

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Main Street Landing Company and City of Burlington
Land Use Permit #4C1068-EB
Docket # 790

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding concerns appeals of Land Use Permit #4C1068.

I. SUMMARY OF PROCEEDINGS

On March 22, 2001, the District #4 Environmental Commission issued Land Use Permit #4C1068 ("Permit") and corresponding Finding of Facts, Conclusions of Law, and Order ("Decision"). On June 15, 2001, the Commission denied a Motion to Alter the Permit and Decision. The Permit authorizes the construction of a three-story, 85,000 square foot building containing a thirty five-room inn, two-screen cinema, performing arts theater, restaurant, botanical garden, retail and office space, basement and surface parking areas, and landscape improvements on a 1.52 acre parcel located between Lake and Battery Streets in Burlington, Vermont (the "Project"). In addition, the Permittee proposes to install and maintain landscape improvements integral to the Project on a portion of city-owned land known as Battery Park Extension located at the corner of Battery and College Streets. The City of Burlington joined as a co-applicant (hereinafter, Main Street Landing Company and the City of Burlington are collectively referred to as "Permittees").

On July 9 and 12, 2001, Benjamin Kernan ("Kernan") and Jack Long, Esq., ("Long") respectively, filed appeals with the Environmental Board ("Board") from the Decision alleging that the Commission erred in its conclusions concerning 10 V.S.A. § 6086(a)(8), (9)(K), and (10). Both Kernan and Long are neighbors opposing the Project.

On July 31, 2001, Board Chair Marcy Harding convened a prehearing conference and subsequently issued a Prehearing Conference Report and Order on August 2, 2001.

In an August 21, 2001 Memorandum to Parties, in response to an August 13, 2001 Motion filed by Long, Marcy Harding recused herself from this matter and appointed Board Member John Drake as Acting Chair.

On September 17, 2001, Kernan filed a Motion for Remand.

The Board deliberated on Kernan's Motion for Remand on September 26, 2001 and issued its Memorandum of Decision denying the motion on September 27, 2001.

On August 29 and 30 and September 20, 2001, the parties filed direct and rebuttal testimony and exhibits.

On October 4, 2001, Kernan filed evidentiary objections.

On October 10, 2001, Long filed a letter explaining that he is adopting Kernan's evidentiary objections.¹

On October 16, 2001, Permittees filed a Response to Evidentiary Objections.

On October 17, 2001, the Board deliberated concerning the parties' evidentiary objections and issued its decision ruling on the objections.

On October 22, 2001, Acting Chair Drake convened the second prehearing conference with the following Participants:

The Permittees by Gordon C. Gebauer, Esq. and Kenneth A. Schatz,
Esq.,
Benjamin Kernan by Carl H. Lisman, Esq. and Christina A. Jensen, Esq.
and
Jack Long, Esq. *pro se*.

During the second prehearing conference, Acting Chair Drake discussed the Board's rulings on the parties' evidentiary objections and verbally ruled, as a Chair's Preliminary Ruling, denying Benjamin's Kernan's request to offer into evidence a new computer-generated exhibit.

On October 24, 2001, the Board convened a public hearing in this matter. As part of the hearing, the Board conducted a site visit to the Project.

On November 16, 2001, Long filed his Renewal of Jack Long's Motion to Dismiss.

¹ The Board notes that Long's letter adopting Kernan's evidentiary objections was not timely filed on or before October 4, 2001.

After recessing the hearing, the Board deliberated on October 24, 2001, November 14 and 19, 2001.

Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned. The matter is now ready for final decision.

II. ISSUES

1. 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 and aesthetics.
2. Whether, pursuant to 10 V.S.A. § 6086(a)(9)(K), the Project will unnecessarily or unreasonably materially jeopardize or interfere with the function, efficiency, or the public's use or enjoyment of or access to a public facility.²
3. Whether, pursuant to 10 V.S.A. § 6086(a)(10), the Project is in conformance with Burlington's duly adopted municipal plan.

III. PRELIMINARY MATTERS

During the second prehearing conference, Acting Chair Drake discussed the schedule for the hearing day. Acting Chair Drake also discussed the Board's October 17, 2001 Memorandum of Decision which ruled on Kernan's evidentiary objections. The parties discussed Kernan's objection to Melinda Moulton's testimony, specifically pages 13 to 14 Answer 19. This objection was later withdrawn by Kernan during the hearing.

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During the prehearing conference the parties agreed that the public facilities included within this issue are: Waterfront Park (including the boat launch area), the Coast Guard Station, Battery Park Extension, Battery Street, municipal parking lots, Lake Champlain, Burlington Skate Park, Burlington Boat House, Lake Champlain Basin Science Center, and boat moorings and slips in Burlington Harbor.

Also during the second prehearing conference, Kernan requested leave to offer into evidence a new computer generated exhibit. This exhibit was described as a computer generated depiction of the mass of the building from one or two different perspectives. The new exhibit was also described as being similar to other exhibits already offered by Kernan. Permittees objected to this offer on the grounds that it was out of time, and alternatively, if the Board granted the offer then Permittees would need additional time to review the new exhibit and possibly offer rebuttal testimony or exhibits. Long supported the offer of the exhibit stating that he felt that the Board should consider the use of technology in reviewing this project.

