



appeal of Criteria in which the Appellant did not seek nor was granted party status. In addition, CVPS asked the Board to deny the appeal without convening an evidentiary hearing.

On December 21, 2000, Board Chair Marcy Harding convened a prehearing conference with the following participants:

CVPS by Tim Upton and Bill Jakubowski  
Harris Peel

During the prehearing conference, the Chair suggested an expedited hearing without a requirement for pre-filed testimony. The parties agreed and CVPS withdrew its request to deny the appeal without convening a hearing.

On December 27, 2000, the Chair issued a Prehearing Conference Report and Order which held that the Appellant can not appeal Criteria 9, 9(F), and 9(H) because he did not obtain or request party status before the Commission on those Criteria. Appellant retained his party status on Criterion 8.

On January 9, 2001, acting as a hearing officer, the Chair convened a hearing and at the conclusion of the testimony she recessed the hearing and deliberated.

Based upon a thorough review of the record and related argument, the hearing officer issued a proposed decision on January 30, 2001, which was sent to the parties. The parties were allowed to file written objections and request oral argument before the Board on or before February 8, 2001. On February 8, 2001, Harris Peel filed an objection to the proposed decision and requested oral argument.

On February 21, 2001, the Board heard oral argument and convened a deliberation concerning this matter. Following a review of the proposed decision and the evidence and arguments presented, the Board declared the record complete and adjourned. This matter is now ready for final decision.

### **III. ISSUE**

Whether, pursuant to 10 V.S.A. § 6086(a)(8), the Project will have an undue adverse effect on the scenic or natural beauty of the area or aesthetics.

#### **IV. FINDINGS OF FACT**

1. The Project involves relocating and reconstructing approximately 13,000 feet of single-phase and three-phase electrical distribution lines from their cross-country location to U.S. Route 7 starting approximately 1,000 feet south of the Danby/Wallingford town line and ending near the intersection of U.S. Route 7 and North Main Street in the Town of Danby, Vermont.
2. These electrical lines were first built in 1931.
3. Appellant owns and operates the Peel Gallery of Fine Art ("Gallery") on a parcel of land in the Town of Danby, Vermont.
4. Specifically, the Project would remove a few utility poles and wires immediately west of the Gallery, reconfigure the lines south of the Gallery along Scottsville Road to single phase thereby reducing the number of electrical lines from three to one, remove the two existing telephone poles and wires on the eastern side of Appellant's property fronting Route 7 and replace those telephone poles with utility poles on the eastern side of Route 7 that will be ten feet higher than the existing telephone poles and hold both electrical and telephone wires.
5. The Gallery is located north of the Town of Danby just off U.S. Route 7. U.S. Route 7 is the major thoroughfare in the area. The surrounding area is comprised of gently rolling hills with a mixture of meadows and woods.
6. Several other commercial or industrial businesses are located along Route 7 near the Gallery.
7. Utility poles and wires generally line and occasionally crisscross the Route 7 corridor. The utility poles include "T" shaped and straight vertical poles supporting one to seven wires.
8. There are a few intermittent areas without any utility poles and wires along Route 7 but utility poles and wires are a near ubiquitous feature of the Vermont landscape.
9. Utility poles and wires detract from the natural beauty of the landscape.

The few areas along the roads without utility poles and wires are noticeably more beautiful and pristine.

10. The Gallery is surrounded by utility poles and wires on three sides. From the Gallery's many small windows, the utility poles and wires are very noticeable.

11. Between U.S. Route 7 and the Gallery there is a large, gently sloping open lawn with several picturesque sculptures. The lawn with sculptures is bordered by utility poles and wires on two sides.

12. When the Project is complete, the view of the Gallery from U.S. Route 7 east and north of the Gallery will no longer include utility poles and wires in the foreground. The view of the lawn, sculptures, and Gallery will be unobstructed.

