

**VERMONT ENVIRONMENTAL BOARD**  
**10 V.S.A. Ch. 151**

Re: *John Larkin, Inc.*

Land Use Permit Application  
#4C0526-11R(2)-EB [861]

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND REMAND ORDER**

John Larkin, Inc. (Applicant) appeals the denial of its application for a permit to build a 6-story tall, 113-room elderly housing building, with associated parking and utilities, to be built on a 7.03-acre tract located between Spear Street and Route 7/Shelburne Road in South Burlington, Vermont (Project). As set forth below, the Environmental Board concludes that the Project complies with Criterion 8(aesthetics), and remands to the District 4 Environmental Commission for a decision on Criterion 1(B).

**I. PROCEDURAL SUMMARY**

On December 18, 2003, the District 4 Environmental Commission (Commission) issued Findings of Fact, Conclusions of Law, and Order #4C0526-11 (Decision) denying a land use permit for the Project on Criterion 8(aesthetics), and deferring decision on Criterion 1(B).

On January 16, 2004, the Applicant filed a request to reconsider, and on March 11, 2004, the Commission issued Findings of Fact, Conclusions of Law, and Order #4C0526-11R (Reconsidered Decision), again denying the application for the Project. On August 19, 2004, the Applicant filed a second request to reconsider, and on October 19, 2004, the Commission issued Findings of Fact, Conclusions of Law, and Order #4C0526-11R(2) (Second Reconsidered Decision, together with the Decision and Reconsidered Decision collectively referred to as the Commission Decisions), again denying a land use permit for the Project.

On November 5, 2004, the Applicant filed this appeal with the Environmental Board (Board) from the Decision alleging error with respect to Criteria 1(B)(waste disposal) and 8(aesthetics)(10 V.S.A. § 6086(a)(1)(B) and 6086(a)(8)).

On December 9, 2004, Board Chair Patricia Moulton Powden convened a prehearing conference with the following participants: the Applicant, by Carl Lisman, Esq.; Martha Lang; and the South Burlington Planning Commission, by JuliBeth Hinds. Before the prehearing conference, the Harbor Heights Homeowners' Association (HHHA) notified the Board that it was unable to attend but wished to participate as a party in this matter. No other person expressed an interest in participating in this matter.

The Chair issued a Prehearing Conference Report and Order (PCRO) on December 14, 2004. Among other things, the PCRO identified the parties and issues on appeal, set the matter for hearing, and set deadlines for prefiling evidence.

On April 1, 2005, the Chair issued a Chair's Dismissal Order for failure to meet filing deadlines. On April 7, 2005, the Applicant filed an objection and a request to continue. The Board deliberated on April 13, 2005. On April 22, 2005, the Board issued a Memorandum of Decision granting the Applicant's request to continue, and rescheduled the hearing in this matter.

On July 27, 2005, the Board convened a public hearing and site visit in South Burlington, Vermont, Chair Moulton Powden presiding. Christina Jensen, Esq., represented the Applicant, and Rebecca Stearns represented HHA. Also present were John Larkin, and the Applicant's witnesses Michele Dufresne and William Nedde. HHA's Motion to Substitute witness Rebecca Stearns for Amy Roth was granted. The Board made observations on the record, admitted evidence and heard testimony. At the hearing, the Applicant requested that the Board provide partial review on Criterion 8(aesthetics). No other party objected to the Applicant's request, and the Board granted this request at the hearing.

On August 17, 2005 and September 28, 2005, the Board deliberated. Based on the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned.

## II. OFFICIAL NOTICE

The Vermont Administrative Procedures Act authorizes the Board to take official notice of judicially cognizable facts in contested cases such as Act 250 appeals. 3 V.S.A. § 810(4); see *also*, 3 V.S.A. § 801(b)(2)(contested cases). According to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); see *also*, 3 V.S.A. § 810(1)(rules of evidence apply in contested cases); *In re Handy*, 144 Vt. 610, 612 (1984). Official notice may be taken whether requested or not and may be taken at any stage of the proceeding, 3 V.S.A. § 810(4); *In re Nelson Lyford*, Declaratory Ruling #341, Findings of Fact, Conclusions of Law, and Order at 3-4 (Dec. 24, 1997)(citing V.R.E. 201(c) and (f)).