During the conference, Acting Chair Drake verbally denied, as a Chair's Preliminary Ruling, Kernan's request to offer into evidence the new computer generated exhibit. Acting Chair Drake explained that his reasoning for denying the request was because the deadlines for the filing of testimony and exhibits had already expired and no reasonable explanation was given as to why Kernan could not have offered the exhibit within the filing deadlines. Furthermore, as represented, the exhibit was similar to other exhibits already offered, and is therefore repetitious.³ The parties were informed that if they wished to have the full Board review this ruling, then they could object to the ruling at the beginning of the hearing and ask that the full Board review the request. This Chair's Preliminary Ruling became binding on all parties as no party objected to this ruling by requesting that the Board consider the offer of a new exhibit.

During the hearing, Kernan moved, and Jack Long joined in the motion, that the proceeding be dismissed on the grounds that Permittees had not filed the Act 250 Permit Application with the Board. The Board recessed the hearing and deliberated on the motion. The Board then reconvened the hearing and announced its denial of the motion. On November 16, 2001, Long filed his Renewal of Jack Long's Motion to Dismiss. The basis of the motion was again that Permittees failed to file an Act 250 Permit Application with the Board, as well as other alleged evidentiary shortcomings.

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Although the Board is not required to strictly adhere to the Vermont Rules of Evidence, pursuant to the rules, irrelevant, immaterial or unduly repetitious evidence shall be excluded. 3 V.S.A. § 810(1).

It is the uniform process before the Board, that when there is an appeal 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. § 6089(a)(3). The Board’s rules provide for a review of the District Commission’s findings of fact, conclusions of law and permit conditions. Environmental Board Rule (“EBR”) 40(A). Thus, the Board cannot rely upon the facts stated, conclusions drawn, or conditions issued by the District Commission in this matter. Rather, it must regard the decisions and exhibits offered below as evidence to be offered by the parties to the Board.

The term “burden of proof” refers to two separate burdens: the burden of going forward and producing evidence, and the burden of persuasion. See 10 V.S.A. § 6088; *In re: Denio*, 158 Vt. 230, 236 (1992); *Re: Pratt’s Propane*, #3R0486-EB, Findings of Fact, Conclusions of Law, and Order at 4-5 (Jan. 27, 1987). 10 V.S.A. § 6088 operates in conjunction with the requirement that before a permit can be issued, the Board must make the affirmative findings required under the 10 criteria. See 10 V.S.A. § 6086(a). Because the Board is limited to de novo review of the Commission’s decision, it must evaluate the parties’ evidence based on certain rules governing the allocation of the burdens of production and persuasion. The Permittee has the burden of production with respect to the three criteria on appeal in this matter. *Pratt’s Propane*, *supra* at 5. Kernan and Long, as opponents to the Permit, bear the burden of persuasion with respect to Criterion 8. 10 V.S.A. § 6088(b). Accordingly, there is no requirement that a copy of the permit application be filed with the Board, nor is there a requirement that any other specific document be filed for that matter. Instead, Permittee must produce enough evidence to allow the Board to reach positive findings under each of the three Criteria on appeal. Based on this reasoning, the Motion to Dismiss was denied at the hearing and the Board now denies the Renewal of Jack Long’s Motion to Dismiss.

Also, during his cross-examination of Wayne Gross at the hearing, Long asked that the Board admit a copy of the Rules and Regulations of the Burlington Department of Parks and Recreation. The Permittees objected to this request. The Board recessed its hearing and deliberated. The Board then reconvened the hearing and announced its denial of the request. The witness had filed prefiled testimony referencing the Rules and Regulations. Long had an opportunity to file rebuttal testimony and could have filed a copy of the Rules and Regulations with rebuttal testimony, but he did not. Long did not provide a reason as to why he could not file the Rules and Regulations pursuant to the

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filing deadlines established within the scheduling order. Accordingly, the Board denied Long's request because Long had notice of the use of the Rules and Regulations, but failed to timely present them as an exhibit in prefiled testimony.

IV. FINDINGS OF FACT

To the extent that any proposed findings of fact are included within, 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).

The findings of fact below are organized into a general section followed by sections related to the specific issues. Because many findings are relevant to more than one issue, the findings should not be read as applicable only to the specific issue(s) under which they are contained. Where findings from the general category or another specific category are relevant, they are assumed and not repeated.

