

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

RE: Brattleboro Chalet Motor Lodge, Inc.
Chalet Drive - Route 101
Wilton, NH 03086
Attn: K. Vern Cassidy
Director of Construction
and
C. W. Gregory
Nob Hill
Williston, VT 05495

Findings of Fact, Conclusions of Law and Order
Land Use Permit Application
#4C0581-EB

This decision pertains to an appeal filed on August 3, 1984 with the Environmental Board ("the Board") by the Agency of Environmental Conservation ("AEC") from the July 5, 1984 Findings of Fact, Conclusions of Law, and Land Use Permit #4C0581 issued by the District #4 Environmental Commission ("the Commission"). That permit authorized the Applicant to construct a four story, 103 room motor lodge with driveways, parking, swimming pool, and related improvements, located adjacent to Vermont Route 2A and Interstate 89 in Williston, Vermont.

On August 8, 1984, the Board notified the parties of its intent to designate its Chairman to act as administrative hearing officer in this matter pursuant to Board Rule 41 and 3 V.S.A. §811. Having received no objection, a public hearing was convened on September 4, 1984 in Essex Junction, Vermont, with Margaret P. Garland acting as hearing officer. The following were present at the hearing:

Permittee Brattleboro Chalet Motor Lodge, Inc. ("BCML")
by Julian Goodrich, Esq. and Philip Dodd, Esq.;
Agency of Environmental Conservation by Dana
Cole-Levesque, Esq.;
Williston Planning Commission by George Gerecke.

The hearing was recessed on September 4th pending a site visit by the Chairman, preparation of this proposal for decision, a review of the record, and deliberation by the full Board. A supplementary memorandum was filed by the Applicant on October 1. On October 3, the Board heard oral argument from the parties, determined the record complete, and recessed the hearing. This matter is now ready for decision. The following findings of fact, conclusions of law are based upon the record developed at the hearing.

11/17/84

231,

I. ISSUES IN THE APPEAL

The AEC appeal raises issues under the aesthetics portion of Criterion a (10 V.S.A. §6086(a)(8)). AEC stated its position as follows: "The close proximity of the proposed motor lodge to the scenic corridor, I-89, and the failure of the applicant to design the building so as to reflect the scenic and natural beauty of the area create [an] undue adverse aesthetic impact."

The Permittee's position is two-fold. BCML first argues that it need not secure a land use permit under 10 V.S.A., Chapter 151 (Act 250) because the proposed project is not a "development" as defined by the Act. In the alternative, BCML believes that the proposed motor lodge "is an aesthetically pleasing building which fits in with the landscape," satisfying the requirements of Criterion a.

The Planning Commission reviewed the issue of aesthetic impact when it considered the project under zoning bylaws and concluded that the motor lodge would not adversely impact scenic vistas. The Planning Commission was, therefore, in general support of the project.

II. JURISDICTIONAL ISSUE

As we find below, the project involves the construction of a 103 room motor lodge and related facilities on an approximately 4.5 acre tract in Williston. Williston has adopted both permanent subdivision and zoning regulations. BCML argues that its project does not constitute a "development" as that term is defined by 10 V.S.A. §6001(3) and, therefore, it need not secure a land use permit. AEC argues that BCML has waived this jurisdictional argument by its failure to raise the issue below and by its submission to the jurisdiction of the Commission. In the alternative, AEC argues that the project is a "development" as defined by Board Rules 2 (A) (3) and 2(M), both of which are a proper interpretation of the statute.

10 V.S.A. §6001(3) states, in pertinent part:

The word "development" shall mean the construction of housing projects such as cooperatives, condominiums, or dwellings, or construction or maintenance of mobile homes or trailer parks, with ten or more units, constructed or maintained on a tract or tracts of land ...

Board Rule 2(A)(3) defines the term "development" to include:

The construction of a housing project such as cooperatives, apartments, condominiums, detached residences, construction or creation of mobile home parks or trailer parks, or commercial dwellings with ten or more units constructed or maintained on a tract or tracts of land owned or controlled by a person within a radius of five miles of any point on any involved land within any period of time after June 1, 1970.

Finally, Board Rule 2(M) defines the term "commercial dwelling" as follows:

"Commercial dwelling" means any building or structure or part thereof, including but not limited to hotels, motels, rooming houses, nursing homes, dormitories and other places for the accommodation of people, that is intended to be used and occupied for human habitation on a temporary or intermittent basis, in exchange for payment of a fee, contribution, donation or other object having value. The term does not include conventional residences, such as single family homes, duplexes, apartments, condominiums or vacation homes, occupied on a permanent or seasonal basis.

