



FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

State of Vermont

Natural Resources Board

District «District» Environmental Commission

10 Baldwin Street

Montpelier, VT 056 Level 2 Floor Plan33-3201

<https://nrb.vermont.gov/>

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CASE NO: 9A0376

LAWS/REGULATIONS INVOLVED

10 V.S.A. §§ 6001 - 6111 (Act 250)

Vergennes Village, LLC
2748 Ferry Road
Charlotte, Vermont 05445

and

Donald B. Clark Sr. and Theresa R. Clark Revocable Trust
6 Hopkins Road
Vergennes, Vermont 05491

I. INTRODUCTION

On September 14, 2020, Vergennes Village, LLC, 2748 Ferry Road, Charlotte, Vermont 05445 and Donald B. Clark Sr. and Theresa R. Clark Revocable Trust, 6 Hopkins Road, Vergennes, Vermont 05491 filed application 9A0376 for a project generally described as **the expansion of an existing senior care facility from 11 residential units to 51 residential units** (the "Project"). The tracts of land consist of 0.89 acres. The Applicant's legal interest is ownership in fee simple described in a deed recorded on January 10, 2019 in Book 83 pages 544-546 of the land records of Vergennes, Vermont and a deed recorded on October 26, 1971 in Book 23 pages 394-397 of the land records of Vergennes, Vermont.

The application, first submitted on June 16, 2020, was determined to be incomplete under Act 250 Rule 10(D) for reasons stated in letters from the State Coordinator to the Applicant dated June 25, 2020, and September 1, 2020. The application was deemed complete on September 14, 2020, upon receipt of the required supplemental information.

On September 21, 2020, a notice of the application was circulated to statutory parties, adjoining parties and the "Downtown Agencies" in accordance with 10 V.S.A. § 6086b and Act 250 Rule 22. On October 26, 2020, timely requests for party status and a hearing were received from adjoining landowners Donald, Julianne, Heather, and Rennie Peddie and Edward and Beverly Biello. On November 17, 2020, a notice of a site visit was circulated to statutory parties, adjoining party

status petitioners, and the “Downtown Agencies” in accordance with 10 V.S.A. § 6086b and Act 250 Rule 22. The Commission conducted a site visit on y December 2, 2020. On December 18, 2020, Edward and Beverly Biello formally withdrew their hearing request. On January 8, 2021, Donald, Julianne, Heather, and Rennie Peddie formally withdrew their hearing request. The Commission completed its deliberations on January 27, 2021.

As set forth below, the Commission finds that the Project complies with 10 V.S.A. § 6086(b) (Act 250).

II. JURISDICTION

Jurisdiction attaches because the Project constitutes a development pursuant to 10 V.S.A. 6001(3)(A)(iv). As the Project is located entirely within the City of Vergennes’ designated downtown development district, it qualifies for review under 10 V.S.A. § 6086b, Downtown Development; Findings in lieu of obtaining an Act 250 Land Use Permit.

III. PARTY STATUS AND FRIENDS OF THE COMMISSION

A. Parties by Right

Parties by right to this application pursuant to 10 V.S.A § 6085(c)(1.)(A)-(D) are:

1. The Applicant by Michael C. Koch and David S. Marshall, P.E. Civil Engineering Associates, Inc.
2. Landowners Vergennes Village, LLC and Donald B. Clark, Sr. and Theresa R. Clark Revocable Trust.
3. The municipality of Vergennes.
4. The Vergennes Planning Commission.
5. The Addison County Regional Planning Commission.
6. The State of Vermont Agency of Natural Resources (ANR) through an Entry of Appearance by Senior Planner Jennifer Mojo dated October 22, 2020.
7. Vermont Department for Historic Preservation (VDHP) through an Entry of Appearance by Historic Resources Specialists Elizabeth Peebles and Yvonne Benney Basque dated October 23, 2020.
8. The Vermont Agency of Transportation (VTrans), through an Entry of Appearance by Christopher Clow, Transportation Engineer dated September 30, 2020.

