

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

RE: Richard Berman, Trustee and Bradford B. Moore
Land Use Permit #5L1086-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision, dated May 8, 1992, pertains to an appeal of Land Use Permit #5L1086, Findings of Fact, Conclusions of Law, and Order issued to Richard Berman, Trustee, and Bradford B. Moore by the District #5 Environmental Commission on May 8, 1991. That permit authorizes the construction of a five-unit apartment building with 21 bedrooms and associated parking area on two lots, which together comprise less than two acres, at the corner of College Hill Road and Town Highway #58 in Johnson, Vermont. As explained below, the Board concludes that the proposed project, as further conditioned by this decision, complies with Criteria 7 and 8.

I. BACKGROUND

On June 5, 1991, adjoining landowners Donald M. McDowell and Barbara S. Farr (the Appellants) filed an appeal with the Environmental Board. The Appellants contend that the proposed project does not conform to Criterion 7 (municipal services) because it will place an unreasonable burden on the ability of the Lamoille County Sheriff's Department to provide law enforcement services. The Appellants contend that the project does not conform to Criterion 8 (aesthetics) because it will create an adverse visual impact and undue noise.

An administrative hearing panel of the Board conducted a public hearing on October 9, 1991, in Johnson, with the following parties participating:

Donald M. McDowell and Barbara S. Farr (Appellants)
Richard L. Berman, Trustee and Bradford S. Moore
(Permittees), by George Stearns, Esq.

After taking a site visit and hearing testimony, the Panel recessed the matter pending submission of proposed findings of fact and conclusions of law, which were filed by the Permittees on November 7, 1991, and by the Appellants on November 21, 1991. The Permittees filed a response to the Appellants' proposed findings on December 3, 1991. The Panel deliberated on March 4, 1992. A proposed decision was sent to the parties on March 18, 1992. In that decision, the Panel instructed the Permittees to submit a landscaping plan incorporating the conditions imposed in the proposed decision with respect to Criterion 8. The Panel deliberated concerning the landscaping plan that was submitted. A proposed land use

permit and revised proposed decision was issued on April 14, 1992. The parties were then provided an opportunity to file written objections to the proposed decision and to present oral argument before the Board. The Appellants filed written objections. Oral argument was not requested. On May 6, 1992, following a review of the proposed decision and the evidence and arguments presented, the Board declared the record complete and adjourned the hearing. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUES

1. Whether the project meets the requirements of 10 V.S.A. § 6086(a)(7) (Criterion 7).

2. Whether the project meets the requirements of 10 V.S.A. § 6086(a)(8) (Criterion 8).

III. FINDINGS OF FACT

1. The project site consists of two lots which together comprise approximately 1.95 acres. The site rises uphill from the intersection of College Hill Road and Town Highway #58, in Johnson. The project will be situated on a natural plateau. The building will be located on the north side of the plateau. The parking area will be located to the south and east of the proposed building on a partially filled area.
2. Both lots are owned by Richard M. Berman, Trustee. The application was filed by Bradford M. Moore on behalf of Richard M. Berman, Trustee. There is currently a residential structure on the western edge of the site that is rented to six students.
3. The project consists of a five-unit apartment building which will contain 21 bedrooms, and a parking lot for 42 vehicles. The tenants are likely to be Johnson College students, although the project will not be restricted to students.

Criterion 7 - Municipal Services

4. Neither the Town nor the Village of Johnson has its own police department. Law enforcement services for the Town and Village of Johnson are provided by the Lamoille County Sheriff's Department with back-up from the Vermont State Police.

5. The Sheriff's Department must often respond to complaints concerning noise and disturbances in off-campus student housing. Residents of the proposed project may create noise and disturbances that will require a response from the Sheriff's Department.
6. Responding to such incidents at the project site would strain the capacity of the Lamoille County Sheriff's Department unless there is an on-site supervisor at the project at all times during the evening and night-time hours when Johnson College is in session.
7. The Permittees will hire a Resident Assistant for the project. In order to adequately supervise the project, the Resident Assistant will need to live in one of the apartments in the proposed building. The Resident Assistant will provide supervision and management services and will be trained to respond to any disorderly conduct that constitutes a violation of the Johnson College Student Code of Conduct or the terms of a resident's lease. Student residents of the project will be required to abide by the Johnson College Student Code of Conduct as a term of their lease.
8. Trinity Property Management will be responsible for overall management of the property. It will supervise the Resident Assistant and will be on call 24 hours a day to provide back-up assistance to the Resident Assistant. Trinity Property Management will be able to respond within one hour of notification of any disturbance at the project site.
9. The close proximity of the project to the campus is likely to reduce the volume of student traffic on town roads and in this respect reduce demands on the Lamoille County Sheriff's Department.

