State of Vermont
ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Old Vermonter Wood Products and Richard Atwood
Land Use Permit #5W1305-EB
Docket # 721

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This decision pertains to an appeal of Land Use Permit #5W1305-EB and supporting Findings of Fact and Conclusions of Law and Order issued to Old Vermonter Wood Products and Richard Atwood (collectively the "Permittees") pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250") authorizing the construction of a new 40' by 100' two story wooden building with a front porch and related driveways and parking areas ('Project"). The appeal concerns whether the Project conforms with 10 V.S.A. § 6086(a)(5) (traffic), (8) (aesthetics) and 9(K) (public investments) ("Criteria 5, 8, and 9(K)" respectively).

As explained more fully below, the Environmental Board ("Board") concludes that the Project complies with Criteria 5, 8 and 9(K). Accordingly, the Board grants Land Use Permit #5W1305-EB.

I. PROCEDURAL SUMMARY

On August 20, 1998, the District #5 Environmental Commission ("Commission") issued Land Use Permit #5W1305-EB ("Permit") and supporting Findings of Fact and Conclusions of Law and Order ("Decision") to the Permittees. This Permit applies to the lands located off Route 100 in Waterbury Center, Vermsnt and identified in Book 139, Pages 321-322 of the land records of Waterbury, Vermont, as subject of a deed to Richard Atwood, the "permittee as grantee," and authorizes the construction of the Project.

On September 17, 1998, Walter Flatow, pursuant to Environmental Board Rule ("EBR") 31 (A), filed a Motion to Alter with the Commission which was denied on October 9, 1998.

On November 6, 1998, Mr. Flatow ("Appellant") filed an appeal with the Board, contending that the Commission erred in denying him party status on Criteria 1(E) (streams), l(G) (wetlands), 4 (erosion) and 9(K) (public investments) and in finding that the subdivision will comply with those criteria and Criteria 5 (traffic) and 8 (aesthetics).

On December 11, 1998, the Board Chair, Marcy Harding, convened a prehearing conference and on December 15, 1998, Chair Harding issued a prehearing conference report and order ("Prehearing Order"), incorporated herein by reference. There were no objections filed to the Prehearing Order.

On December 17, 1998, Appellant tiled an Amendment to Notice of Appeal ("Amendment") and Richard and Barbara Woodard filed a Request for Party Status ("Petition").

On January 5, 1999, the Permittees filed a Response to Request for Party Status of Appellant and Other Parties ("Response").

On January 8, 1999, the Chair issued a Preliminary Ruling denying the Woodards' and the Appellant's party status requests on Criteria 1 (A), 1 (B), 1 (E), 1 (F), 1 (G) and 4 and granting Appellant party status on Criterion 9(K).

On January 19, 1999, the Woodards and the Appellant tiled Objections to the Preliminary Ruling on their party status requests.

On January 28, 1999, the Board deliberated on the issue of party status.

On February 3, 1999, the Board issued a Memorandum of Decision denying the Woodards' and the Appellant's party status requests on Criteria l(A), l(B), l(E), l(F), l(G) and 4.

On April 1, 1999, the Board issued a Memorandum of Decision, ruling on the parties' motions, requests and objections, which is incorporated herein by reference.

On April 7, 1999, Board Chair Harding and Board members Alice Olenick and Jack Drake ("Panel") convened an evidentiary hearing at the Holiday Inn in Waterbury, Vermont. The following parties participated: Permittees, by their attorney, and Appellant, *pro* se and with the assistance of Barbara Woodard.

At the April 7, 1999 hearing, the Panel conducted two site visits, accepted documentary and oral evidence into the record, and heard opening and closing statements. After recessing the hearing, the Panel deliberated.

On April 12, 1999, pursuant to EBR 20, the Panel issued a Recess Memorandum and Order requesting that the parties provide additional information for consideration during further hearing on specified issues and setting out the filing and hearing dates.

On April 21, 1999, the Appellant filed a Motion to Deny the Application and a Motion to Alter Decision, challenging the Panel's authority to seek additional information and the Chair's decision to limit the Appellant's participation under Criterion 9(K) to the

effects of the Project on Route 100 in Waterbury. The Permittees filed a responsive memorandum on May 3, 1999. The Panel referred these motions to the full Board for consideration, and on May 20, 1999, the Board denied both motions.

On Wednesday, June 2, 1999, the Panel reconvened the hearing in this matter at the Environmental Board's Conference Room, National Life Records Center Building, National Life Drive, Montpelier, Vermont with the following parties participating: Permittees, by their attorney, Paul Gilles, Esq. and the Appellant, by his attorney, Thomas F. Koch, Esq.

In addition to its deliberative session on April 7, 1999, the Panel deliberated on June 2 and on July 8, 1999.

Based upon a thorough review of the record and related argument, the Panel issued a proposed decision on July 9, 1999 which was sent to the parties. The parties were allowed to file written objections and request oral argument before the Board on or before July 29, 1999. On July 27, 1999, Appellant filed an objection to the proposed decision and requested oral argument.

On August 18, 1999, the Board heard oral argument and convened a deliberation concerning this matter. Following a review of the proposed decision and the evidence and arguments presented, the Board declared the record complete and adjourned. This matter is now ready for final decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. See Secretary, Agency of ***Natural Resources v. Upper Valley Regional Landfill Corporation, 167*** Vt. 228, 241-42 ***(1997)***; *Petition* ***of Village of*** *Hardwick* ***Electric Department, 143*** Vt. ***437,445*** (1983).