B. Interested Parties

The following persons timely petitioned for party status pursuant to 10 V.S.A § 6085(c)(1)(E):

Edward and Beverly Biello under Criteria 8 (Aesthetics) and 5(A) (Traffic).

Donald, Julianne, Heather, and Rennie Peddie under Criterion 8 (Aesthetics).

However, on December 18, 2020, Edward and Beverly Biello formally withdrew their hearing request, and on January 8, 2021, Donald, Julianne, Heather, and Rennie Peddie formally withdrew their hearing request. Therefore, no hearing was held on the matter, and the issue of party status for the Biellos and the Peddies likewise was not taken up by the Commission.

IV. OFFICIAL NOTICE

Under 3 V.S.A. § 810(4) of the Administrative Procedure Act (“APA”), notice may be taken of judicially cognizable facts in contested cases. See 10 V.S.A § 6007(c) and 3 V.S.A. § 801(b)(2). Under § 810(1) of the APA, “[t]he rules of evidence as applied in civil cases . . . shall be followed” in contested cases. Under the Vermont Rules of Evidence, “(a) judicially noticed fact must be one not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” V.R.E. 201(b); See *In re: Handy*, 144 Vt.601, 613 (1984).

The Commission may take official notice of a judicially cognizable fact whether requested or not, and may do so at any stage of the proceeding. See V.R.E. 201(c) and (f). Under 3 V.S.A. § 809(g), the Commission may make findings of fact based on matters officially noticed. A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e). The Commission takes official notice of the Vergennes Municipal Development Plan 2020 – 2028, Adopted by the Vergennes City Council on March 10, 2020, and Approved by Addison County Regional Planning Commission on September 9, 2020.

Accordingly, official notice is hereby taken of the aforementioned Municipal Plan subject to the filing of an objection on or before thirty days from the date of this decision pursuant to Act 250 Rule 6.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the application, Exhibits 001– 079, and other evidence in the record. Findings made in this decision are not limited to the specific criterion in which they appear, and may apply to other sections of the decision.

Criterion 1 - Air Pollution:

The following exhibits shall serve as Findings of Fact under this criterion:

1. 001 Application
2. 036 Blasting Protocol

3. 057 Cover Letter 10/20/20
4. 059 ANR Comments

Conclusions of Law

The Commission has concerns about the potential noise impacts of exterior and interior construction work on residents of the facility and adjoining property owners. The Commission will include special conditions on construction hours in its Order (Section VII). As conditioned, the Commission concludes that this Project will not result in undue air pollution.

Criterion 1 - Water Pollution

The following exhibits shall serve as Findings of Fact under this criterion:

5. 001 Application
6. 059 ANR Comments

Conclusions of Law

The Commission concludes that the Project will not result in undue water pollution.

Criterion 1(A) - Headwaters:

The following exhibits shall serve as Findings of Fact under this criterion:

7. 001 Application
8. 059 ANR Comments

Conclusions of Law

The Commission concludes that this Project is not located in a headwaters area as defined by this section because it is not situated in a drainage area of 20 square miles or less, is not above the elevation of 1,500 feet, is not in the watershed of a public water supply, and is not in an aquifer recharge area.

The Project complies with Criterion 1(A) (Headwaters).