General Findings:

1. Main Street Landing Company owns two adjoining parcels at the northeast corner of Lake Street and College Street on which the Project will be constructed.
2. One lot, formerly known as the "Pease Grain parcel," comprises 0.87 acres. It is predominantly paved and is presently used as a parking lot. A metal retaining wall is located along the steep embankment along the east side of this lot.
3. The other parcel, formerly known as the "McKenzie parcel," comprises 0.65 acres. It is located immediately north of the Pease Grain parcel.
4. The Project consists of: 1) a building to be constructed on the "Pease Grain parcel," and 2) improvements to the southernmost or lower section of Battery Park Extension, which is property owned by the City of Burlington.
5. Main Street Landing Company's property adjoins the southerly end of Battery Park Extension.
6. The Project is a three- and four-story, multi-use building, containing approximately 85,000 square feet of total floor space. The overall length of the building will be approximately 365 feet.
7. The Project's building will contain approximately 85,000 square feet of total space. The building will contain a 35-room inn and two small meeting rooms, along with a 60-seat hotel dining room and related kitchen facilities; approximately 5,900 square feet of retail space; 4,500

square feet of office space; a two-screen cinema with a total of 240 seats; a 40- seat black box performing arts theater; a 130-seat restaurant; and a dance studio. The building will also include approximately 8,100 square feet of public lobbies and view areas.

8. Improvements to Battery Park Extension involve grading changes, new walkways, the installation of an amphitheater, new benches, new lighting and new plantings in the public park area immediately adjacent to the property owned by Main Street Landing Company. The wooded slope along the west side of the park will be cleared, regraded, and replanted and new walks and sitting areas will be provided along this frontage of the new building.
9. The renovations to the City park will be paid for by Main Street Landing Company and the City of Burlington.
10. Main Street Landing Company has agreed to maintain, at its sole expense, all of the improvements to park property for as long as the City of Burlington requests such maintenance and/or for as long as the property remains park land.

Criterion 8

11. The Project is located in the Waterfront Commercial-East district in downtown Burlington.
12. This district is highly urbanized.
13. The area around the Project includes high density residential, retail and commercial development as well as city parks.
14. Directly east from the Project, across Battery Street, is the six story, 121,157 square foot brick residential/commercial College and Battery condominium building (80 College Street).
15. Also across Battery Street from the Project, and north of 80 College Street, is the seven story, 120,000 square foot Radisson Hotel.
16. The McKenzie and Haigh buildings are located immediately north of the Project and are constructed of brick.

17. Battery Park lies approximately three blocks to the north of the Project site. It runs from the south side of the Burlington Police Station on North Avenue, south to Pearl Street.
18. Battery Park comprises approximately 2,000 linear feet along the west side of Battery Street and along a steep embankment overlooking Lake Champlain and the Adirondack Mountains.
19. Battery Park Extension is approximately 1,250 feet in length between Pearl Street and College Street, and serves as a pedestrian park linking Battery Park to College Street.
20. Several overlooks exist within this park, including the Pearl Street Terrace, Cherry Street Terrace, and the limited views located in the lower plaza adjacent to College Street.
21. A steep slope exists on the west side of Battery Park Extension from the Project site northward through Battery Park.
22. The slope currently existing on the westerly edge of Battery Park Extension, and adjacent to the building site on the east, will be filled so that pedestrians may access the building directly from the southern end of Battery Park Extension. The filling of this land will result in approximately 18,000 square feet of new, usable public park land.
23. At the southern end of Battery Park Extension the Project will rise above the lower plaza.
24. The Project will be visible at the northern end of Battery Park Extension. An amphitheater will be constructed at the northern end of the Project site. The slope of the amphitheater towards the building will result in two stories of the Project's building being visible from the northern portion of Battery Park Extension.
25. West of the Project site is Waterfront Park, the Burlington Boathouse, the Lake Champlain Basin Science Center (currently under reconstruction), the Burlington Bike Path, and a parking lot owned by the City of Burlington. Beyond these facilities lies Lake Champlain.

26. Distant views of the Adirondack Mountains in New York can be seen from the Project site.
27. Distant views of the Adirondack Mountains in New York can also be seen from the Pearl Street and Cherry Street overlooks within Battery Park Extension and from Battery Park, all north of the Project site.
28. South of the Project site is One Main Street, Three Main Street, the new train station (Union Station) and the Union Station parking lot. These facilities are owned by Main Street Landing Company.
29. The Project design incorporates sloped roofs, which will hide the heating, ventilation and air conditioning equipment. Along the length of the Project the rooflines will vary in size and shape, giving the sense of several different buildings adjacent to each other.
30. The height of the Project is restricted to 50 feet by Burlington Zoning Ordinance. The average height of the Project roof line is 50 feet.
31. The colors and materials used on the buildings will be similar to those used on buildings in the immediate area of the Project site.
32. The building materials will be primarily brick and stone with intermixed stone, slate and wood trim. All colors will be earth tones.
33. The roof will be copper, similar to the roofs on existing buildings in Burlington including Champlain College, the University of Vermont Business School and the Trinity College Library.
34. Shielded light fixtures will be incorporated into the Project.
35. The building includes dormers, awnings and porches. The windows will be recessed.
36. The Project will be visible from Battery Street from approximately the intersection with Pearl Street southward to the intersection with Main Street, a distance of about four blocks.
37. The Project will also be visible to pedestrians or motorists traveling westward on College Street, between Champlain Street and Battery

Street, and from the Waterfront including portions of Waterfront Park, the Train Station, the Burlington Boathouse, the Burlington Bike path and Main Street Landing Company's other properties located at One Main Street and Three Main Street.