II. JURISDICTION

Pursuant to 10 V.S.A. § 608 1 (a), no person may commence development without an Act 250 permit. "Development" is defined as the construction of improvements for a commercial purpose where the tract of involved land is "more than one acre." EBR 2(A). In towns with both permanent zoning and subdivision bylaws, jurisdiction applies only if the tract of involved land is greater than ten acres, unless the town chooses to have jurisdiction attach to development on more than one acre. Id. No party contests that, in Waterbury, Vermont, Act 250 jurisdiction attaches to projects on land in excess of one acre.

The Project Tract for the proposed Project is 1.18 acres. Because the Project is to be located on land in excess of one acre, there is Act 250 jurisdiction over the Project.

III. ISSUES

The issues on appeal in this matter are:

Whether, pursuant to 10 V.S.A. § 6086(a)(5), the Project will cause unreasonable congestion or unsafe conditions with respect to use of Route 100.

Whether, pursuant to 10 V.S.A. § 6086(a)(8), the Project will have an undue adverse impact on the aesthetics, scenic or natural beauty of the area, historic sites or rare and irreplaceable natural areas.

Whether, pursuant to 10 V.S.A. § 6086(a)(9)(K), the Project will materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to Route 100.

IV. FINDINGS OF FACT

1. On March 13, 1998, the Permittees tiled an application with the District 5 Commission for an Act 250 permit to construct a new 40' x 100' two story building with a porch and related driveways and parking (previously identified as the "Project").

2. The Project will be located on a 1.18 acre tract off of Route 100 in Waterbury Center, Vermont ("Project Tract").

3. Richard Atwood owns the Project Tract.

4. The Appellant's 1 8th century brick home and property abut the Project Tract to the south.

5. Looking to the south from the Appellant's property, there are unobstructed mountain views of Camel's Hump. The views from the Appellant's property to the northwest are obstructed by a line of deciduous and evergreen trees located behind the area proposed for the Project building.

6. The majority of the Project Tract is fairly level except for a steep drop at its northwest corner and a less steep drop at its southwest comer.

7. The Project building ("building") is to be located in the back of the Project Tract to the northwest.

8. The building will be wood frame and have plywood siding painted a rusty red brown, The roof will be corrugated metal painted a dark antique brown.

9. The roof has a shallow pitch which slopes down from front to back. There is a small facade running the length of the building where the highest part of the roof meets the front wall of the building.

10. Latticework will obscure the cement support piers of the structure along the front porch.

11. The loading docks will be at the north and south ends of the building.

12. The upstairs (second) floor of the building will be used for storage only and will not be heated.

13. The covered front porch will be 100' x 10', will run along the entire front of the building on the first story and will be used as additional retail space. It will not be heated.

14. The Project will provide retail space for the sale of unfinished wood products, such as furniture, benches, small tables, dressers and a variety of small knick-knack items. N these items will be manufactured or finished in any ma

15. The Project is designed to provide for 26 parking spaces, 3 of which are designated as handicapped parking spaces. There will be an area reserved for overflow parking.

16. The existing driveway to the Project Tract is on the north side of the existing store and runs along the northern boundary of the Project tract in a westerly direction from Route 100 to the western, or back, portion of the Project Tract. This driveway will be paved and painted with arrows indicating lanes for entry and exit.

17. No buses will be allowed on this driveway. Deliveries to the Project building will be by small utility vehicles. No tractor-trailers will be used.

18. There is a public parking area in front of the existing

Only" d ties; a sign saying "Do Not Enter, Pedestrians

end

19. The posted speed limit on Route 100 in both directions where it passes the Project Tract is 40 mph.

20. Approximately 2/10ths of a mile south of the Project Tract there is a sign cautioning northbound motorists not to exceed 35 mph. This is the design speed (the speed for which the road is designed) for Route 100 north at this point. There is no evidence in the Record that this design speed remains in effect at the point where Route 100 passes the Project driveway.

21. Route 100 has a present Saturday average traffic volume of 11,000 vehicles,

22. The Project will lead to a small increase in the traffic on Route 100.

23. Route 100 is level and straight at the Project entrance.

24. The Project is diagonally across Route 100 south from the Cold Hollow Cider Mill, a large retail operation. A58.9 During the fall foliage season, the Cider Mill is very busy, and the Permittee expects pedestrians to cross the highway to visit the Project.

25. According to the owner of Vermont Wood Products, pedestrian traffic increases during foliage season.

26. The Permittees do not expect that the Project will draw tourist vehicular traffic, although there could be some vehicular traffic between the Project and the Cold Hollow Cider Mill.

27. The Permittees have made no accommodation to address the increase in pedestrian traffic that the Project is likely to generate.

28. The Vermont Agency of Transportation ("VAOT") maintains accident data for reportable accidents (accidents with more than $1000 in property damage) throughout Vermont. Accident data for 1993 – 1997 reveals that there was one accident in close proximity to the Project Tract driveway, and five hundred feet south of the Project Tract driveway there were two reported accidents. There were also three accidents in late 1998 (two in October 1998) near the Project site, and VAOT accident data indicates that there were four accidents in 1991 and 1992 near the Project site.