Criterion 1(B) - Waste Disposal:

The following exhibits shall serve as Findings of Fact under this criterion:

9. 001 Application
10. 004B Demolition Plan 12/15/20
11. 005C Proposed Conditions Site Plan 12/15/20
12. 006C Proposed Grading Plan 12/15/20
13. 007C Utility Plan 12/15/20
14. 010B EPSC Plan 12/15/20, 011 EPSC Specifications and Details
15. 014A C4.1 Details 12/15/20, 015 C4.2 Details, 016 C4.3 Details
16. 017 C5.0 Specifications, 018 C5.1 Specifications, 019 C5.2 Specifications, 020 C5.3 Specifications, 021 C5.4 Specifications, and 022 C5.5 Specifications
17. 039 Water and Sewer Design Flows
18. 040 Sewer Allocation
19. 043 Stormwater CGP 3-9020
20. 044 WW-9-2788
21. 045 Waste Reduction Plan
22. 050 Cover Letter 8/26/20
23. 051 Cover Letter 9/10/20
24. 052 Basement Level Floor Plan
25. 053 Ground Level Floor Plan
26. 054A Level 1 Floor Plan 9/11/20
27. 056 Level 2 Floor Plan
28. 057 Cover Letter 10/20/20
29. 059 ANR Comments
30. 070 Response Letter to VDHP

Conclusions of Law

The ANR permits create a presumption pursuant to Act 250 Rule 19 that the disposal of wastes through the installation of wastewater and waste collection, treatment and disposal systems authorized by the permits will not result in undue water pollution. Technical determinations made by ANR in issuing the permits are entitled to substantial deference. 10 V.S.A § 6086(d).

The Project will meet all applicable Department of Environmental Conservation (DEC) regulations on waste disposal, and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells. In addition, the Project will not cause undue water pollution.

The Commission will include special conditions on floor drains in its Order (Section VII). As conditioned, the Commission concludes that the Project complies with Criterion 1(B) (Waste Disposal).

Criterion 1(C) - Water Conservation:

The following exhibits shall serve as Findings of Fact under this criterion:

31. 001 Application
32. 059 ANR Comments

Conclusions of Law

The Project design has considered water conservation, uses the best available technology for water conservation, and provides for continued efficient operation of these systems.

The Project complies with Criterion 1(C).

Criterion 1(D) - Floodways:

The following exhibits shall serve as Findings of Fact under this criterion:

33. 001 Application
34. 034 Location Map
35. 059 ANR Comments

Conclusions of Law

The Commission concludes that the Project will not involve the development or subdivision of lands within any floodway or floodway fringe.

The Project complies with Criterion 1(D).

Criterion 1(E) - Streams:

The following exhibits shall serve as Findings of Fact under this criterion:

- 36. 001 Application
- 37. 034 Location Map
- 38. 059 ANR Comments

Conclusions of Law

The Commission concludes that the Project is not on or adjacent to a stream.

The Project complies with Criterion 1(E).

Criterion 1(F) - Shorelines:

The following exhibits shall serve as Findings of Fact under this criterion:

- 39. 001 Application
- 40. 034 Location Map
- 41. 059 ANR Comments

Conclusions of Law

The Commission concludes that this Project will not be located on any shoreline.

The Project complies with Criterion 1(F).

Criterion 1(G) - Wetlands:

The following exhibits shall serve as Findings of Fact under this criterion:

- 42. 001 Application
- 43. 034 Location Map

44. 059 ANR Comments

Conclusions of Law

As there are no wetlands on the Project tract, the Commission concludes that the Project complies with Criterion 1(G).

Criteria 2 and 3 – Water Availability and Impact on Existing Water Supply:

The following exhibits shall serve as Findings of Fact under this criterion:

- 45. 001 Application
- 46. 039 Water and Sewer Design Flows
- 47. 040 Sewer Allocation
- 48. 041 Water Allocation
- 49. 044 WW-9-2788
- 50. 059 ANR Comments

Conclusions of Law

The ANR Wastewater Management Division issued Permit WW-9-2788, which creates a presumption pursuant to Act 250 Rule 19 that the Project has sufficient water available for its reasonably foreseeable needs and complies with Criterion 2. No evidence was presented to rebut the presumption or challenge the technical determinations made by ANR.

The Commission concludes that there is sufficient water available to meet the reasonably foreseeable needs of this Project. The Project complies with Criterion 2.

The Project will not place an unreasonable burden on an existing water supply. The Project complies with Criterion 3.