The "housing project clause" found in 10 V.S.A. §6001(3) includes a non-exclusive list of examples: the project types enumerated exemplify the sorts of construction which qualify as "developments" and projects not included in the list which are similar in character nonetheless fall within the definition. Furthermore, the statutory definition, apparently in an effort to fully articulate the variety of qualifying projects, uses terms which describe forms of ownership (i.e. cooperative, condominium) as well as terms which provide a physical description (i.e. dwellings, mobile homes, trailer parks). Therefore, we conclude that the Legislature did not intend to limit its housing definition to either narrow legal or physical characteristics. Finally, the definition does not distinguish between permanent and transient housing: condominiums, for example, are often offered on the rental housing market for weekend or weekly occupancy.

With this view of the statute in mind, we must conclude that a motor lodge with 10 or more units constitutes a "housing project" and, therefore, a "development" within the contemplation of the housing project clause. Motor lodges

are occupied as "dwellings" and, therefore, fall within the plain meaning of the housing project clause. See In Re Burlington Housing Authority, 143 Vt. 80, 83 (1983). Further, like condominiums, motor lodges can be occupied on an intermittent, short-term basis, or, like more permanent housing, they can be occupied for longer periods. In short, BCML's motor lodge proposal has characteristics similar to the specific housing types listed by example in 10 V.S.A. §6001(3). It is not determinative that "motor lodges" are omitted from the housing project clause enumeration; /1/ it is determinative that motor lodges offer housing of a character similar to the types enumerated in the statute. /2/

Furthermore, the BCML proposal is clearly a "development" as defined by the Board's Rules. The motor lodge is a "commercial dwelling": it is a motel intended for human habitation on a temporary or intermittent basis in exchange for payment of a fee. See Rule 2(M). Because the project involves 10 or more units, the proposal is a "development" as defined by Rule 2(A) (3).

This Board and the District Commissions were created by the Legislature for the purpose of regulating land use under the provisions of Act 250 "... to protect and conserve the lands and the environment of the state and to insure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests" Act No. 25C of 1969 (Adj. Sess.)', §1. In terms of impacts on such values as air and water quality, traffic, governmental services, aesthetics, agricultural soils, energy conservation, utility costs, and local or regional plan conformance, there is little logical basis for distinguishing between a motor lodge and a condominium project or a trailer park. /3/

/1/ The statute also omits hotels, lodges, nursing homes, rooming houses, labor camps, dormitories, hostels, and apartment houses. We believe these projects may also share characteristics sufficiently similar to those enumerated in the statute to qualify as "housing projects."

/2/ It is also important to note that motor lodges are not among the land uses specifically excluded from the definition of development. See In re Baptist Fellowship of Randolph, Inc., Supreme Court Docket No. 83-380, filed August 3, 1984.

/3/ We note that at least one condominiumized hotel has been proposed in Vermont. Should we agree with the Permittee's position, we would be left with the irrational result that two hotels with the same potential impacts would not both be reviewed under Act 250.

III. CONSTITUTIONAL ISSUES

In a Memorandum filed with the Board on October 1, 1984, BCML raised for the first time the question of the constitutionality of Criterion 8 of 10 V.S.A. §6086(a). BCML argues that Criterion 8 is unconstitutional for two reasons:

1) "... the delegation of power to administer Act 250 provides no intelligible standards for interpreting the subjective concepts of 'undue adverse effect,' 'scenic or natural beauty,' and 'aesthetics.'"

2) "... Criterion Eight is unconstitutional because it is so vague that it violates the Due Process Clause."

10 V.S.A. §6086(a) (8) reads: "Before granting a permit, the board or district commission shall find that the proposed subdivision or development: (8) Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." In respect to the first alleged basis of unconstitutionality, improper delegation, the Supreme Court has stated that "such functions of the Legislature as are purely and strictly legislative cannot be delegated." State v. Auclair, 110 Vt. 147, 162 (1939). However, the Auclair decision further stated:

Since legislation must often be adapted to complex conditions involving a host of details, with which the lawmaking body cannot deal directly, the Legislature may, without abdication of its essential functions, lay down policies and establish standards "while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply."

[Citations omitted.]

