

## **14. Criterion 6 (Educational services)**

### **I. Requirements for Issuance of Permit**

Criterion 6 requires that, before issuing a land use permit, the Commission must find that the proposed project “[w]ill not cause an unreasonable burden on the ability of a municipality to provide educational services.” 10 V.S.A. §6086(a)(6).

The inquiry under Criterion 6 focuses on the reasonableness of the burdens imposed on the local government. *In re St. Albans Group and Wal\*Mart Stores, Inc.*, 167 Vt. 75, 81-83 (1997) (In the interest of general welfare, the police power may be exercised to protect citizens and their businesses in financial and economic matters, and it may be exercised to protect the government itself against potential financial loss); *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, Findings of Fact, Conclusions of Law, and Order at 13 (Sep. 8, 2005).

### **II. Burden of Proof**

The burden of proof is on the opponents under Criterion 6. 10 V.S.A. § 6088(b). As with any criterion, however, the applicant must provide sufficient information for the Board or district commission to make affirmative findings. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep’t of Forests, Parks and Recreation, and Green Mountain Railroad*, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, Findings of Fact, Conclusions of Law, and Order at 88 (Feb. 22, 2002); *Re: Swanton Housing Associates*, #6F0482-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Apr. 24, 1997); *Re: Fair Haven Housing Limited Partnership*, #1R0639-2-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Apr. 16, 1996); *Re: St. Albans Group and Wal\*Mart Stores, Inc.*, #6F0471-EB, Findings of Fact, Conclusions of Law, and Order (Altered) at 50 (Jun. 27, 1995).

### **III. Permit can be conditioned but not denied**

A permit cannot be denied under Criterion 6, but the Commission may impose reasonable conditions and requirements to alleviate any burden created by the proposed project. 10 V.S.A. §6087(b); *Re: Horizon Development Corporation*, #4C0841-EB, Findings of Fact, Conclusions of Law, and Order at 18 (Aug. 21, 1992) (finding that proposed subdivision will not create an unreasonable burden if residential construction is completed in phases). *Re: Dept. of Forests and Parks*, Declaratory Ruling #77 (Sep. 8, 1976) (condition may be imposed on project to compensate town for its resulting burden on school system).

## **IV. Analysis**

### **A. Relevant Information**

The commission may require the applicant to provide a secondary growth study to satisfy criterion 6 when they conclude that a proposed project would accelerate and attract substantial secondary growth. *In re Wal\*Mart Stores, Inc.*, No. 95-398, slip op. at 7 (Vt. 1997).

### **Act 60**

Prior to the passage of Act 60, Commissions would look at both the impacts of a proposed Project on the operating costs (e.g, the need for additional teachers) created by a project and the increased infrastructure (classrooms) necessitated by the project. Because Act 60 cushions operating costs, the focus under Criterion 6 is now on physical improvements that become necessary because of the project.

### **Burden**

The first question that must be answered is the extent to which the project will create burdens on the municipalities. The burden can be ascertained by calculating what would be an appropriate impact fee, considering the following factors: (i) whether new facilities are necessary because of proposed project; (ii) if yes, the costs of such new facilities; and (iii) whether project should be given credits because of other revenues it will generate. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, Findings of Fact, Conclusions of Law, and Order at 87 (Feb. 22, 2002); Re: Swanton Housing Associates, #6F0482-EB, Findings of Fact, Conclusions of Law, and Order at 20 (Apr. 24, 1997); Re: Clarence & Norma Hurteau, #6F0369-EB, Findings of Fact, Conclusions of Law, and Order at 10 (Apr. 24, 1989).*

A burden on a municipality's ability to provide educational services was also created where a project's impact on existing retail stores might have a negative impact on appraised property values (tax base) because educational services depend on the tax base. *In re St. Albans Group and Wal\*Mart Stores, Inc.*, 167 Vt. 75, 81 (1997).

### **Need for Additional Facilities**

To adequately determine whether new facilities are needed because of the project, the district commission needs to know the current conditions at the school, the estimated number of students who will reside in the project, whether improvements are needed to meet public school approval standards, and the aggregate number of students the existing homes in the town will produce in the future. *Re: Swanton*

*Housing Associates*, #6F0482-EB, Findings of Fact, Conclusions of Law, and Order at 21 (Apr. 24, 1997)

### ***Cost of Additional Facilities***

If new facilities are necessary, it is the burden of the opponent to provide evidence concerning the cost of the facilities. *Re: Swanton Housing Associates*, #6F0482-EB, Findings of Fact, Conclusions of Law, and Order at 22 (Apr. 24, 1997).

### ***Credits Based on Other Revenue from the Project***

To aid the district commission in a fair assessment of fiscal impact, the opponent must provide sufficient information concerning what credits should be given based upon other sources of revenue from the project. *Re: Swanton Housing Associates*, #6F0482-EB, Findings of Fact, Conclusions of Law, and Order at 22 (Apr. 24, 1997).