Criterion 4 - Soil Erosion:

The following exhibits shall serve as Findings of Fact under this criterion:

- 51. 001 Application
- 52. 006C Proposed Grading Plan 12/15/20

53. 010B EPSC Plan 12/15/20
54. 011 EPSC Specifications and Details
55. 016 C4.3 Details
56. 017 C5.0 Specifications
57. 018 C5.1 Specifications
58. 022 C5.5 Specifications
59. 043 Stormwater CGP 3-9020
60. 059 ANR Comments

Conclusions of Law

The ANR stormwater permit creates a presumption under Rule 19(E)(6) that stormwater runoff during construction authorized by the permit will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water. In addition, technical determinations are entitled to substantial deference. No evidence was presented to rebut the presumption or challenge the technical determinations made by ANR.

The Commission concludes that the construction of the Project will not cause unreasonable soil erosion or a reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

The Project complies with Criterion 4.

Criterion 5 - Transportation:

The following exhibits shall serve as Findings of Fact under this criterion:

61. 001 Application
62. 005C Proposed Conditions Site Plan 12/15/20
63. 006C Proposed Grading Plan 12/15/20
64. 007C Utility Plan 12/15/20
65. 008A C2.3 Access Profile 12/15/20

66. 013A C4.0 Details 12/15/20
67. 037 Traffic Generation
68. 051 Cover Letter 9/10/20
69. 055 Cover Letter 9/14/20
70. 058 VTrans Comments
71. 068 Cover Letter 12/17/20

Conclusions of Law

Criterion 5(A) requires that the Project “will not cause unreasonable congestion or unsafe conditions with respect to use of the highways.” See 10 V.S.A § 6086(a)(5)(A). Notwithstanding the requirement for a positive finding, the Commission may not deny a permit solely on the reasons set forth under Criterion 5. See 10 V.S.A § 6087(b). The Commission may, however, attach reasonable conditions to alleviate traffic burdens. *Id.*

Criterion 5(B) requires that a project, “as appropriate . . . incorporate transportation demand management strategies and provide safe access and connections to adjacent lands and facilities and to existing and planned pedestrian, bicycle, and transit networks and services.” 10 V.S.A § 6086(a)(5)(B). In determining what is appropriate for a particular project, the Commission considers whether the measure is reasonable, “given the type, scale and transportation impacts” of the proposed project. *Id.*

The Commission concludes that the Project will not cause unreasonable congestion or unsafe conditions with respect to use of roads, highways, waterways, railways, airports, and other existing or proposed means of transportation.

The Project complies with Criterion 5(A).

The Project incorporates all appropriate transportation measures and complies with Criterion 5(B).

Criterion 8 - Aesthetics, Historic Sites and Rare and Irreplaceable Natural Areas:

FINDINGS OF FACT

Findings of Fact: Aesthetics, Scenic or Natural Beauty. The following exhibits shall serve as Findings of Fact under this criterion:

72. 001 Application
73. 005C Proposed Conditions Site Plan 12/15/20
74. 009A C2.4 Proposed Lighting Plan
75. 013A C4.0 Details 12/15/20
76. 023A A1.1 Building Elevation 12/16/20, 024A A1.2 Building Elevation 12/16/20, 025A A1.3 Building Elevation 12/16/20, 026A A1.4 Building Elevation 12/16/20
77. 027A Perspective 1 12/17/20, 028A Perspective 2 12/17/20, 029A Perspective 3 12/17/20, 030A Perspective 4 12/17/20, 031A Aerial View 12/17/20
78. 032 L100 Landscape Plan
79. 033 Site Lighting Cut Sheets
80. 057 Cover Letter 10/20/20
81. 068 Cover Letter 12/17/20
82. 069 Perspective 2 - No Trees 12/17/20
83. 070 Response Letter to VDHP
84. All new development and redevelopment within the HN (Historic Neighborhood) district must reflect the historic residential character and development pattern of existing neighborhoods, including density, lot coverage, setbacks, footprints, scale, mass, and height. Vergennes Municipal Development Plan, page 61.
85. All new development and redevelopment shall uphold and respect the character-defining features and historic integrity of homes in this district including small lots, minimal setbacks, yard depths, and tree-lined sidewalks. Responsible historic preservation practices should be promoted. The demolition of historic structures is strongly discouraged and should be considered only as a last resort if no other feasible option is possible. It is specifically not the intent of this plan to regulate windows, siding, roofs, color, etc. Vergennes Municipal Development Plan, page 61.