38. The Project will also be visible from Lake Champlain.
39. The Project's development of 18,000 square feet of park land, presently unusable because of the steep slopes and vegetation along the west embankment of Battery Park Extension, will be at the expense of Main Street Landing Company, and will be available and open to the public at all times. It will remain the property of the City of Burlington.
40. In addition to the substantial landscaping and regrading of the lower part of Battery Park Extension, the building site along Lake Street will be landscaped with trees and shrubs in accordance with the site plan (Exhibit P29).
41. The Project will alter the access to the westerly views of Lake Champlain and the Waterfront from Battery Park Extension.
42. The Project will change the pedestrian access to the views by blocking some westerly views of the lake and mountains from Battery Park Extension, but will at the same time create indoor and outdoor public space from which the public may have views of the Waterfront and Lake Champlain.
43. Access to the public space will be available from Lake Street and from Battery Street. This access is secured through a written agreement between Main Street Landing Company and the City of Burlington.
44. The 1990 Urban Renewal Plan for the Waterfront Revitalization District (Urban Renewal Plan) detailed future development on the Burlington Waterfront.
45. The 1998 Waterfront Revitalization Plan replaced the Urban Renewal Plan.

46. The 1996 Municipal Development Plan specifically references the 1990 Urban Revitalization Plan, the predecessor to the Waterfront Revitalization Plan.
47. The Project is in an Urban Renewal District.
48. The Urban Renewal Plan and the Waterfront Revitalization Plan anticipate public investment in infrastructure improvements and also anticipate private development on private lands in order to support and justify the infrastructure improvements.
49. The Waterfront Revitalization Plan acknowledges and approves dense urban development, acknowledges and approves the height limitations and density requirements as contained in the City of Burlington Zoning Ordinances, and supports the creation of public space, public restrooms, arts space, linkages, public accessibility in accordance with the Americans with Disabilities Act ("ADA"), and the improvement of access to the views of Lake Champlain.

Criterion 9(K)

50. Public investments in the area of the Project include: Waterfront Park (including the boat launch area), the Coast Guard Station, Battery Park Extension, Battery Street, municipal parking lots, Lake Champlain, Burlington Skate Park, Burlington Boat House, Lake Champlain Basin Science Center, and boat moorings and slips in Burlington Harbor.
51. Improvements to the lower section of Battery Park Extension include the installation of new working street lights, new park benches, regraded and improved walkways, an amphitheater for public use, ADA compliant walkways and ramps, new landscaping and the addition of 18,000 square feet of new usable park space, which is currently unusable due to steep slopes and vegetation.
52. The Project will also improve a linkage between the Central Business District and the Waterfront, will provide open, safe and weather independent public space for views of the Waterfront, will increase venues for performing arts, and will include restrooms available for public use.

53. The lower portion of Battery Park Extension, located at the corner of Battery and College Streets, was developed in approximately 1974 and has never been renovated or redeveloped.
54. The lower portion of Battery Park Extension is underutilized and is poorly maintained. It suffers from some infrastructure failures such as broken lights and a failed fountain. The Park surfaces need to be refurbished and renovated.
55. The views westward from the lower portion of Battery Park Extension are currently limited by existing vegetation.
56. There are no ADA compliant walkways or other ADA compliant access to the views from the lower section of Battery Park Extension.
57. Fifty-six parking spaces will be provided in a subsurface parking garage located beneath the building. These 56 spaces will be combined with 61 parking spaces located in the nearby Union Station Parking Lot, for a total of 117 parking spaces for the Project. Additional parking is located immediately adjacent to the Project on other property owned by Main Street Landing Company.
58. The City of Burlington granted a 50% waiver of the required parking spaces (approximately 225 would have been required for this Project without the 50% waiver) because of the Project's proximity to downtown, public transit and other establishments. It is anticipated that people visiting the Project will visit other establishments in the downtown area and that their parking needs will overlap.

Criterion 10

59. The 1996 Municipal Development Plan, Section I. Land Use Plan, The Downtown Waterfront, states, in pertinent part:

The City's priorities for the Downtown Waterfront begin with economic vitality and public access. An effort will be made to ensure the waterfront remains an economically inclusive zone. To remain active, the Downtown Waterfront must foster access for pedestrians, bikes and public transit; host a variety of uses - including housing - as part of mixed-use

structures; remain open to the public; and have strong linkages to adjacent neighborhoods.

60. The 1996 Municipal Development Plan, Section I. Land Use Policy and Action Plan lists the following policies:
- Encourage mixed-use development patterns, at urban densities, which limit the demand for parking and unnecessary automobile trips, and support public transportation.
 - Target new development into the CBD [Central Business District], Downtown Waterfront, Pine Street corridor, Institutional Core Campuses, and the Neighborhood Activity Centers.
 - Encourage development of an active, urban waterfront that offers a mix of uses, is open to the public and linked with adjacent neighborhoods.
61. The 1996 Municipal Development Plan, Section III. Built Environment, Built Environment Policy and Action Plan, sets forth the following policies:
- Retain its human scale and urban form.
 - Protect scenic views and view corridors, and encourage development that compliments its natural setting.
 - Improve opportunities for pedestrian access and interaction throughout the city.
 - Strengthen the City's role as a cultural and arts center, and support public art.
 - Ensure people with disabilities have equal access to the built environment.
62. The Project reduces a small portion of views along Battery Park and the Extension.