An agency charged with the duty of administering a statute enacted in pursuance of the police power of the State may be vested with a wide discretion, but such discretion must not be unrestrained and arbitrary. It is essential to the validity of the statute that it shall "establish a certain basic standard--a definite and certain policy and rule of action for the guidance of the agency created to administer the law."

Aucair, supra, 110 Vt. at 163.

Referring to dictionary definitions of constituent words, the Auclair Court proceeded to conclude that the term "natural marketing area" was sufficiently precise to withstand attack as an improper delegation of legislative power.

We conclude that Criterion 8 includes the "definite and certain policy and rule of action" required by Auclair. The term "undue" generally means that which is more than necessary--exceeding what is appropriate or normal. The word "adverse" means unfavorable, opposed, hostile. "Scenic and natural beauty" pertain to the pleasing qualities that emanate from nature and the Vermont landscape. In short, through Criterion 8 the Legislature has directed that no project within our jurisdiction be approved if it has an unnecessary or inappropriate negative impact on the enjoyment of surrounding natural and scenic qualities. Criterion 8 is, therefore, sufficiently specific to constitute a proper delegation.

In regard to the second alleged basis of unconstitutionality, vagueness, the Supreme Court has stated:

When a statute is attacked on vagueness grounds under the due process clause of the Fifth or Fourteenth Amendments of the Federal Constitution, the theory of the attack is that the party against whom the statute is to be applied did not receive fair warning that his conduct was prohibited. [Citation omitted.]

. . . The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.

State v. Bartlett, 128 Vt. 618, 622 (1970). However, as in Vermont Woolen Corporation v. Wackerman, 122 Vt. 219 (1961), we are not involved in adjudicating a violation of the law or the condemnation of and punishment for past acts. We are, instead, determining prospectively whether construction of the BCML motel at the Williston site comports with the requirements of Act 250. Furthermore, as noted below, we do not conclude that no motel can be constructed on the Williston site. We only conclude that the motel proposed by BCML must be redesigned.

In any event, we believe Criterion 8 provides ECML with sufficient notice to comport with due procedural requirements. First, as we have explained, Criterion 8 itself contains readily understandable concepts. Second, the Legislature provided further interpretive guidance when it enacted Vermont's Capability and Development Plan, which provides, in part:

(12) Scenic resources. The use and development of lands and waters should not significantly detract from recognized scenic resources including river corridors, scenic highways and roads, and scenic views. Accordingly, conditions may be imposed on development in order to control unreasonable or unnecessary adverse effects upon scenic resources.

Act No. 85 of 1973, Sec. 7.

Finally, the analogous Board decision to which we refer in footnote 8 together with the State Comprehensive Outdoor Recreation Plans described in Finding of Fact #9 provide additional amplification concerning the concepts addressed in Criterion 8. We reject the notion that Criterion 8 is vague.

IV. FINDINGS OF FACT

1. BCKL proposes to construct a 103 unit motel with an exterior swimming pool on a 4.5 acre lot in Williston, Vermont. An access drive from Vermont Route 2A will be constructed and parking and interior drives will be installed to serve motel patrons./?/

2. The southeast corner of the structure will be located 200' from the paved north-bound access ramp to I-89 and approximately 340 feet from the north-bound lane of the Interstate. The building entrance on the structure's east side lies 200' from the south-bound lane of Route 2A. The swimming pool, a driveway, and vegetation will be installed south of the structure, adjacent to the Interstate. The entrance drive, parking areas and vegetation will be located east of the structure, adjacent to Route 2A. Exhibit #22

3. The motel will be rectangular in shape and will be approximately 60' wide, 200' long, and 35' high. Existing ground elevation at the proposed building location ranges from 414' to 417'. However, the finished floor elevation after grading of the site will be 420'. Exhibit #2. The basic building color will be beige with vertical window panels of brown. A glass entrance "greenhouse" will be installed at the front of the building. Exhibit #6.

4. BCML proposes to locate two 10' by 12' facade signs on the building, one directly over the building entrance and

^{/4/} Exhibit #2 identifies a location for a restaurant which the Applicant indicated was not now proposed but may be constructed in the future. We do not review the project with any assumptions concerning the restaurant.

one on the south end of the building facing the Interstate. The signs consist of a shield together with the words "Susse Chalet." A freestanding sign 12' high with a display panel measuring 4' by 8' would be erected adjacent to the access drive, approximately 60' from the traveled portion of Route 2A and perpendicular to that roadway. This sign would also have a red shield and would read "Susse Chalet Inn, Home of the Super Room, Entrance." The freestanding and facade signs will be internally lighted. Exhibits #9 and 21./5/ Ten wall-mounted floodlights will be installed together with ten pole-mounted parking lot lights. All lamps will be 400 watt high pressure sodium, and will be shielded. Exhibits #11 and 14.