Findings of Fact: Historic Sites. The following exhibits shall serve as Findings of Fact under this criterion:

86. 001 Application

87. 004B Demolition Plan 12/15/20
88. 005C Proposed Conditions Site Plan 12/15/20
89. 023A A1.1 Building Elevation 12/16/20, 024A A1.2 Building Elevation 12/16/20, 025A A1.3 Building Elevation 12/16/20, 026A A1.4 Building Elevation 12/16/20
90. 027A Perspective 1 12/17/20, 028A Perspective 2 12/17/20, 029A Perspective 3 12/17/20, 030A Perspective 4 12/17/20, 031A Aerial View 12/17/20
91. 038 Archaeological Resources Assessment
92. 048 VDHP Determination of Eligibility 40 North Street
93. 060 VDHP Entry of Appearance
94. 061 Applicant Response to VDHP 10/23/20
95. 064 Applicant Response to VDHP Request for Supplemental Information 11/5/20
96. 068 Cover Letter 12/17/20
97. 069 Perspective 2 - No Trees 12/17/20
98. 070 Response Letter to VDHP
99. 071 Phase 1 End of Field Cover Letter
100. 072 Phase 1 End of Field Letter Report
101. 073 VDHP Comments 12/18/20
102. On October 22, 2020, the Vermont Advisory Council on Historic Preservation determined the building at 40 North Street is not eligible for the State Register of Historic Places. However, the building at 34 North Street is listed as a contributing resource to the Vergennes Historic District which is listed in the National Register of Historic Places and, therefore, is considered a "historic site" for purposes of Act 250. Exhibits 048 VDHP Determination of Eligibility 40 North Street and 073 VDHP Comments 12/18/20
103. The Vermont Division for Historic Preservation (VDHP) has consulted with the Applicant's architect and historic preservation consultant on revisions or treatments that could be incorporated into the plans to minimize and/or mitigate the Project's effects on historic structures, districts, and landscapes. Exhibit 073 VDHP Comments 12/18/20

104. The Applicant has agreed to document the building at 34 North Street according to VDHP's Historic Resource Documentation Package Guidelines and made revisions to the plans as described in 106 Associates Memorandum of October 30, 2020, and as shown in the revised plan set dated 12/16/2020. Exhibits 070 Response Letter to VDHP and 073 VDHP Comments 12/18/20
105. The Applicant retained the University of Vermont Consulting Archaeology Program (UVM CAP) to conduct a Phase I Site Identification for the proposed Project. The resulting End of Field letter report, dated December 15, 2020, found no cultural resources or historic structural remains within the Project area. Based on these results, the UVM CAP recommended that the Project will have no effect on archaeological resources. Exhibits 071 Phase 1 End of Field Cover Letter and 072 Phase 1 End of Field Letter Report.
106. It is the opinion and recommendation of VDHP that the proposed Project as depicted in the revised plans will have No Undue Adverse Effect to historic sites within the Vergennes Village Historic District. Exhibit 073 VDHP Comments 12/18/20

Findings of Fact: Rare and Irreplaceable Natural Areas. The following exhibits shall serve as Findings of Fact under this criterion:

107. 001 Application
108. 034 Location Map
109. 035 Vergennes Designated Downtown Area Map
110. 059 ANR Comments

CONCLUSIONS OF LAW

Prior to granting a permit, the Commission must find that the subdivision or development under Criterion 8 "will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." 10 V.S.A § 6086(a)(8). This Project involves concerns under Criterion 8 related to aesthetics, noise, and historic sites.