29. A "High Accident Location" is defined as a place where the "Actual Accident Rate" exceeds the "Critical Rate." VAOT has not designated any location in Waterbury as a High

Accident Location

30. There are no records of accidents involving pedestrians near the Project.

31. When a car exits the Project Tract by the existing driveway, the driver's view to the north is unobstructed, and the view to the south is partially blocked by a split rail fence on the Project Tract. This fence is used to display merchandise, such as whirligigs, which further obstructs the view.

32. VAOT utilizes Standard B-71 to determine the suitability of proposed new accesses onto a highway.

33. Standard B-71 establishes minimum "comer sight distances" for each posted speed limit or design speed on highways.

34. The "corner sight distance" is the minimum distance necessary to allow safe egress from a driveway onto a highway. The "stopping sight distance" is the distance required to stop at a given speed.

35. According to Standard B-71, on a highway with a posted speed limit of 40 mph, the minimum corner sight distance must be equal to or grea er than 560 feet in both directions for all drives entering the public highway unless otherwise approved by the VAOT. Pursuant to B-7 1, the corner sight distance "is measured from a point on the drive at least 15 feet from the edge of [the] traveled way of the adjacent roadway and measured from a height of eye of 3.5 feet on the drive to a height of 4.25 feet on the roadway." Advance warning signs are required if the corner sight distances are below the minimum stopping sight distance in each direction.

36. Where a posted speed limit exceeds the design speed limit, the posted speed should be used to determine the minimum corner sight distance, because it requires a longer sight distance. Design limits should not be used for the purpose of compliance with corner sight distances.

37. Comer sight distances at the proposed exit of the Project Tract are 760' to the north along Route 100 and 445' to the south.

38. Detail C of Standard B-71 requires a curb cut width of a minimum of 24' at the right of way line where the Project meets Route 100. The Project's site plan describes an adequate width at its entrance.

39. The width of the road narrows to 19' about 30' west of the right of way, but there is no requirement in Detail C which addresses the distance over which the 24' width must be retained.

40. Detail C of standard B-71 also requires the Project's drive to have at least a 10 turning radius where it meets the traveled way of Route 100. The site plan describes no turning radius.

41. A "trip end" is defined as one car either entering or exiting a given location. Therefore, one car entering the Project Tract and then exiting the Project Tract would constitute two trip ends.

42. The Permittees obtained information concerning the existing trip ends generated by the existing store at the Project Tract through conversations with the person who presently operates the Old Vermonter Wood Products retail store. Actual traffic counts using automatic or human counters were not performed.

43. While an automatic road counter would have been better way to count existing trip ends, using information provided by the owner of Old Vermonter Wood Products is adequate.

44. The majority of the present customers of Old Vermonter Wood Products walk across Route 100 from the Cold Hollow Cider Mill to visit the existing store.

45. Both the Permittees and the Appellant have submitted reports on their predictions of the number of new trip ends that the Project will generate.

46. In making their predictions, both parties have relied on traffic data provided by the Institute of Transportation Engineers' ("ITE") Trip *Generation* publication. The ITE publication attempts to predict the number of trip ends that a particular business will generate based upon the type and "gross leasable area" ("GLA") of the business.

47. The Permittees used the ITE category of "furniture store" and a GLA for the Project building of 5000 square feet (the building's first floor and the porch) in order to arrive at their estimates of predicted trip ends.

48. While the second floor storage area of the building is GLA, the Permittee does not believe that it will draw traffic.

49. Merchandise will not be displayed on the porch every day.

50. The Permittees estimate that the Project will generate the following total (existing plus predicted) trip ends:

Study Period	Existing Trip Ends	Expected Additional Trip Ends	Total Trip Ends
Average Weekday	10	22	32
Weekday Evening Peak Hour	1	2	3
Average Saturday	24	25	49
Saturday Peak Hour	4	4	8
Average Sunday	24	23	47
Sunday Peak Hour	3	5	8

51. The Permittees' estimate does not state how the "average" figures are determined. The report does not state which time frame (week, month or year) has been used to calculate the "average" figures.

52. The projected estimates which the Permittees have provided are conservative (or

traffic in the Waterbury area during fall foliage season.

53. The Permittees' figures are accurate only within a 30%, plus or minus, range.

54. The Appellant's predictions of trip ends are substantially higher (to a factor of six) than those presented by the Permittees. The Appellant's projection of trip ends is based upon its contention that the proposed Project does not easily fall within the definition of a "furniture store," that the ITE data concerning furniture stores has been gathered from larger furniture stores ranging from 40,000 square feet to 270,000 square feet and is therefore unreliable for a business of this size, and that the ITE data points for a furniture store are too variable to adequately present a useable equation over the entire range of the sites analyzed. The Appellant therefore suggests that this means that more conservative (higher) values need to be used for design or that another source of data, such as finding an existing site of similar use and size and performing a traffic count, should be used. The Appellant also contends that the Permiflees should have included the 4000 square feet of the building's second floor storage area within the GLA in order to predict the number of trip ends.

55. If a 9000 square foot figure were used in place of the 5000 square foot figure used by Permittee, the number of Expected Trip Ends in Permittees' chart would double for each Study Period.

56. An increase of four trip ends in the Saturday peak hour is not a significant change from the present use of four trip ends in that hour in relation to the 11,000 vehicles which travel Route 100 on an average Saturday.

