above quoted language did not rise to the level of a clear, written community standard, because “they apply generally to the community at large rather than to specific scenic resources in the project area.” *Id.* at 21.

In contrast to *Barre* was the town plan provision at issue in *Re: Taft Corners Associates, #4C0696-11-EB* (Remand), Findings of Fact, Conclusions of Law, and Order (Revised) (May 5, 1995). The Board found that the town plan identified as “significant” the views of the mountains to the east and west and foreground views from I 89 of “the high ground at the water tower and other open spaces . . .” *Id.* at 19. The Board quoted the town plan:

Taft Corners should feature quality design, compatible with its setting. Buildings should be architecturally compatible and should be enduring, not transient. Their siting should enhance the setting, and particularly the east-west views. The placement of buildings should define public spaces, such as the streets, courtyards and greens. The area should be well landscaped, and feature green spaces, open spaces, trails and other opportunities for human interaction.

Id. at 18 -19. Based on the above language, the Board found a clear, written community standard “which contains provisions regarding aesthetics” that applied to the project. *Id.* at 42; *accord, Re: Herbert and Patricia Clark, supra* (Brandon Town Plan constituted clear, written community standard where it established and defined three categories of scenic resources, contained an inventory that described 30 scenic areas, and provided recommended policies and implementation measures for protecting the scenic value and resources of the listed areas and where the proposed project was located in one of the scenic areas listed in the inventory); *Re: The Mirkwood Group and Barry Randall, #1R0780-EB*, Findings of Fact, Conclusions of Law, and Order at 22 - 23 (Aug. 19, 1996) (Pittsford zoning ordinance constituted clear, written community standard where a proposed radio tower was located within a conservation district and the ordinance contained a clear statement of the community policy against use of conservation district lands for anything other than dwellings, forestry, and agriculture).

The Commission must therefore determine whether there exists a community aesthetic standard that is applicable to the project. If the project does not comply with the written community standards evidenced by the community aesthetic standard, the project does not meet the aesthetic requirements of Criterion 8.

Shocking or offensive

Under this second aesthetic factor, the Commission must determine whether the Project offends the sensibilities of the average person. This includes whether the Project would be so out of character with its surroundings or so significantly diminish the scenic qualities of the area as to be offensive or shocking to the average person. *Re: Pike Industries, Inc. and William E. Dailey, Inc.*, #1R0807-EB, Findings of Fact, Conclusions of Law, and Order at 18 - 19 (June 25, 1998); *Re: Nile and Julie Dupstadt, supra*, at 35; and see, *Re: Robert B. & Deborah J. McShinsky*, #3W0530-EB, Findings of Fact, Conclusions of Law, and Order at 9 (April 21, 1988), *aff'd, In re Robert and Deborah McShinsky*, 153 Vt. 586 (1990).

If the Commission concludes that the project, as designed, would be offensive or shocking to the average person, the project does not meet the aesthetic requirements of Criterion 8.

Mitigation

Pursuant to 10 V.S.A. §6086(c), the Commission has the authority to impose conditions necessary to alleviate adverse impacts with respect to the ten Act 250 criteria. As long as a condition constitutes a proper exercise of the police power and alleviates adverse effects that would otherwise be caused by a project, the condition may be imposed. Any condition must be reasonable. *In re Denio*, 158 Vt. 230, 240 (1992).

In judging whether there should be mitigation, the Commission looks to the steps that the applicant has taken or may take to reduce the aesthetic impacts of a project on the character of the area where it is proposed; the Commission asks whether there are generally available mitigating steps that have or should be taken to improve the harmony of the project with its surroundings. See *Re: Thomas W. Bryant, supra*, at 22 (height and exterior color restrictions on homes, plantings to screen the development, covenants to govern future activities on the site, and retained open space all comprised generally available mitigating steps to alleviate adverse effects of subdivision on the surrounding area).

If the Commission finds that the applicant has failed to take available mitigation measures to minimize the aesthetic impact of the project, the project fails Criterion 8 (aesthetics). See, e.g., *Re: Didace and Susan LaCroix*, #3W0485-EB, Findings of Fact, Conclusions of Law, and Order at 13 (Apr. 27, 1987).