63. The Project provides balconies with western views of Lake Champlain and distant vistas.
64. Improvements enhancing the park and which provide better access for the public-at-large consistent with the 1996 Municipal Development Plan include: limited tree clearing, excavation, regrading, the installation of an amphitheater, lights, park benches, walkways and ADA compliant ramps, and landscape materials.
65. The Project facilitates pedestrian traffic and access from Battery Street and Battery Park Extension to Waterfront Park.

V. CONCLUSIONS OF LAW

A. Jurisdiction, Scope of Review and Burden of Proof

The Project is subject to Act 250 jurisdiction because it involves the construction of more than ten commercial dwelling units (hotel rooms), and thus constitutes “development” pursuant to 10 V.S.A. § 6001(3) and EBR 2(A)(3).

When a party appeals from a 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. § 6089(a)(3). Board rules provide for the *de novo* review of a Commission’s findings of fact, conclusions of law, and permit conditions. EBR 40(A). Thus, the Board cannot rely upon the facts stated, conclusions drawn, or conditions issued by the Commission regarding the criteria on appeal in this matter. Rather, it must regard the Commission’s Permit as evidence to be offered by the parties.

The term “burden of proof” refers to two separate burdens: the burden of going forward and producing evidence, and the burden of persuasion. See 10 V.S.A. § 6088; *In re: Denio*, 158 Vt. 230, 236 (1992); *Re: Pratt’s Propane*, #3R0486-EB, Findings of Fact, Conclusions of Law, and Order at 4-5 (Jan. 27, 1987). 10 V.S.A. § 6088 operates in conjunction with the requirement that before a permit can be issued, the Board must make the affirmative findings required under the 10 criteria. See 10 V.S.A. § 6086(a). Because the Board is limited to *de novo* review of the District’s Commission’s decision, it must evaluate the

parties' evidence based on the allocation of the burdens of production and persuasion established under law.

The Permittees have the burden of production with respect to the three criteria on appeal. *Pratt's Propane, supra* at 5. Kernan and Long, as opponents to the Permit, bear the burden of persuasion with respect to Criterion 8, while Permittees have the burden of persuasion with respect to Criteria 9(K) and 10. 10 V.S.A. § 6088(b).

B. Criterion 8 - Aesthetics

Before issuing a permit, the Board must find that a proposed project will not have an undue adverse effect on the aesthetics of the area. The Board relies upon a two-part test to determine whether a project satisfies Criterion 8. First, it determines whether the proposed project will have an adverse effect under Criterion 8. The 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 locations from which the project can be viewed, and the potential impact of the project on open space. *Re: Barre Granite Quarries, LLC, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law and Order at 79 (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)).*

Second, if the Board concludes that the Project will have an adverse effect under Criterion 8, then the Board must evaluate whether the adverse effect is “undue.” The Board will conclude that the adverse effect is undue if it reaches a positive finding with respect to any one of the following factors:

1. Does the Project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?
2. Have the Applicants failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings?
3. 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?

Criterion 8, “was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from her property will remain the same forever.” *Re: Okemo Mountain, Inc., #2S0351-S-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Dec. 18, 1986).* Criterion 8 was

intended to ensure that as development occurs, reasonable consideration will be given to the visual impacts on neighboring landowners, the local community, and on the special scenic resources of Vermont. *Horizon Development Corp.*, #4C0841-EB, Findings of Fact, Conclusions of Law, and Order (Aug. 21, 1992). 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. See *Re: Quechee Lakes Corp.*, #3W0411-EB, Findings of Fact, Conclusions of Law and Order (Nov. 4, 1985).

Surroundings

The nature of the Project's surroundings is urban. It is located in a densely populated city. The Project site is adjacent to substantial downtown development. The Project's surroundings are highly developed and urbanized, with extensive residential, retail, and commercial development in the immediate vicinity. The Project's design is compatible with the surrounding development in that the Project provides a mixture of uses in a mixed-use area. The urban parks nearby and adjacent to the building site do not change the primarily developed nature of the surrounding area.

Compatibility of Design

The Project building will be constructed with brick, stone, slate and wood and will have a copper roof. The colors and materials selected for the Project are consistent and compatible with the colors and materials of the surrounding buildings and are suitable for the Project and the surrounding area. The use of varied rooflines, natural materials, and varied facades, will be a substantial improvement to this section of Burlington's downtown waterfront core. The McKenzie and Haigh buildings located immediately north of the Project are also constructed of brick, as is the Battery\College condominium building across the street.

Visibility

The Project will be visible from public viewing locations along Battery Street and College Street, Battery Park Extension, Waterfront Park and from Lake Champlain in the vicinity of the Burlington Harbor and Burlington Boathouse.