57. Using the ITE manual to make predictions requires the use of discretion.

58. Directly to the north of the Project Tract on Route 100 is property owned by Mrs. Vanasse.

59. Vanasse's driveway runs from her garage parallel to the existing driveway on the Project Tract to Route 100.

60. Vanasse has an easement to use as a part of her driveway a strip of land approximately 9 feet wide along the northerly boundary line of the Permittees' land

61. The proposed ingress lane to the Project Tract is to be delineated by an arrow pointing into the Project Tract. This ingress lane will use a part of the same land as Vanasse presently uses as her driveway.

62. If Vanasse uses that portion of the Project's proposed driveway to which she has an easement, there is the potential of conflict if Vanasse attempts to exit her driveway at the same time as a car is attempting to enter the Project Tract from Route 100.

63. This conflict could create an unsafe situation on Route 100, as a car attempting to enter the Project Tract might have to stop if confronted with a car attempting to exit the Vanasse property.

64. The project will make Vanasse's access to her home less desirable.

65. A one-foot high landscaping berm will be built along the entire length of the southern boundary of the Project Tract to screen the project and to channel stormwater runoff,

66. A hedge of 6' (at planting) red cedars spaced apart a maximum of 20" will be planted on top of the landscaping berm along the Project Tract's south property line. The planting will begin at the northwesterly comer of Appellant's barn and continue westerly for a distance of approximately 220'. For the first 70' of this row, the cedars will be planted in a double row. A second hedge of 4' – 6' red cedars will be planted along the easterly boundary of the Project Tract directly to the west of the land owned by Vanasse. These cedars will also be spaced apart a maximum of 20".

67. While six-foot cedar trees should be planted 3' to 4' apart, they can be planted 20" apart if they are planted with their root balls close together. Cedar trees planted 20" apart will create a full screen at the time of planting.

68. A 6' red cedar will grow to a height of 30' in about 15 years.

69. All existing trees on the Project Tract will remain.

70. There is an already existing retail building on the Project Tract ("existing store"). This building will not be demolished or otherwise removed from the site.

71. There is an existing barn and storage trailer at the rear of the site. The trailer will be removed after the Project building is erected.

72. Extending across the front of the Project Tract, parallel to and approximately six feet west of the pavement of Route 100 is a split rail fence that stands about 46 inches tall. This fence will be moved back at least twenty feet from the edge of the Route 100 pavement to the

point where it will not block sight distance views for people exiting the Project.

73. The lawn in front of the existing store has been used for retail displays of the wood products sold at the store, such as outdoor furniture and wells. The Permittees plan to continue to use the lawn as a display area.

74. The lawn display area will be inside the fence, not on the Route 100 side of the fence.

75. A three-foot high juniper hedge will be planted along the Route 100 side of this fence.

76. Lighting for the Project will include high pressure sodium wall packs or metal halide (100 watt) bulbs mounted on the rear of the building and over both loading docks; these lights will be on motion sensors for security purposes. Lights in the parking lot will be 100-watt metal halide bulbs, mounted on three 12' high poles. Porch lights will be 100-watt iridescent can lights mounted in the porch soffit. All of the lights will be downcast and shielded.

77. The lot lights and porch lights will be on only during business hours (9:00 AM to 7:00 PM). The security lights will be motion sensitive and could come on at any time.

78. There are no handicap access ramps to the Project building on any plan or exhibit submitted by the Permittees.

79. In judging whether the proposed Project fits the character of the area where it is proposed, an important consideration would be how it would be viewed from Route 100.

80. The Project building will be slightly visible but hard to see from Route 100.

81. A person driving a vehicle the posted speed on Route 100 would have only a brief view of the Project.

82. The Project building would impact the view of pedestrians crossing Route 100 from the Cold Hollow Cider Mill.

83. The area where the Project Tract is located is characterized as a 19th century Vermont village in transition to predominately tourist retail use. The recent acceleration of this transition has eroded the area's character.

84. The Project is located directly across Route 100 from an historic early 19" century

brick church listed on the National Register of Historic Sites. Other historic and architecturally significant houses dominate the section of Waterbury Center where the Project is located.

85. The nature of historic additions to early structures, such as the Cider Mill, has been the addition to the rear of structures in a linear manner because of limited lot frontage. This maintains the potential to retain the historic village scale and character and is in keeping with the area.

86. Waterbury Village was put on the National Historic Register in August 1978.

87. The size and arrangement of the Project are not consistent with buildings in the surrounding area. Although the porch relieves the stark box-like character of the Project building, a typical gable structure with less than a full second story would be more in keeping with the other buildings in the area. A pitched roof would reduce the scale of the building as seen from the street and the neighbors, Further, wood clapboard siding would be more historically accurate than the proposed plywood. Siting the building in an east/west direction would be more in keeping with the historic growth of houses and outbuildings into the depth of the lot. The length of the Project building runs parallel to Route 100, rather than back from it in the historical fashion, as does the Cold Hollow Cider Mill.

88. The white barn owned by the Appellant erodes the character of the area.

89. There are no clear written community standards in the Waterbury town plan or the zoning bylaws applicable to the Project.

90. There is no evidence in the Record that supports a finding that the Project would offend the sensibilities of the average person.

91. At most, it is the Project's failure to conform with traditional design in terms of the layout of the site that might offend the sensibilities of the average person.

V. CONCLUSIONS OF LAW

A. De Novo Review and Burden of Proof

When a party appeals from a District Commission determination, the Board provides a "*de novo* hearing on all findings requested by any party that files an appeal or cross-appeal, according to the rules of the [B]oard." 10 V.S.A. § 6089(a)(3). Board rules provide for the

de novo review of a District Commission's findings of fact, conclusions of law, and permit conditions. EBR 40(A). Thus, the Board cannot rely upon the facts stated, conclusions drawn, or conditions issued by the District Commission in this matter. Rather, it must regard the Decision and exhibits presented to the Commission as evidence to be offered by the parties.