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Criterion 8 - Aesthetics

10. To the north and to the rear of the project site is a wooded hillside that is owned by Vermont State Colleges, Inc. To the south, the site abuts Town Highway #58 which is not a through street. The Lehoullier residence, which is located to the south of the project site and across Town Highway #58, is rented to students. The owners of that property are in the process of securing permits for the construction of an apartment unit on the property. Johnson Elementary School is located across College Hill Road, to the west of the project. McClelland Hall, part
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of the Johnson State College complex, is located to the north of the Johnson Elementary School. It is a **three-** story brick building that contains classrooms and offices.

11. The Appellants' single-family residence is located to the east of the site. There is a separate rental unit in a detached barn on the Appellants' property. The Appellants' residence is approximately 35 feet from the common boundary line with the project site. Their rental unit is approximately five feet from the boundary line. The Appellants' property line is approximately 90 feet from the proposed building. To the west of the Appellants' property is another single-family residence.
 12. The neighborhood contains a mix of single-family residential housing, and rental housing. There is a mix of student and non-student residents.
 13. Students have held loud parties on occasion and created noise that is offensive to the Appellants and to the individual who occupies their rental unit.
 14. The proposed building is two stories; it is approximately 95 feet in width and 32 feet in length. The exterior will be beige clapboard with brown and white trim. The roof will be brown asphalt shingles. The overall height to the peak of the roof will be approximately 28 feet.
 15. Access to the building will be from College Hill Road over a driveway that currently serves the existing residential structure on the site. The driveway will be widened resulting in the removal of some of the existing tree cover.
 16. A 42-space parking lot will be located to the west and to the south of the apartment building. The **Permittees'** proposal calls for approximately 13 parking spaces to abut the Appellants' property. An additional 20 parking spaces will be situated in front of the building.
 17. The project will be visible from College Hill Road and Town Highway #58. There is existing tree cover between the proposed building and parking lot location and the two roads. The project will involve filling on the slope between the project site and Town Highway #58.
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18. The Permittees will grade, stabilize and mulch the slopes between the parking area and Town Highway #58. They will construct tree wells to save at least two of the larger existing trees on the slope.
19. The Permittees propose to plant a variety of trees in a random arrangement along the southern edge of the parking lot. The proposed plantings will adequately screen parked cars from Town Highway #58.
20. The Permittees will install a 200-foot stockade fence between the proposed parking lot and the Appellants' property line. There will be a 15-foot setback between the fence and the parking area, which will be planted with trees eight to ten feet high. The fence, setback and plantings will provide an adequate buffer between the parking area and the Appellants' property.
21. The Permittees will install a guardrail along the parking areas in order to protect the proposed plantings.
22. The Permittees propose to remove snow from the parking area by plowing it to two areas to the north and south of the parking area. Depositing snow in vegetated areas as proposed might impair the growth or survival of the existing vegetation on the site or the vegetation proposed to be planted by the Permittees.

IV. CONCLUSIONS OF LAW

Criterion 7 -Municipal Services

Criterion 7 requires that, prior to issuing a permit, the Board find that the proposed project "will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services." 10 V.S.A. § 6086(a)(7). The Board may not deny a permit pursuant to Criterion 7, but may issue conditions to alleviate any burdens created. 10 V.S.A. § 6087(b). The burden of proof is on the opponents under this Criterion. 10 V.S.A. § 6088(b).

The Board concludes that the proposed project complies with Criterion 7, provided that there is a supervisor on-site during the evening and night-time hours. The witness representing the Sheriff's Department testified that the project would be a burden on its ability to provide law enforcement services only if there were not an on-site supervisor during the evening and night-time hours. The

Permittees' proposal to have a Resident Assistant will alleviate any burden on the Sheriff's Department, provided that the Resident Assistant, or other supervisor, is always on site at those times.

Because the Permittees have not specified what hours the Resident Assistant will be present on the site in a supervisory capacity, the Board will condition the permit to require that the Resident Assistant, or another person acting as supervisor under contract with Trinity Property Management, be on the project premises during the evening and night-time hours on all days when Johnson College is in session and for three days before the commencement of each session and for three days after the close of each session.

The Board will also require that the Resident Assistant occupy one of the units in the proposed building rather than in either the existing residential structure or the new building as proposed by the Permittees. A resident of the existing unit to the west of the new building would be unable to observe activities in the parking area to the east of the proposed building.