The Board finds that views from Lake Champlain and Waterfront Park will be greatly improved by the Project as it will erase from the landscape the currently unsightly retaining wall and surface parking area. Currently the view from Lake Champlain and Waterfront Park, eastward towards Burlington, is one of many commercial, retail and residential structures of varying sizes, designs and materials. The Project buildings are lower in height than adjacent buildings located uphill and across Battery Street. Therefore, the Project will not change the skyline as viewed from Waterfront Park or Lake Champlain.

The Board also finds that the Project's design, height and materials and lighting plan will not call singular attention to this Project or cause the Project to stand out from any other structures along the Waterfront.

The visual impact of the Project from Battery Street and College Street will be appropriate for its surroundings in that the overall appearance of the Project will be part of a high density urban area in Burlington. Although the Project will be visible from various points, such visibility is not out of context given the Project's location.

Impact on Open Space

The Project will not result in the loss of open space, nor will it have a negative impact on the open space in Waterfront Park. The Project building will be constructed on what is currently a paved parking lot, and therefore, will not result in the loss of open space. The improvements to the southern section of Battery Park Extension will not result in the loss of open space, but rather will result in the creation of approximately 18,000 square feet of park land which is currently unusable because of the steep slopes associated with the westerly side of Battery Park Extension. The 18,000 square feet of new park space will be available and open to the public at all times and will remain property of the City of Burlington.

The Project will alter the access to the westerly views of Lake Champlain and the Waterfront. The open space consisting of Waterfront Park and Lake Champlain will remain as they are. The Project will change the pedestrian access to the views by blocking some westerly views of the lake and mountains from Battery Park Extension, but will at the same time create indoor and outdoor public space from which the public may have views of the Waterfront and Lake Champlain. Access to the public space will be available from Lake Street and from Battery Street. This access is secured through a written agreement

between Main Street Landing Company and the City of Burlington. In addition, the Project will provide enhanced pedestrian access from Battery Street to Waterfront Park which provides similar westerly views.

Overall, the Project will have a positive impact on the open space of the area in that the Project will create additional public park land, will enhance and upgrade the park facilities so that they may be utilized by more people, and will create safe, ADA compliant, year-round access to the westerly views of Lake Champlain and the Waterfront.

The Board concludes that the Project has an adverse effect on the scenic and natural beauty of the area because the Project's building will block some westerly views of Lake Champlain and the Adirondack Mountains. Even though the Project incorporates public space and balconies with new westerly views, the views are different in character from the views presently existing from Battery Park Extension. This is offset, however, by enhanced pedestrian access from Battery Street to Waterfront Park and the enhanced views of Burlington to the east from Waterfront Park and Lake Champlain.

Because the Board concludes that the Project will have an adverse effect under Criterion 8, the Board must evaluate whether the adverse effect is "undue." *Hand, supra* at 25.

Written Community Standards

After considering all of the evidence and testimony including, but not limited to, the City's 1996 Municipal Development Plan and the 1998 Waterfront Revitalization Plan, the Board finds no evidence that the Project would violate any clear written community standard with regard to aesthetics. The Board finds that the 1996 Municipal Development Plan, the 1998 Waterfront Revitalization Plan, and the 1990 Urban Renewal Plan set forth clear written community standards intended to preserve the aesthetics or scenic beauty of the area. The 1998 Waterfront Revitalization Plan establishes that there has been a long-term plan to develop the properties east of Lake Street for a mixed-use urban neighborhood.

As discussed below under Criterion 10, the Board finds that the Project complies with the 1996 Municipal Development Plan, including those intended to preserve area aesthetics. Based on the above facts, the Board concludes that the Project does not violate aesthetic standards set out in the 1996 Municipal

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Development Plan, the 1998 Waterfront Revitalization Plan or the 1990 Urban Renewal Plan. The City has planned for a number of years for this type of development at this location.

Sensibilities of average person

As to whether the Project offends the sensibilities of the average person, we conclude that the Project would not be offensive or shocking to the average person because it is not out of character with its surroundings nor does it significantly diminish the scenic qualities of the area. The proposed building has an appropriate scale and mass in relation to its surroundings, an urban downtown area. Because the Project will rise above the lower plaza of Battery Park Extension, the access to some vistas presently enjoyed by the public in the vicinity of Battery and College Street will be altered. The Project will change the access to the views of the Lake and the Adirondacks from a small portion of the park, but will also provide improved views to the east from public spaces including Waterfront Park and Lake Champlain. The remainder of Battery Park Extension and the entirety of Battery Park, will still provide views west to Lake Champlain and the Adirondack Mountains.

Many of the proposed changes to the lower section of Battery Park Extension are positive improvements. The changes will result in improved east-west pedestrian access to the Waterfront; additional usable public park land and public access to indoor facilities including restrooms; ADA compliant walkways and facilities to and from the Waterfront; and ADA compliant year-round access for everyone.

Mitigating steps

The Board concludes that Permittees have taken generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed Project with its surroundings. The buildings will be constructed into the side of the embankment minimizing the overall height as viewed from Battery Street. All heating, ventilation and air conditioning equipment will be hidden under the building's roof. Subsurface parking will be provided underneath the buildings, thereby minimizing vehicular presence. Further, the buildings will be constructed with similar materials and colors as other nearby downtown buildings, and extensive landscaping and shielded light fixtures will be incorporated into the Project.