Because the Board is limited to de novo review of the District Commission's Decision, it must evaluate the parties' evidence based on certain rules governing the allocation of the burdens of production and persuasion.

Pursuant to 10 V.S.A. § 6086(a), the Board is required to make positive findings with respect to the Act 250 criterion, irrespective of the placement of the burden of proof. *In re Denio*, 158 Vt. 230,237 (1992). The applicant has the burden ofproducing sufficient evidence in order to enable the Board to make affirmative findings under all ten criteria. A party with the burden of producing evidence can lose if they fail to provide sufficient evidence.

B. Criterion 5

Before issuing a permit, the Board must find that the Project "[w]ill not cause unreasonable congestion or unsafe conditions with respect to the use ofhighways. . 10 V.S.A. § 6086(a)(5) (traffic).

> Criterion 5 does not require that proposed development be the principal cause or the original source of traffic problems. Several causes may contribute to a particular effect or result. The Board found[, in an application involving access to a warehouse,] that the development would contribute to [an] existing traffic problem. It would be absurd to permit a hazardous condition to become more hazardous.
>
> One purpose of Act 250 is to insure that "lands and environment are devoted to uses which are not detrimental to the public welfare and interests." Safe travel . is in the public interest. Exacerbating [an] existing traffic hazard by allowing additional travel on [a] road would be detrimental to the public interest.

In re Pilgrim Partnership, 153 Vt. 594, 596-97 (1990) (citations omitted) (affirming Board decision that proposed project did not satisfy Criterion 5).

A permit may not be denied solely on the basis of Criterion 5, but the Board may attach reasonable conditions and requirements to the permit to alleviate the burden created 10 V.S.A. § 6087(b). The burden of proof is on the Appellant under Criterion 5, id. § 6088(b), but the Permittees must provide sufficient infomation on which the Board can make affirmative findings.

There are three discrete issues presented by this appeal relative to the considerations at issue in a determination under Criterion 5: whether the increase in predicted trip ends will cause congestion or unsafe conditions on Route 100; whether the comer sight distances are adequate; and whether the conflict created by Vanasse's use of the ingress lane to the Project Tract may create an unsafe condition on Route 100.

I. *Expected Trip Ends*

The conflict in the evidence presented by the parties as to the Expected Trip Ends which the Project will create makes it clear that predicting trip ends based upon the ITE manual is, at best, a highly inexact science. Fitting the proposed business into the correct ITE category (assuming that one can be found), determining the appropriate GLA, estimating how much traffic will be vehicular or pedestrian, and even attempting to give some effect to seasonal variations in tourist traffic present variables that are difficult, if not impossible, to quantify. Even if the Board were to adopt the Appellant's suggestion that the Permittee find an existing site of similar use and size and perform a traffic count, this approach does not account for the variations that will arise from differences in site location, the size of the market area served by the existing and proposed stores, and the type of consumer each store likely will draw.

The Board is therefore left with the "best guesses" of the parties in its determination of this element. Here, the parties have presented widely differing estimates of the increased number of trip ends which will likely result from this Project. The Board will accept the numbers presented by the Permittees and then require the Permittees to operate within their stated predictions.

The Board also determines that it is impossible for it to impose a condition in the Permittees' permit that can adequately address the question of "average" weekday, Saturday or Sunday trip ends. The Permittees have not presented any evidence as to how these averages are determined. Is the number of "average" Saturday trip ends derived from a study of 52 Saturdays over the course of an entire year? Did the Permittees examine every weekday in a particular month of the year and derive their "average" weekday total from that inquiry?

The absence of an actual timeframe makes crafting a permit with conditions based on averages difficult and leads to the situation where enforcement of such a condition becomes nearly impossible. For example, if the Board were to set a condition which limited the total trip ends on an "Average Saturday" to the Permittees' estimate of 49, and if the Permittees were to have 100 actual total trip ends on a Saturday in October, an enforcement action against the Permittees for violating this permit condition would be met with an argument that a Saturday in the following February would likely produce no trip ends and, therefore, the "average" limitation had been met. The Board finds this unworkable. The Board will not write a permit condition which it believes is unenforceable at the time it is written. See ***In re Denio***, 158 Vt. 230,240 (1992) (pursuant to 10 V.S.A. §6086(c), conditions imposed by the Board in Act 250 permits must be reasonable); *In re Stowe Club Highlands*, 166 Vt 33, 35 (1996) (permit conditions should not be meaningless).

Here, the Board understands the Permittees' "average" numbers to represent a "worst case scenario." The Permittees' expert testified that his projections were conservative (or high) for two reasons: first, the proposed Project will sell unfinished furniture only; and, second, his estimates are based in part on the potential contribution of tourist generated trip traffic in the Waterbury area during fall foliage season. Given this assurance, the Board will set limits on the total trip ends for each Study Period at the figures presented by the Permittees. The Board wishes to make it clear that these limitations are total limitations, not averages.