At the hearing, the Applicant agreed that it would be appropriate for the Board to take official notice of the City of South Burlington City Plan and the City of South Burlington Zoning Ordinance, but objected to official notice being taken the Commission Decisions, at least insofar as they concerned the Commission's findings on aesthetics and clear, written community standards. The Board took official notice of the City of South Burlington City Plan and the City of South Burlington Zoning Ordinance, and the Applicant filed these documents after the hearing.

The Board now takes official notice of the Commission Decisions, for the purpose of procedural background facts only. The objection raised at the hearing by the Applicant was based on the *de novo* nature of this appeal, and was entirely proper in the context of Criterion 8(aesthetics), since the Board cannot rely on prior decisions as evidence of facts that might be in dispute. See also *In re Killington, Ltd.*, 159 Vt. 206, 214 (1992)(citing *In re Green Peak Estates*, 154 Vt. 363, 372 (1990)). However, the Board is not relying on the Commission Decisions as evidence of any fact in dispute, but rather for procedural facts that are not subject to dispute. As discussed below, the procedural background in this case has direct bearing on the issues the Board has jurisdiction to decide in this appeal. Official notice is, therefore, appropriate.

### III. ISSUES; REMAND

The issues raised in the Applicant's notice of appeal, and identified in the Prehearing Conference Report and Order are:

1. Whether the Project complies with 10 V.S.A. § 6086(a)(1)(B).
2. Whether the Project complies with the aesthetics requirements of 10 V.S.A. § 6086(a)(8)(aesthetics).

At the hearing, the Board granted the Applicant's request for partial review and decision on Criterion 8(aesthetics), pursuant to EBR 21. However, it appears from the Commission Decisions that the Commission did not decide the Criterion 1(B) issue. The Board's jurisdiction in this appeal, therefore, is limited to Criterion 8(aesthetics). See *In re Taft Corners Assocs.*, 160 Vt. 583, 591 (1993)(Board has no jurisdiction to rule on criteria that were not ruled on by the district commission)(citing *In re Vermont Gas Systems*, 150 Vt. 34, 40 (1988)).

Accordingly, this matter must be remanded to the Commission for a decision on Criterion 1(B).

### IV. FINDINGS OF FACT

To the extent that any proposed findings of fact are included in this decision, they are granted; otherwise, they are denied. See *Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983). Facts stated and terms defined in the procedural summary are incorporated herein.

1. The Applicant proposes to build a 6-story tall, 113-room elderly housing building, with associated parking and utilities, on a 7.03-acre tract located between Spear Street and Route 7 (Shelburne Road), on the north side of Harbor View Drive, in South Burlington, Vermont.

2. The building will be 59 feet 6 inches tall from the first floor to the roof peak, with the front door at grade level. The building will be 62 feet in width and approximately 332 feet in length.
3. The general topography of the area slopes downward from east to west.
4. Harbor View Drive contains a mix of commercial, multi-family and single-family residential properties, with the multi-family properties providing a buffer between the commercial uses to the west, along Shelburne Road, and the single-family residential uses to the east, along the west side of Spear Street.
5. The land between the commercial and residential areas is currently dominated by multifamily and senior housing.
6. The Pillsbury South Community Care Center is located across Harbor View Drive from the Project site. That building is about 284 feet in length and three stories tall. Harborview Senior Housing is also across Harbor View Drive from the Project site, and is about 170 feet long and four stories in height. The Project will be connected to these existing senior housing facilities by footpaths and sidewalks.
7. Another senior housing building, Allenwood, is located just south of Harbor View Drive, on Allen Road. Allenwood is approximately 434 feet long and four stories in height.
8. There are several hotels on Shelburne Road, in the vicinity of the Project site. The Smart Suites, Howard Johnson's and Main Stay Suites are each four stories tall. The Holiday Inn is three stories tall.
9. There is no five- or six-story-tall building in the area of the Project site. The Project would be the first six-story-tall building in South Burlington.
10. There is a bank of mature trees on the northern border of the Project site. Some of these trees are as tall as the proposed building, and a few of these trees are taller than the proposed building.
11. The proposed building has three sections, connected at angles to give the building a concave shape. This minimizes the appearance of length. Measuring straight across from end to end, the building will be approximately 276 feet long.
12. The building is set into the bank and tree line, which minimizes its appearance.