Accordingly, the Board concludes that the Project will not have an undue adverse effect on the scenic or natural beauty or aesthetics of the area.

C. Criterion 9(K) -- Public Investments and Services

Criterion 9(K) provides that:

[a] permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.

10 V.S.A. § 6086(a)(9)(K).

The Board conducts two separate inquiries under Criterion 9(K) with respect to governmental and public facilities. First, the Board examines whether the proposed Project will unnecessarily or unreasonably endanger the public investment in such facilities. Second, the Board examines whether a proposed Project will materially jeopardize or interfere with (a) the function, efficiency, or safety of such facilities, or (b) the public's use or enjoyment of or access to such facilities. *Re: Swain Development Corp., #3W0445-2-EB, Findings of Fact, Conclusions of Law, and Order at 33 (Aug. 10, 1990).*

With respect to the second inquiry under Criterion 9(K), the Board has interpreted this inquiry to be different than that under Criterion 5 concerning unsafe traffic conditions. Under Criterion 5, the Board looks to see whether a proposed project will create traffic conditions which are unsafe or traffic congestion which is unreasonable. The Board may not deny a project simply because such conditions are present. In contrast, under Criterion 9(K), the Board examines whether a proposed project will *materially jeopardize or interfere* with a public facility's function, safety, or efficiency or the public's use or enjoyment of or access to such facilities. *Id.* at 34.

During the prehearing conference the parties agreed that the public facilities included within this issue are: Waterfront Park (including the boat launch area), the Coast Guard Station, Battery Park Extension, Battery Street, municipal parking lots, Lake Champlain, Burlington Skate Park, Burlington Boat House, Lake Champlain Basin Science Center, and boat moorings and slips in Burlington Harbor.

This Project will improve the southern most section of Battery Park Extension and the lower plaza at College Street. New lights will be installed, the walkways will be improved and will be ADA compliant, new benches will be installed, and all improvements to Battery Park Extension will be monitored and maintained by Main Street Landing Company. The City of Burlington will maintain ownership and control over the park lands. Main Street Landing Company will maintain security throughout the building and will monitor activities in the adjacent section of Battery Park Extension, as needed.

The southern-most section of Battery Park Extension is underutilized with heavy undergrowth and trees blocking or restricting the views to the west. The Project will block some views but will also provide new views and additional access to the Waterfront from Burlington's Central Business District and from Battery Street. Because of pedestrian and ADA design considerations, and the amphitheater construction, the Project will provide additional public access opportunities to a broader spectrum of the public. In addition, the Project will provide better public access between Battery Street and Lake Street and Waterfront Park by incorporating ADA compliant elevators and walkways. Thus, the Project does not materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to facilities, services, or lands.

The Project will not result in any physical loss of park land. Rather, there is a net gain of 18,000 square feet that is presently unusable because of the steep slopes and vegetation along the west end of Battery Park Extension. Therefore, the Project will actually increase the amount of park space presently available to the public. Main Street Landing Company will be responsible for the costs of all maintenance of the improvements in the lower portion of Battery Park Extension. Thus, the Project reduces the necessary public investment for maintenance and repairs within the lower portion of the Park.

The Board finds that the Project will have a positive impact on Battery Park Extension and the Waterfront because of improvements including, but not limited to, new landscaping and pedestrian throughways.

The Project will change the access to the views of the Waterfront and Lake Champlain. The Project will not only create new park land, it will improve the access to the views of Lake Champlain from the Waterfront. It is anticipated that more people will have access to and actually see the views of Lake Champlain and the Waterfront from this area due to increased east-west pedestrian access, and more people will have an easier time accessing the Waterfront through ADA compliant linkages.

The views from Battery Park (north of the Project site by three blocks) will be uninterrupted. Views from Battery Park Extension, proceeding south from Battery Park to the northern tip of the Project site, will also be uninterrupted. The Project does not alter the appearance of Lake Champlain or of the Waterfront, but it does improve the access to those views.

With respect to municipal parking facilities, the City granted a 50% waiver of the required parking spaces specifically because of the Project's "proximity to downtown, public transit and other establishments where dual use is anticipated and encouraged." It is clear that the 50% parking space waiver will not unnecessarily endanger the public's investment in, or materially jeopardize or interfere with the public's use of the nearby municipal parking facilities.

The Board concludes that the Project will not unnecessarily or unreasonably endanger the public investment in any public facilities, but rather will support and justify the public's investment of the adjacent public facilities. Further, the Project will not materially jeopardize or interfere with the function, efficiency or safety of the public's use or enjoyment of access to any public facilities. Rather, the Project will enable the public to utilize renovated park land, thus making efficient use of the public's investment in that park land. Further, the Project will create a safe area for the public to enjoy the park and to enjoy the views of Lake Champlain and the Waterfront. The Project will not negatively interfere with the public's use, enjoyment or access to any public facilities on the Waterfront.