Having imposed the total trip ends at certain maximums, the Board concludes that the estimated trip ends which the Project will create will not cause unreasonable congestion or unsafe conditions with respect to the use of Route 100. An increase of 25 Saturday trip ends is an increase of only 13 vehicles over the course of a ten-hour business day, or a little more than one additional car per hour. Given the fact that Route 100 has a Saturday average daily traffic volume of 11,000 vehicles, the increase in total volume resulting from the Project is insignificant.

With the inclusion of a condition limiting the total number of trip ends to those proposed by the Permittees, the Project's additional trip ends will not cause "unreasonable congestion or unsafe conditions with respect to the use of highways ..." 10 V.S.A. § 6086(a)(5).

2. *Corner sight distances*

The proposed Project does not satisfy the south corner sight distance requirements of the B-71 standards: the standards require a sight distance of 560' in a 40 mph zone, and the sight distance to the south is only 445'.[2] then presented by this case is whether

Re: Richard and Barbara Woo #5W1262-EB, *Land Use* at 14 (Dec. 18, 1997) at 14, *Wal*Mart Stores, Inc and St. Albans* Sup. Ct. Dkt. No. 95-10 (Aug. 29, slip op. 1997) ("Under Criterion 5, the Board must make its own determination as to the nature of the area and the level of service appropriate for that area.").

The facts surrounding the application, except as to the nu were worse than those presented by the instant case. Approximately 50 to 75 cars visited the Woodards' antique business on a daily basis. In the vicinity of the Woodard project's driveway, Route 100 is a two lane, curving highway which inclines when approaching the driveway in the northbound lane. The Woodards' sight distances at the driveway were 260' to the north and 290' to the south.' The posted speed limit on Route 100 in the vicinity of the Woodard project entrance was, as here, 40 mph; there were also signs cautioning motorists not to exceed 35 mph in the same area.[4] *supra*, at 5-7.

Contrary to what both parties' witnesses in the present case think to be reasonable, in

2 **This site distance is premised on the Board's understanding that the existing fence will be moved back from Route** 100 **to a point where it does not interfere in any way with a motorist's ability to see the full extent of the site distance to the south. To ensure that this is the case, the Board will include a condition prohibiting the Permittee from placing the fence or any of the lawn displays on the front lawn in such a way as to impede the view to the south.**

3 **The** *appellants* in the *Woodard* **case** *measured* **the sight distances at the** driveway **at** 290' to **the north and only 200' to the south.**

4 Had **the** *Woodard* Board applied the higher (40 mph) speed limit to the B-71 standards (which **would have required that the project meet a sight distance of** 560'), **the Woodards' project would have failed the standard by at least 300' in one direction and 270'** in the other.

determining whether the Woodards' project met the B-71 standards, the *Woodard* Board applied the *design speed limit* of 35 mph, not *thepostedspeed limit* of 40 mph. Despite the fact that the Woodard project did not meet the B-71 standards even at 35 mph,' the Board concluded that the project complied with Criterion 5. Four reasons for this conclusion are given in the Board's decision:

> Individuals will access their self-storage units via the Project Driveway, the driveway currently used by patrons of Permittees' antique business. Signs *along* Route 100 warn motorists of turning vehicles in the vicinity of the Driveway entrance. Although Route 100 is a heavily traveled roadway, no vehicular accidents were reported between 1991 and 1995 at the entrance to the Project Driveway or Lakeview Terrace. Appellant has failed to prove that the addition of 3-4 cars per day will cause "unreasonable congestion or unsafe conditions" along Route 100.
>
> ***
>
> For the reasons stated in the preceding paragraph, the Board concludes that the evidence provided concerning sight distances is not dispositive in this case. The Board's conclusion would have been different if the evidence had supported a finding that a greater number of cars would visit the Project on a daily basis. Accordingly, the Board concludes that the Project will not violate Criterion 5.

Id. at

Woodard case

adequate.[6] lore than

5 Under the B-71 standards, on a highway with a posted speed limit of 35 mph, the comer sight distance must be equal to or greater than 445' in both directions for all drives entering the public highway unless otherwise approved by the Agency of Transportation.

6 The corner sight distance to the north is 760', well above the B-71 requirements for the posted speed limit of 35 mph.

exiting the Project in a northerly direction (into the northbound lane) or waiting to turn into the Project from the northbound lane. Motorists turning south out of the Project or turning into the Project from the southbound lane create no traffic hazards insofar as sight distances are concerned.' Given that on its busiest day the Project will generate only an average of 2.5 trip ends per hour (and some of those will exit to or enter from the southbound lane), the Board cannot find that the failure of the Project to meet the B-71 standards in one direction also causes the Project to fail Criterion 5.

3. *Vanasse* ***access***

The Board has concerns that the siting of the ingress lane to the Project on the same portion of the traveled driveway that Vanasse will use to exit from her home will lead to congestion or unsafe conditions on Route 100. Cars attempting to enter the Project from either direction at the same time that a person is exiting the Vanasse property will be prevented from doing so, if Vanasse is limited to using only the nine foot easement on the north boundary of the Project Tract. The Board concludes that it is necessary for Vanasse (and others visiting her home) to be given permission to use the entire Project driveway when exiting her property. Therefore, the Board will require that the Permittees, by easement or other deeded right grant this permission to Vanasse, her successors and assigns.