13. This location and positioning of the building on the Project site minimizes the visual impact of the building and preserves some views of Lake Champlain and the Adirondack Mountains from Harbor View Drive.
14. The building materials for the Project include forest green asphalt shingles and vinyl siding in earth tones, with white window trim and door frames.
15. The architectural design of the building includes corners, overhangs, and other details, proportionate to the building's size, that are designed to draw the eye from the building's mass. Sun rooms and decks also break up the building's appearance of length and add visual interest.
16. The sixth-floor rooms and suites are within the roof, making the building appear to be somewhat lower than six stories in height.
17. The Applicant proposes landscaping around the Project site, including native plants to provide flowers and seasonal changes of foliage. The parking area will be screened by lilacs and small trees, decreasing in height from north to south, to limit their impact on views from Harbor View Drive.
18. The building will be visible to users of public ways such as nearby roads, sidewalks and Lake Champlain.
19. Because of trees and buildings closer to Shelburne Road and the relative topographical differences between Shelburne Road and the building site, the building will be visible behind existing roof lines and trees from Shelburne Road at its intersection with Collins Boulevard.
20. The building will be partially visible from the intersection of Harbor Ridge Road and Bay Crest Drive.
21. Small sections of the roof will be visible between houses on the west side of Spear Street from Allen Road about half way to Pheasant Way.
22. The building will not be visible from the corner of Bay Crest Drive, or the municipal Overlook Park on Spear Street.
23. The Project will be somewhat visible from Shelburne Point, and is likely to be more visible from more proximate parts of Lake Champlain.
24. The building will be visible from some of the Harbor Heights condominium units immediately to the east of the Project site. From this

- location, approximately the top five stories of the proposed building will be visible.
25. Units 702, 703 and 704, and 801, 802, 803 and 804 of the Harbor Heights condominiums have westerly views of the Adirondack mountains and Shelburne Bay of Lake Champlain. These views will be obstructed by the Project.
  26. The Project will block westerly views from the Harbor Heights condominiums if it is any higher than two-and-one-half or three stories high. The obstruction is the same whether a four-story or six-story building is constructed.
  27. The Applicant previously had proposed to reduce the length of the building by approximately 18 feet, but no longer wishes to do this. This would mitigate the impact on the westerly views of the Harbor Heights condominium owners, but would result in a loss to the Applicant of six units with good views of Lake Champlain and the Adirondack mountains to the west.
  28. The Applicant does not want to reduce the length of the building to maintain most of the views from the affected Harbor Heights condominiums for economic reasons.
  29. Reduction of the length of the building as previously proposed will not have a significant impact on views from any public right of way. It would reduce views of the Project slightly from Shelburne Road/Route 7 and Lake Champlain.
  30. The Project will involve clearing a small amount of tall trees to the south of Collins Boulevard, southeast of the Project building, which will broaden the views to the west slightly for some of the Harbor Heights condominium units in the 800 series.
  31. The City of South Burlington Zoning Regulations, Section 25.113, limit building height in the Project's zoning district to 40 feet.
  32. The City of South Burlington Zoning Regulations, Section 25.113(b), authorize height increases up to 45 feet for residential structures, under certain circumstances. The Project is not considered a residential use under the City of Burlington Zoning Regulations. It is congregate housing, which is not listed as a residential use in Appendix D.
  33. The City of South Burlington Zoning Regulations, Section 25.113(c) authorize the development review board to approve heights over 40 feet

for non-residential structures if the taller structure: “(i) will not affect adversely the essential character of the neighborhood or district in which the property is located; [and] (ii) will not detract from important scenic views from adjacent public roadways and other public rights-of-way.”

34. The City of South Burlington granted the Applicant’s request for a waiver of the height limit, with corresponding setback increases, to allow a building approximately 67 feet in height.
35. The Applicant has since reduced the height of the building to 59 feet and 6 inches.

## V. CONCLUSIONS OF LAW

The Applicant proposes to build a 113-unit, 6-story tall, elderly housing building, with associated parking and utilities. Under Criterion 8(aesthetics), the Board must determine whether the Project has or will have “an undue adverse effect on the scenic or natural beauty of the area [or] aesthetics,” with or without a screening row of trees or other mitigating conditions. 10 V.S.A. § 6086(a)(8) (aesthetics). The HHA bears the burden of proving noncompliance with Criterion 8, *id.* § 6088(b), but the Applicant must produce sufficient evidence for the Board to make affirmative findings. *Re: The Home Depot U.S.A., Inc., Ann Juster and Homer and Ruth Sweet, #1R0048-12-EB*, Findings of Fact, Conclusions of Law, and Order at 31 (Aug. 20, 2001)(citing *Re: Black River Valley Rod & Gun Club, Inc., #2S1019-EB*, Findings of Fact, Conclusions of Law, and Order (Altered) at 19 (Jun. 12, 1997)).