D. Criterion 10 -- Conformance with the Town and Regional Plan

Before granting a permit, the Board must find that the Project “is in conformance with any duly adopted local or regional plan or capital program of Title 24.” 10 V.S.A. § 6086(a)(10). The burden of proof, which consists of both the burden of production and the burden of persuasion, is on Permittees. *Id.* § 6088(a).

If the town plan provisions are specific, they are applied to the proposed project without any reference to the zoning regulations. A provision of a town plan evinces a specific policy if the provision: (a) pertains to the area or district in which the project is located; (b) is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and (c) is sufficiently clear to guide the conduct of an average person, using common sense and understanding. *The Mirkwood Group and Barry Randall, #1R0786, Findings of Fact, Conclusions of Law and Order at 29 (Aug. 19, 1996).*

If the provisions are ambiguous, however, the Board examines the relevant zoning regulations for provisions which resolve the ambiguity. This does not mean that the Board conducts a general review of a project for its compliance with the zoning regulations, but rather it sees if there are provisions in the zoning regulations that address the same subject matter that is at issue under the town plan. *Re: Fair Haven Housing Limited Partnership and McDonald's Corporation, #1R0639-2-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Apr. 16, 1996), aff'd, In re Fair Haven Housing Limited Partnership and McDonald's Corporation, Docket No. 96-228 (Vt. Apr. 23, 1997) (unpublished).*

In this proceeding, Criterion 10 requires analysis of the Project's compliance with the City of Burlington 1996 Municipal Development Plan. Permittees argue, however, that the Waterfront Revitalization Plan and its predecessor, the 1990 Urban Revitalization plan, are also relevant to Criterion 10 analysis. Kernan argues that because the Waterfront Revitalization Plan was not adopted pursuant to Chapter 117 of Title 24, V.S.A., that plan is not relevant to Criterion 10 analysis in this matter.

The Board finds that the Waterfront Revitalization Plan and its predecessor, the 1990 Urban Revitalization Plan, are not relevant to Criterion 10 analysis in this proceeding. The Board will therefore limit its review of the Project under the 1996 Municipal Development Plan only.

The Board finds that the 1996 Municipal Development Plan provisions are specific with respect to the Project in that they pertain to the area in which the Project is located, are intended to guide conduct or land uses within the area of the Project, and are sufficiently clear to guide the conduct of an average person of common sense and understanding.

Permittees have provided sufficient evidence and testimony with regard to their burden under Criterion 10. The Board concludes that this Project complies with the City of Burlington's 1996 Municipal Development Plan. There is nothing within the Plan which prohibits the proposed development nor is there anything in the Plan which prohibits an alteration of the access to the views of Lake Champlain and the Waterfront from this location, while also improving and preserving public accessibility to the views. This Project complies with the 1996 Municipal Development Plan.

For instance, the Project provides commercial development on the Waterfront; limits the use of surface parking; provides access to the westerly views; links the Waterfront with the Central Business District; creates public spaces for pedestrians; utilizes public transportation systems; creates ADA compliant walkways and links from Battery Street to the Waterfront; provides additional space for the performing arts; provides improvements and maintenance to a public park

While the 1996 Municipal Development Plan identifies the westerly views as important to planning, there is nothing in the plan which prohibits this type of development or prohibits the construction of a building which alters the views.

While this Project changes the access to the views of Lake Champlain and to the Waterfront from the southern most portion of Battery Park Extension, it does not eliminate or entirely block those views, nor does it permanently cause those views to be inaccessible to the public.

The Board concludes that the Project will only alter a small portion of the westerly views along the lower section of Battery Park Extension, and that there will not be any undue adverse impact with respect to the aesthetics and scenic views. The Board also notes that there are no buildings which will be constructed on City property, but rather on property immediately adjacent to the Park. The Project will continue to provide views of the Waterfront, Lake Champlain and distant vistas, and those views will be weather independent and will be accessible to a broad range of individuals within the community. The

improvements on City land involve limited tree clearing, excavation, regrading, and the installation of an amphitheater, park lights, park benches, walkways and ADA compliant ramps and landscape material. These improvements will enhance the Park and provide better access for the public at large. These improvements are consistent with the 1996 Municipal Development Plan.

The Board concludes that the Project complies with this criterion.

VI. ORDER

1. Jack Long's Motion to Renew his Motion to Dismiss is DENIED.
2. Land Use Permit # 4C1068-EB is issued.

3. Jurisdiction is returned to the District #4 Environmental Commission.

Dated at Montpelier, Vermont this 20th day of November 2001.

ENVIRONMENTAL BOARD

_____/s/ John C. Drake_____
John Drake, Acting Chair
George Holland**
Samuel Lloyd*
Rebecca Nawrath
Alice Olenick
Jean Richardson* & **
Nancy Waples
Donald Sargent, Alternate
A. Gregory Rainville, Alternate

* *DISSENT*: Board Members Lloyd and Richardson dissent from the decision relative to the conclusions under Criterion 8. Lloyd and Richardson would conclude that the Project does not result in any adverse effects and they would end Criterion 8 analysis with that conclusion.

** Board members Holland and Richardson were not present for the November 19, 2001 deliberations, but have reviewed and concur with the decision.