5. Directly southeast of the project and on the same side of Route 2A is an Agency of Transportation commuter parking lot with a small shelter. Exhibits #15E and 15C. Due east of the project site across Route 2A is a Sunoco gasoline service station. Exhibits #15D and 15E. Just north of the Sunoco station and east of the project site lies a Green Mountain Power Company maintenance and storage facility. Aside from an old brick farmhouse, there are no other structures on Route 2A north of these commercial buildings for several hundred feet. There are no commercial structures south of the project site on Route 2A for several miles and the first residential buildings are several hundred feet south of the Interstate.

6. Traveling south on I-89 approaching the project site, one is treated to sweeping views of the Green Mountains, including Mt. Mansfield, Bolton Mountain, and Camels Hump Mountain. Exhibits #15A, 15B and 151. Closer at hand are rolling meadows and the Green Mountain foothills. Traveling north on I-89 approaching the project site, the views include farmland, glimpses of Lake Champlain and panoramic views of the Adirondack Mountains, together with downtown Burlington, approximately five miles away.

7. Approximately two miles north of the project adjacent to the Interstate are three large commercial office complexes. The Digital Equipment Corporation building on the north side of the roadway is set back several hundred feet from the highway, has a low profile falling below the tree line behind the building, uses colors to break up the structure's mass, and is well adapted to the contours of the

/5/ In its application to the Commission, BCML also proposed a flag pole mounted on the roof of the building. By permit condition #16, the Commission directed that revised landscaping plans filed with the Commission depict an alternate location for the pole.

site on which it sits. Exhibit #15F. The Mitel building on the south side of the Interstate is less successful than the Digital building in adapting to its site. However, the building is set back from the Interstate a substantial distance, uses a variety of materials and shapes to break up the building's bulk, and does not obscure views of the surrounding scenery. Exhibit #15A. The New England Telephone building just west of the Mitel building, is currently under construction, making difficult any definitive analysis of its design or impact on its surroundings. However, that building will not be a single rectangular mass and it is located just below the crest of a hill, limiting the structure's impact on surrounding views. Exhibit #15G.

8. The proposed design is virtually identical to four existing BCML motels and four other installations which are now in the planning stage. This uniform design was prepared for BCML based upon a number of criteria: 1) accommodation of business and tourist tastes, 2) public safety, 3) economy of operation, and 4) creation of a design which the public will identify with BCML (i.e. a trademark). The building's designer did not visit the Williston site before selecting the design and no adaptations or changes of the design were made in response to the natural characteristics of the Williston site or the surrounding area.

9. State Comprehensive Outdoor Recreation Plans (SCORPs) prepared by the Agency of Environmental Conservation in 1967, 1973, 1978 and 1983 all address the "scenic corridor" concept: certain roadways, streams and trails have been designated as scenic corridors with the goal of improving public access to the corridors and protecting the corridors from "overuse, misuse, and inharmonious activities." /6/ Exhibit #16. The State's limited access highways (Interstates 89 and 91) have been designated scenic corridors since the 1967 SCORP. The 1973 SCORP identified driving for pleasure as the most universal outdoor recreation activity, and stated:

Roadside development denies the traveler visual access to the landscape beyond and changes the view from rural to urban. The traveling public should be given consideration whenever development permits are in question, and the scenic corridor should be protected from further damage as well as improved whenever and wherever possible.

The 1978 SCORP continued to emphasize protection of scenic corridors and stated:

/6/ The scenic corridor along the Interstate highway network was designated by the 1967 SCORP as a one-mile wide path.

Special attention should be given to scenic corridors adjacent to urban areas and villages where urbanization is likely to diminish scenic quality.

Finally, the 1983 SCORP noted the contribution of scenic roads to the Vermont economy.

10. The project site lies within the scenic Interstate-89 corridor at a location that treats both north and south-bound travelers to scenic vistas of Vermont's landscape. The BCML structure would be directly visible from both the north and south-bound lanes as well as the north-bound Route 2A exit and entrance ramps.^{/7/} The building would also be visible to traffic moving both north and south on Route 2A. Finally, the structure would be visible from a distance on the Interstate near the Digital building.