To determine whether a project complies with Criterion 8 (aesthetics), the Board applies a two-part test, known as the *Quechee* test. The first question is whether the project fits in aesthetically with its surroundings. *Re: Barre Granite Quarries, LLC, #7C1079 (Revised)-EB*, Findings of Fact, Conclusions of Law, and Order at 78 (Dec. 8, 2000)(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); *Re: Quechee Lakes Corp., #3W0411-EB and #3W0439-EB*, Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1985)). If a project fits its context, it does not have an adverse effect, and complies with Criterion 8(aesthetics). *Re: John J. Flynn Estate and Keystone Development Corp., #4C0790-EB*, Findings of Fact Conclusions of Law, and Order (May 4, 2004).

If a project does not fit the aesthetic context of its surroundings, it has an adverse aesthetic impact, and the Board must determine whether that adverse effect is undue. *Barre Granite*, Findings, Conclusions and Order at 79 (citing *Hand*,

Findings, Conclusions and Order at 24; *Quechee Lakes*, Findings, Conclusions and Order, at 17-20).

**1. Adverse Impact: Does the Project Fit its Surroundings?**

To determine whether a development fits in with its context, or whether it has an adverse aesthetic impact, the Board considers a variety of factors, including:

1. What is the nature of the project's surroundings? Is the project to be located in an urban, suburban, village, rural or recreational resort area? What land uses presently exist? What is the topography like? What structures exist in the area? What vegetation is prevalent? Does the area have particular scenic values?
2. Is the project's design compatible with its surroundings? Is the architectural style of the buildings compatible with other buildings in the area? Is the scale of the project appropriate to its surroundings? Is the mass of structures proposed for the site consistent with land use and density patterns in the vicinity?
3. Are the colors and materials selected for the project suitable for the context within which the project will be located?
4. Where can the project be seen from? Will the project be in the viewer's foreground, middleground or background? Is the viewer likely to be stationary so that the view is of long duration, or will the viewer be moving quickly by the site so that the length of view is short?
5. What is the project's impact on open space in the area? Will it maintain existing open areas, or will it contribute to a loss of open space?

Re: *J. Philip Gerbode*, #6F0396R-EB, Findings of fact, Conclusions of Law, and Order at 11 (Mar. 25, 1991); see also, 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 25 (Aug. 19, 1996)(factors to be considered include: a. the nature of the project's surroundings; b. the compatibility of the project's design with those surroundings; c. the suitability for the project's context of the colors and materials selected for the project; d. the locations from which the project can be viewed; and e. the potential impact of the project on open space).

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 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 *Main Street Landing Co.*, #401068-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. Re: *Thomas W. Bryant and John P. Skinner*, #4C0795-EB, Findings of Fact, Conclusions of Law, and Order at 21 (Jun. 26, 1991). See also Re: *Maple Tree Place Associates*, #4))775-EB, Findings of Fact, Conclusions of Law, and Order at 48-49 (Jun. 25, 1998); Re: *George, Mary and Rene Boissoneault*, #6F0499-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Jan. 29, 1998).

The Project building will be the first six-story-high building in South Burlington. Although, as discussed below, there is considerable aesthetic mitigation proposed, the Project will be visible from public and private locations, and the building will block the views of the Adirondacks and Shelburne Bay from several nearby condominium units. The Project could be considered an infill development because it is in a commercial area and adjacent to a developed residential area, but it is clear that the Project will have an adverse impact on open space. Based on these facts, the Board concludes that the Project will have an adverse aesthetic impact.

## **2. Is the Impact Unduly Adverse?**

Because the Project has some adverse aesthetic impact on the surrounding area, the Board must determine whether that impact is unduly adverse. *Barre Granite*, Findings, Conclusions and Order at 79 (citing *Hand*, Findings, Conclusions and Order at 24; *Quechee Lakes*, Findings, Conclusions and Order, at 17-20). As set forth below, the Board concludes that the Project, as conditioned, does not have an unduly adverse aesthetic impact.