Criterion 8 - Aesthetics - noise and visual impact

10 V.S.A. § 6086(a)(8) requires that, prior to issuing a permit, the Board find that the project "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area [or] aesthetics ." The Board uses a two-part test to determine whether a project meets Criterion 8. First, it determines whether the project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. Re: Quechee Lakes Corn., Applications #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 18-19 (Nov 4, 1985). The Board considers noise to be an aesthetic consideration under this Criterion. Re: John and Joyce Belter, Land Use Permit #4C0643-6R-EB, Findings of Fact, Conclusions of Law, and Order at 13 (May 28, 1991). The burden of proof is on the opponents as to this Criterion. 10 V.S.A § 6088(b).

1. Adverse Effect.

In considering whether a project will have an adverse effect on aesthetics and scenic beauty, the Board looks at whether a proposed project will be in harmony with its surroundings and will "fit" the context within which it will be located. In making this determination, the Board considers the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability of the colors and materials proposed for the project, the

locations from which the project can be viewed, and the potential impact of the project on open space. Quechee, supra, at 18. While the "Quechee analysis" was developed in the context of visual aesthetics, it also provides a framework for evaluating whether noise from a project will have an undue adverse effect upon aesthetics. Belter, supra, at 14.

a. Noise

The Board concludes that noise from the project will not create an adverse effect under the "Quechee analysis." The area has experienced some disturbances and noise from students living in the existing residential property on the site. It can be expected that the tenants of the proposed project will also generate some noise and at times create disturbances. Nevertheless, the project is not incompatible with its surroundings. The area is one of mixed student and non-student residential use. The proposed student housing project is not out of context in an area that is in the immediate vicinity of the Johnson State College complex and that already includes student residential properties.

b. Visual Impact

The Board concludes that the project is not in harmony with the natural setting or with the existing residential uses. Although there are institutional structures on the east side of College Hill Road, the immediate context of the project is residential. The creation of a 42-car parking lot is not compatible with the surrounding residential uses. The project site is a sloped hillside, substantially covered with trees. It is visible from both College Hill Road and Town Highway #58. Upon completion of the project, the predominant view from those highways will be the proposed building and the 42-car parking lot. The Board therefore concludes that the project will have an adverse visual effect.

2. Undue Adverse Effect.

In evaluating whether adverse effects on aesthetics are undue, the Board analyzes the following three factors and concludes that a project is undue if it reaches a positive conclusion with respect to any one of these factors:

- a. 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?
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- b. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?
- c. Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings?

Because the Board has determined that there is no adverse impact due to noise, it will answer these three questions only as to the adverse visual impact. As to the first question, the Board concludes that the adverse visual effect of this project will not offend the sensibilities of the average person. Although the project will diminish the scenic qualities of the area, it will not do so to a degree that can be considered offensive or shocking.

With regard to the second question, no evidence was provided of any clear, written community standard intended to preserve the aesthetics and scenic beauty of the area.

As to the third question, the Board believes that the Permittees have taken generally available mitigating steps to improve the harmony of the project with its surroundings. The Permittees have submitted two proposed landscaping plans. A combination of the following elements of the two proposed landscaping plans will mitigate the visual impact of the project.

As shown in both plans, the Permittees will install a 200-foot stockade fence between the parking lot and the Appellants' property, on the property boundary line. As shown in Landscaping Plan A, the Permittees will create a 15-foot buffer between the fence and the parking area, which will be planted with eight to ten-foot arbor vitae in two staggered rows, ten feet on center. The fence and the plantings will adequately screen the project from the Appellants' residence. As shown in Landscaping Plan B, the Permittees will install plantings along the south side of the parking lot; these **plantings** will provide adequate screening from Town Highway #58.. As shown in Landscaping Plan B, a guardrail will be installed in front of the parking spaces to protect the plantings. As shown in Landscaping Plan A, tree wells will be constructed to protect at least two of the existing trees on the site. As shown in Landscaping Plan B, the Permittees will replant site-found trees along the hillside on the south side

of the parking lot to further screen the parking area. Removal from the site of snow plowed from the parking area will protect the plantings from the adverse impacts of snow stockpiling.

The Board concludes that the project, as conditioned to require elements of Landscaping Plan A and Landscaping Plan B, satisfies Criterion 8.

V. ORDER

Land Use Permit #5L1086 is hereby issued. Jurisdiction is returned to the District #5 Environmental Commission.

Dated this 8th day of May, 1992, at Montpelier, Vermont.

ENVIRONMENTAL BOARD

Elizabeth Courtney

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