11. Based upon the above facts, we must find that the motel proposed by BCML will have an undue adverse effect on the scenic and natural beauty of the area. The building would be a large, rectangular monolith, the design of which has not taken into consideration the unique features of the site, the character of the lands surrounding the site, or the scenic qualities of the general area. The building's mass can be "softened" through the use of vegetation, but the building simply cannot be effectively screened from those wishing to enjoy the scenic vistas of the area. The signing and lighting of the project would only further interfere with the passing motorist's enjoyment of the area.

V. CONCLUSIONS OF LAW

10 V.S.A. §6089(a) (8) requires a conclusion that the project "will not have an undue adverse effect on the scenic or natural beauty of the area, [or] aesthetics" We have found that the area surrounding the project affords panoramic vistas of the Green Mountains, farmlands, Lake Champlain, the Adirondacks, and the City of Burlington. We have turned to the Vermont SCORPs for guidance concerning scenic enjoyment and have found that, since 1967, Interstate 89 has been designated as a scenic corridor.^{/8/} Our reliance on the scenic corridor concept is especially appropriate in view of the "Scenic Resources" component of the Vermont Capability and Development Plan:

^{/7/}The Applicant estimates that the top two stories will be visible at the exit and the internally-lit facade signs will be visible from the Interstate.

^{/8/}This is not the first time this Board has recognized the value and beauty of the Interstate 89 corridor. See Re: Ammex Warehouse Company, Inc., Application #6F0248-EB, 8/3/81.

The use and development of lands and waters should not significantly detract from recognized scenic resources including river corridors, scenic highways and roads, and scenic views. Accordingly conditions may be imposed on development in order to control unreasonable or unnecessary adverse effects upon scenic resources.

Act No. 85 of 1973, section 7(a)(12).

We have further found that the applicant has made little effort to adapt its building design to the selected site, choosing instead to place an "off-the-shelf" design within the scenic corridor. We found that the massive, rectangular building 35' high (after a 3' to 6' increase in the site's base elevation) and within 200' of the Interstate and Route 2A is an intrusion on the scenic enjoyment of the traveling public. This intrusion is especially significant when one considers that traveling south, the I-89--Route 2A interchange is the last Interstate exit for many miles with substantial commercial development visible from the roadway; it offers visitors entering the Burlington area from the south with their first taste of the developed core of Chittenden County.

We must conclude that the project as proposed will have an undue adverse effect on aesthetics and the scenic and natural beauty of the area. The other large commercial structures referred to above are a substantial distance from the project site, have been designed to reduce intrusion on the scenic value of the area and, in any event, are not now subject to our review under Criterion 8./9/

We do not conclude that a motel cannot be constructed at this location without unduly impinging on the values addressed in Criterion 8. We instead invite the applicant to redesign its building. We are confident that an acceptable design which is responsive to the natural features of the site and the surrounding area can be developed. A reduction of building height, use of structural variety instead of a rectangular block, reassessment of the building's locale in relationship to the Interstate, and re-evaluation of building materials and colors all could contribute to a more innovative design which is both attractive in a commercial sense and less obtrusive in an aesthetic sense. However, in relation to the pending proposal, we must conclude that the project will result in a detriment to the public health, safety and welfare and we must deny Land Use Permit Application #4C0581-EB pursuant to 10 V.S.A. §6087.

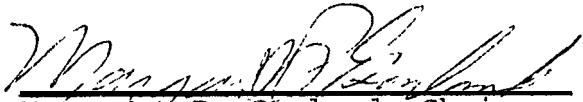
/9/ While Criterion 9(K) of 10 V.S.A. §6086(a) is not before us, we question whether the project could survive scrutiny under that Criterion as well.

VI. ORDER

Land Use Permit Application #4C0581-EB is denied. Land Use Permit #4C0581 issued on July 5, 1984 by the District #4 Environmental Commission is without further force or effect. We reserve jurisdiction over this appeal for a period of ninety days from the date hereof and will within that time period entertain an amended project proposal, should the Applicant be so inclined.

Dated at Montpelier, Vermont, this 17th day of October, 1984.

ENVIRONMENTAL BOARD

By: 
Margaret P. Garland, Chairman

Board members participating
in this decision:
Margaret P. Garland
Lawrence H. Bruce, Jr.
Melvin H. Carter
Dwight E. Burnham, dissenting
Roger N. Milier, dissenting