An aesthetic impact is unduly adverse if any of the following is true:

1. The project violates a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area;

2. The project offends the sensibilities of the average person because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area; or
3. The applicant has failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings.

See *Black River* at 19-20; *Hand* at 25-29; *Quechee Lakes* at 19-20.

**a. Clear, Written Community Standard**

An adverse aesthetic impact is undue if, among other things, it violates a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area. *Home Depot*, Findings, Conclusions and Order at 31 (citations omitted). "In evaluating whether a project violates a clear written community standard, the Board routinely looks to town and regional plans, open land studies, and other municipal-generated documents to discern whether a clear, written community standard exists and should be applied in the review of the aesthetic impacts of a project." *Re: McDonald's Corporation*, No. 100012-2B-EB, Findings, Conclusions and Order at 14 (Mar. 22, 2001)(citing *Re: Herbert and Patricia Clark*, #1R0785-EB, Findings, Conclusions and Order at 35- 37 (Apr. 3, 1997); *Re: Thomas W. Bryant and John P. Skinner d/b/a J.O.T.O. Associates*, #4C0795-EB, Findings, Conclusions and Order at 22 (June 26, 1991); see also, *Re: Nile and Julie Dupstadt*, #4C1013 (corrected)-EB, Findings, Conclusions and Order at 23 (Apr. 30, 1999)).

In this case, the City of South Burlington's zoning regulations set a 40-foot height limit in the Project's zoning district. A height restriction in a zoning ordinance has been held to constitute a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area. See, e.g., *Re: The Mirkwood Group*, #1R0780-EB, Findings, Conclusions and Order at 14-15 (Aug. 19, 1996)(35-foot height limit); *Re: Northshore Development, Inc.*, #4C0626-5-EB, Findings, Conclusions and Order at 8 (Dec. 29, 1988)(35-foot height limit). Although the height limit can be construed as a clear, written community standard, the zoning regulations also set clear criteria for waiving that standard, and those criteria were met in this case because the Project does not have an adverse impact on the essential character of the neighborhood or zoning district, and because it will not detract from any important scenic view from adjacent public roadways or other public rights-of way.

Therefore, the Project does not violate any clear, written community standard intended to protect aesthetic values in the area.

**b. Mitigation**

The question under this part of the *Quechee* test is whether there are generally available mitigating steps that have or should be taken to improve the harmony of the project with its surroundings. See *Bryant and Skinner*, Findings, Conclusions and Order at 22 (reasonable aesthetic mitigation for subdivision project includes 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).

As set forth in the findings, the Applicant proposes a variety of aesthetic mitigation measures, including setting the Project building into the bank, keeping most of the trees and adding landscaping, using compatible colors and material, adding architectural features to break up the apparent mass of the building, an eight-inch height reduction and location of the sixth story in the roof, and keeping some of the parking underground. The Board concludes that the Applicant has taken all generally available mitigating steps.

**c. Shocking and Offensive**

The question under this part of the *Quechee* test is whether the Project offends the sensibilities of the average person, and 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.*, #1R0807-EB, Findings of Fact, Conclusions of Law, and Order at 18-19 (Jun. 25, 1998); *OMYA, Inc.*, #9A0107-2-EB, Findings of Fact, Conclusions of Law, and Order at 37 (May 25, 1999), *aff'd OMYA, Inc. v. Town of Middlebury*, No. 99-282 (Jul. 26, 2000).

The Board concludes that the Project, as conditioned above, is not shocking or offensive and does not offend the sensibilities of the average person. The Project complies with Criterion 8(aesthetics).

**VI. ORDER**

1. The Board takes official notice of the South Burlington City Plan, the South Burlington Zoning Ordinance, and the Commission Decisions.
2. The Project, as conditioned, complies with Criterion 8(aesthetics).
3. This matter is REMANDED to the Commission for a decision on Criterion 1(B).

DATED at Montpelier, Vermont this 11<sup>th</sup> day of October, 2005.

ENVIRONMENTAL BOARD

*/s/Patricia Moulton Powden*\_\_\_\_  
Patricia Moulton Powden, Chair  
George Holland  
W. William Martinez  
Patricia Nowak\*  
Karen Paul  
Richard C. Pembroke, Sr.  
A. Gregory Rainville

\* Board member Patricia Nowak was unable to participate in the Board's deliberations on September 28, 2005, but has reviewed and joins in this decision.