Precedent exists for a condition such as this. First, the Board may impose conditions which are appropriate and reasonable. 10 V.S.A. §6086(c); In *re Denio*, 158 Vt. 230 (1992). Second, the Board and Commissions have imposed conditions in Act 250 permits which require deed restrictions. See ***Re: Nehemiah Associates, Inc.,*** Application #1R0672-1-EB, Findings of Fact, Conclusions of Law, and Order at 4, 5, 8 (June 8, 1995) (deed covenants for farm use and open space). While the Supreme Court reversed the Board on other grounds, ***In re Nehemiah*** Associates, Inc., 166 Vt. 593 (1996), it did not disapprove of the fact that Nehemiah's Land Use Permit included conditions which required restrictive covenants.

Because the Board may impose reasonable conditions relating to traffic safety and congestion in order to ensure compliance with Criterion 5 and to "alleviate the burdens created," 10 V.S.A. §6087(b); ***UVM, State Agricultural College, and Novarr-Mackesey Development Co.,*** Application #4C0895-EB, Findings of Fact, Conclusions of Law, and Order at 20 (Aug. 28, 1992), the Board concludes that, with the above condition, the potential conflicts on the Vanasse easement can be resolved and the Project complies with Criterion 5.

7 However, a traffic hazard is possible because of the conflict that may arise with respect to motorists exiting the Vanasse driveway. See discussion in Section B(3), *infra.*

C. Criterion 8 (aesthetics)

Before issuing a permit, the Board must find that a proposed project "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." 10 V.S.A. § 6086(a)(8) (aesthetics). The burden of proof is on the opponents under Criterion 8, id. § 6088(b), but the applicant must provide sufficient information for the Board to make affirmative findings. See, e.g., ***Re: Herndon and Deborah Foster,*** Application #5R0891-8B-EB, Findings o Order at 1 O-l 2 (June 2, 1997); ***Re: Black River Valley Rod & Gun Club, Inc.,*** #2S1019-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Mar. 27, 1997) and cases cited therein.

1. ***Adverse Effect***

The Board relies upon a two-part test to determine whether a project satisfies Criterion 8. First, it must determine whether the project will have an adverse effect under Criterion 8. ***Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership,*** Land Use Permit #8B0444-6-EB(Revised), Findings of Fact, Conclusions of Law, and Order at 24 (Aug. 19, 1996); ***Re: Quechee Lakes Corp.,*** #3 W041 1-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1985).

With respect to the analysis of adverse effects on aesthetics and scenic beauty, the Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will "tit" the context within which it will be located.

> If a project "fits" its context, it will not have an adverse effect. ***Re: Talon Hill Gun Club [and John Swinington,*** #9A0192-2-EB, Findings of Fact, Conclusions of Law, and Order] at 9 [(June 7, 1995)]. In evaluating the "tit," the Board looks at the nature of the project's surroundings and the compatibility of the project with those surroundings. ***Id.***

Black River, *supra* at 19. The Board also looks at the locations from which the project can be viewed, and the potential impact of the project on open space. ***Quechee,*** *supra,* at 18.

This Project does not tit its surroundings. It is a modem retail sales building situated in the middle of a 19'" century Vermont village in transition to predominately tourist retail use. The design of the wood-frame building is box-like, with rusty red brown plywood siding, and a dark antique brown, corrugated metal, shallow-grade roof which slopes down from front to back. The flat two-story front is capped with a small facade running the length

of the building where the highest part of the roof meets the front wall of the building.

A typical gable structure with less than a full second story would be more in keeping with the other buildings in the area. Wood clapboard siding would be more historically accurate than the proposed plywood.

The size and arrangement of the Project is also out of character of the area.* Siting the building in an east/west direction would be more in keeping with the historic growth of houses and outbuildings into the depth of the lot. Here, the length of the Project building runs parallel to Route 100, rather than back from it in the historical fashion, as does the Cold Hollow Cider Mill.

The Project is located directly across Route 100 from an historic early 19th century brick church listed on the National Register of Historic Sites. Other historic and architecturally significant houses dominate the section of Waterbury Center where the Project is located.

The Board concludes that the Project will have an adverse effect on its surroundings.

2. Undue

Because the Board has determined that the Project will cause an adverse effect, it must decide whether the adverse effect is "undue." Id. The Board will conclude that an adverse effect is undue if it reaches a positive finding with respect to any one of the following factors:

a. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?

b. 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 tne area?

c. 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

8 Interestingly, the Appellant's own witness testified that the white barn owned by the Appellant also erodes the character of the area.

surroundings?

See Black River, supra at 19-20; Ouechee Lakes, supra at 19-20.

a. ***Written Community Aesthetic Standard***

In evaluating whether a project violates a clear written community standard, the Board routinely looks to town plans, open land studies, and other municipal-generated documents to discern whether a clear, written community standard exists and should be applied in the review of the aesthetic impacts of a project. See Ret ***Herbert and Patricia Clark***, Application #1R0785-EB, Findings of Fact, Conclusions of Law, and Order at 35-37 (Apr. 3, 1997); ***Re: Thomas W. Bryant and John P. Skinner d/b/a J. 0. T. 0. Associates,*** #4C0795-EB, Findings of Fact, Conclusions of Law, and Order at 22 (June 26, 1991).

The parties have provided no evidence that Waterbury Town has adopted such a standard for the area in question. Indeed, the Appellant's aesthetics expert testified that there are ***no*** clear written community standards ***in*** the town plan or the bylaws applicable to the Project. Without such evidence, the Board cannot conclude that a clear, written community standard to preserve the aesthetic or scenic beauty of the area is violated by the Project. ***Re: Richard and Barbara Woodard,*** *supra,* at 16; ***Re: Sherman Hollow,*** Application #4C0422-5-EB (Revised Decision), Findings of Fact, Conclusions of Law, and Order at 40 (Nov. 9, 1988).