13. The Project will result in a net decrease of 6 utility poles in the immediate area near Appellant's property.

14. The poles to be moved to the east of U.S. Route 7, east of the Gallery, although ten feet higher, will be less noticeable, especially from Appellant's property, due to the vegetative background and additional distance from the Gallery.

## **V. CONCLUSIONS OF LAW**

### **A. Scope of Review and Jurisdiction**

When a party appeals from a District Commission determination, the Board provides a "de novo hearing on all findings requested by any party that files an appeal or cross-appeal, according to the rules of the [B]oard." 10 V.S.A. section 6089(a)(3). Board rules provide for the de novo review of a District Commission's findings of fact, conclusions of law, and permit conditions. EBR 40(A). Thus, the Board cannot rely upon the facts stated or conclusions drawn by the District Commission in this matter concerning the Criteria on appeal.

### **B. Criterion 8 - Scenic beauty and aesthetics**

Before granting a permit, the Board must find that a proposed project "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." 10

V.S.A. § 6086(a)(8). The burden of proof is on the opponents under Criterion 8, 10 V.S.A. § 6088(b), but the Permittees must provide sufficient information for the Board to make affirmative findings. See, e.g., *Re: Black River Valley Rod & Gun Club, Inc.*, #2S1019-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Mar. 27, 1997) and cases cited therein. Appellant did not raise any issues concerning historic sites or rare and irreplaceable natural areas.

The Board uses 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. *James E. Hand and John R. Hand d/b/a Hand Motors and East Dorset Partnership*, Findings of Fact, Conclusions of Law, and Order, at 24 (August 19, 1996); *Re: Quechee Lakes Corp.*, #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 17-20 (Nov. 4, 1985). Second, it determines whether the adverse effect, if any, is undue. *Hand, supra; Quechee Lakes, supra*, at 17-20.

If a project will not have an adverse effect on aesthetics, then the Board does not need to conduct the second part of the Quechee Lakes analysis, and the project at issue therefore complies with Criterion 8. *Re: Timothy and Mary Baker*, #8B0506-WFP, Findings of Fact, Conclusions of Law, and Order at 9 (Jan. 10, 1996).

As a general matter, 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.” *Re: Okemo Mountain, Inc.*, #2S0351-8-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Dec. 18, 1986). Nevertheless, 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: 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).

In determining whether a project will have an adverse effect on aesthetics, “[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.”  
*Hand, supra* at 25.

Appellant argues that the Project does not fit in the context of the area because utility poles and wires are an eyesore that destroy the beauty of the landscape. Appellant asserts that the utility poles and wires detract from and interfere with the public's enjoyment of the fine art in the gallery and the picturesque sculptures outside.

However, Appellant acknowledged that several components of the Project such as the removal of utility poles and the reduction in the number of wires would be an aesthetic improvement. It appears that Appellant's real argument is not that the Project would adversely affect the aesthetics of the surrounding area, but that the Project if undertaken differently such as by removing the utility poles and burying the lines, could dramatically benefit the aesthetics of the area. This argument concerns possible ways to mitigate any adverse impacts which is a question only reached if an adverse impact is found first.

Permittees argue that the Project fits in the context of the area because utility poles and wires line the vast majority of all roads in Vermont. Permittees also assert that the Project would improve the aesthetics of the area since it will result in a net decrease in the number of utility poles and wires. Permittees' argument is more persuasive.

Although burying the cables would result in an aesthetic improvement, the threshold question under Criterion 8 is whether the Project would result in an adverse impact to the aesthetics of the area. In addition, the Board evaluates the impact of the Project on the landscape as it exists now, not on the landscape as it existed before the existing utility poles and wires were in place.

The utility poles and wires along the roads, while ubiquitous, detract from the natural beauty of the landscape. Therefore, reducing the number of utility poles and wires can lead to improved aesthetics in the area. Even though the replacement utility poles to be located east of Route 7 will be ten feet higher than the existing telephone poles on the west side of Route 7, the new utility poles will be less noticeable because they will blend in with the vegetative background and are farther from the Gallery.