Because a permit may be conditioned by not denied under Criterion 6, once the net burden has been finally calculated, a condition can be incorporated into the permit which requires the applicant to alleviate the burden.

### ***Reasonableness of Burden/Impact***

If the municipality can prove that the project will cause a burden on its ability to provide schooling for its children, the second question is the reasonableness of that burden. The Commission considers whether the burden on the town is unreasonable in light of (i) the ability of the community as a whole to absorb the burden, (ii) other burdens from developments which have been accepted or not accepted as reasonable by the town or other communities, and (iii) other measures which may be taken, or factors which may exist, to mitigate the burden. *Re: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Dep't of Forests, Parks and Recreation, and Green Mountain Railroad*, #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, #2S0351-25R-EB, #2S0351-31-EB, #2S0351-25R-EB, Findings of Fact, Conclusions of Law, and Order at 88 (Feb. 22, 2002); *Re: Clarence & Norma Hurteau*, #6F0369-EB, Findings of Fact, Conclusions of Law, and Order at 12 (Apr. 24, 1989). And see, *In re St. Albans Group and Wal\*Mart Stores, Inc.*, 167 Vt. 75, 87 (1997) (proper for Board to conclude that application failed Criterion 6 where burden on educational services established by evidence showing that project would add six students to area schools and applicant failed to produce evidence of plan to reduce or eliminate burden, even though applicant does not bear burden of proof on Criterion 6).

### ***Ability of Community to Absorb Burden***

Assessing the burden on the town can be done through the same calculation as would be made to assess the impact fee. *Re: Clarence & Norma Hurteau, #6F0369-EB, Findings of Fact, Conclusions of Law, and Order at (Apr. 24, 1989).*

In *Swanton Housing* at 23-24, the Board concluded that the opponents had provided no evidence to indicate that the community was unable to absorb a burden that was 1.63% (before State aid) and 2.85% (after State aid) of the town's school budget, 2.05% of the town's school population, and 1.11% of the total town population. In *Hurteau* at 12, the Board found that the burden resulting from the proposed development was reasonable where it represented approximately 4% of the town's school budget and where the increase in students was 8%. The *Hurteau* conclusions were based in part on the fact that the development would be phased over 10 years.

### ***Burdens from Other Developments***

In order to assess the reasonableness of a project's fiscal impact under Criterion 6, the Commission must also determine whether or not fiscal burdens from other developments have been accepted as reasonable. *Re: Swanton Housing Associates, #6F0482-EB, Findings of Fact, Conclusions of Law, and Order at 24 (Apr. 24, 1997); Re: Clarence & Norma Hurteau, #6F0369-EB, Findings of Fact, Conclusions of Law, and Order at 12 (Apr. 24, 1989).*

### ***Mitigating the Burden***

In order to assess the reasonableness of a project's fiscal impact under Criterion 6, the Commission must also determine whether other measures might be taken, or whether other factors may exist, that mitigate the impact. Swanton Housing at 24; Hurteau at 12.

### ***Appropriateness of Impact Fee Assessment***

The Commission can determine that an impact fee is an appropriate remedy. An impact fee must be fair, spent within a reasonable time, and spent only to remedy the impacts for which it is levied. [EB#778]; *Re: Swanton Housing Associates, #6F0482-EB, Findings of Fact, Conclusions of Law, and Order at 24 (Apr. 24, 1997); Re: Fair Haven Housing Limited Partnership, #1R0639-2-EB, Findings of Fact, Conclusions of Law, and Order at 15 (Apr. 16, 1996); Clarence & Norma Hurteau, #6F0369-EB, Findings of Fact, Conclusions of Law, and Order at 12 (Apr. 24, 1989).* [EB #369]

An impact fee cannot be assessed on the basis of a school expansion unless the expansion is, at least in part, directly attributable to the project. 24 V.S.A. §§ 5200-5206; *Re: Swanton Housing Associates, #6F0482-EB, Findings of Fact, Conclusions of*

Law, and Order at 19 (Apr. 24, 1997). The party affirmatively seeking an impact fee must bear the burden of coming forward with adequate information for fair fee assessment. *Re: Clarence & Norma Hurteau*, #6F0369-EB, Findings of Fact, Conclusions of Law, and Order at 13 (Apr. 24, 1989). See, *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, Findings of Fact, Conclusions of Law, and Order at 13 (Sep. 8, 2005) (no impact fee warranted under Criterion 6 where school enrollments are declining and school closings are possible even with proposed project).

An impact fee permit condition must be reasonable. *Re: Fair Haven Housing Limited Partnership and McDonald's Corporation*, #1R0639-2-EB (Apr. 16, 1996), *aff'd*, *In re Fair Haven Housing Limited Partnership*, (Vt. S. Ct. Unpublished)

Last Revised: October 16, 2006

J:\ADMIN\TRAINING\MANUAL\final\6final.doc