The Board concludes that the Project does not violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area.

b. ***Shocking*** or ***offensive***

There is little evidence in the Record that could support a finding that the Project would offend the sensibilities of the average person. At most, the Project fails to conform with traditional design in terms of the layout of the site.

While the Project's design layout may be questionable, there is nothing about it that can be termed shocking or offensive. The Project is not on the main highway; it is tucked behind the existing building and only minimally visible to passersby. While the Board might prefer that the building have been designed to be more in the traditional New England style, the Appellant's failure to do so does not form the basis for a denial under Criterion 8.

The Board concludes that the Project is not shocking or offensive.

c. Mitigation

In judging whether the Project tits the character of the area where it is proposed, one would view it from Route 100, as that is the view which the general public will have of the Project. The Project is hidden behind existing buildings along the Route 100 corridor; the existing building, which partially hides the Project building from Route 100, will not be removed or demolished. The Project building will be slightly visible but hard to see from Route 100. Viewing the Project from a vehicle travelling on Route 100 would not cause an impact on aesthetics; only the view of pedestrians crossing Route 100 from the Cold Hollow Cider Mill would be impacted by the aesthetics of the Project building.

The Permittee has proposed to plant two cedar hedges which will screen the Project building from the south and east. All existing trees on the Project Tract will remain. The dark brown building is to be located in the back of the Project Tract to the northwest, in front of a line of deciduous and evergreen trees.

The lighting for the building and the parking lots is downcast, shielded and not excessive. Except for motion-sensitive security lights on the sides and rear of the building, the lights will be turned on only when the business is open.

The Permittees have also taken steps to improve the aesthetics of the existing building by replacing the driveway in front of the existing building with a pedestrian walkway, planting a juniper hedge, and moving the fence back from the road.

By permit condition the Board will prohibit the removal of the existing house and will also require the continued maintenance of proposed plantings. The purpose of these conditions is to assure that the Permittees and their successors in interest will be under a continuing duty to maintain the Project such that it will harmonize with its surroundings. 10 V.S.A. § 6086(c); *Re: Richard and Barbara Woodurd, supra,* at 17 and fn. 1 (The Board may impose permit conditions to alleviate adverse effects that would otherwise be caused by the project and that, if not alleviated, would require a conclusion that a project does not comply with Criterion 8).

With these measures in place, the Board concludes that the Permittees have taken generally available mitigating steps to improve the harmony of the Project with its surroundings. See *Ret Thomas W. Bryant and John P. Skinner, supra,* at 22 (Where an applicant placed height restrictions on homes and trees, proposed plantings to screen the development, proposed covenants to govern future construction and activities on the site,

placed limits on exterior house colors, and retained open space, such applicant had taken the generally available mitigating steps to alleviate the adverse effects of the subdivision on the surrounding area.)

The Board concludes that the Permittees have taken generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings.

The Board therefore concludes that the Project complies with Criterion 8.

D. Criterion 9(K) (public investments)

Before issuing a permit, the Board must find that the Project will not materially jeopardize the safety of, or the public's use of or access to, Route 100. 10 V.S.A. § 6086(a)(9)(K) (public investments). The burden of proof is on Permittees under Criterion 9(K). *Id*. § 6088(a).

> The Board interprets Criterion 9(K) to call for two separate inquiries with respect to public facilities. First, the Board is to examine whether a proposed project will unnecessarily or unreasonably endanger the public investment in such facilities. Second, the Board is to examine 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.
>
> With respect to the second inquiry under Criterion 9(K), the Board interprets this inquiry to be different from 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. Because public facilities include public highways, traffic conditions on those highways may be examined under Criterion 9(K), and if material jeopardy ***or*** interference will be created, the proposed project may be denied. Thus, the inquiry into traffic safety under Criterion 9(K) involves a higher threshold of material jeopardy or material interference, which is absent from the language of Criterion 5. This

conclusion is consistent with the fact that a proposed project may not be denied under Criterion 5 but may be denied under Criterion 9(K).

Re: Swain Development Corp. and Philip Mans, #3W0445-2-EB, Findings of Fact, Conclusions of Law, and Order at 33-34 (Aug. 10, 1990) (emphasis in original).

Here, because the Project meets the lower threshold required under Criterion 5, the Project also satisfies the requirements of Criterion 9(K). The Board notes, however, that Criterion 5 is satisfied only by virtue of the conditions concerning limitations on the number of anticipated trip ends which the Project will create, the requirement that the fence and lawn displays not interfere with drivers' sight lines, and the provision that people living at or visiting the Vanasse home be permitted to use the entire width of the Project's driveway when exiting. Were these conditions not *in* place, the Board's conclusion as to Criterion 9(K) might be different.

VI. ORDER

1. Land Use Permit #5W1305-EB is herety issued.

2. Jurisdiction is returned to the District #5 Environmental Commission.

Dated at Montpelier, Vermont this 19th day of August 1999.

ENVIRONMENTAL BOARD

Marcy Harding

Marcy Harding, Chair
John Drake
George Holland
Sam Lloyd
Robert Opel, Esq.
W. William Martinez
Rebecca Nawrath
Alice Olenick

F:users/johnh/appeals/oldvrmtr/finaldecision.8.18.99.doc