Conclusions of Law: Aesthetics and Scenic or Natural Beauty

The Commission uses a two-part test to determine whether a Project meets the portion of Criterion 8 relating to aesthetics and natural and scenic beauty. First, it determines whether the Project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. *In re Rinkers, Inc., No. 302-12-08 Vtec, Decision and Order at 12 (Vt. Env'tl. Ct. May 17, 2010)* (citations omitted); see also, *Re: Quechee Lakes Corporation, #3W0411-EB and #3W043 Stormwater*

CGP 3-90209-EB, Findings of Fact, Conclusions of Law, and Order at 18-20 (Vt. Env'tl. Bd. Nov. 4, 1985); In re Halnon, 174 Vt. 514 (mem.) (applying Quechee test in Section 248 context).

The burden of proof under Criterion 8 is on any party opposing the Project, 10 V.S.A § 6088(b), but the applicant must provide sufficient information for the Commission to make affirmative findings. *In re Rinkers, No. 302-12-08 Vtec, Decision and Order at 10-11 (Vt. Env'tl. Ct. May 17, 2010)* (citing *Re: Susan Dollenmaier, #3W0125-5-EB, Findings, Conclusions and Order at 8 (Vt. Env'tl. Bd. Feb. 7, 2005)*; *In re Eastview at Middlebury, Inc., No. 256-11-06 Vtec, slip op. at 5 (Vt. Env'tl. Ct. Feb. 15, 2008)*, *aff'd, 2009 VT 98*. "Either party's burden, however, may be satisfied by evidence introduced by any of the parties or witnesses . . ." *In re McShinsky, 153 Vt. 586, 589 (1990)* (quoting *In re Quechee Lakes Corp., 154 Vt. 543, 553-54 (1990)*).

1. Adverse Effect

To determine whether the Project will have an adverse aesthetic effect, the Commission looks to whether the Project will "fit" the context in which it will be located. In making this evaluation, the Commission examines a number of specific factors, including the following: the nature of the project's surroundings; the compatibility of the project's design with those surroundings; the suitability of the colors and materials selected for the project; the locations from which the project can be viewed; and the potential impact of the project on open space. *Quechee Lakes Corp et al. #3W0411-EB and #3W043 Stormwater CGP 3-90209-EB Findings of Fact, Conclusions of Law and Order at 18 (Vt. Env'tl. Bd., Nov. 4, 1985)* (cited in *Rinkers, No. 302-12-08 Vtec, Decision and Order at 12-13*).

The Project is located within a mapped Downtown District. This high-density neighborhood is characterized by a number of historic homes on small lots, with short setbacks and yard depths, and tree-lined sidewalks. Pedestrian access to the downtown is easy from this neighborhood. The existing structure, built in 1865 in the Italianate style, is surrounded by a mix of lawn, a variety of trees and shrubs, and paved parking. From the perspective of a person standing on the sidewalk in front of the existing structure, the ground surface generally slopes away from the viewer toward the rear of the Project Tract. The majority of the new construction will occur to the rear of the Project Tract, creating less visual impact on the streetscape.

The Project involves significant enlargement and alteration of a historic structure. The 54,000-square foot building addition will range from two to four stories in height, and will be located within approximately 40 feet of three adjoining homes.

The Project will create noise impacts during construction.

Because of its size and proximity to existing homes, as well as the noise created during construction, this Project will have some adverse aesthetic impact. Accordingly, we must determine whether that impact is undue.

2. *Undue Adverse Effect*

An adverse aesthetic impact is undue if any of the following is true: (1) the Project violates a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area; (2) the Project offends the sensibilities of the average person, or is offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area; or (3) the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings. *In re Rinkers*, 302-12-08 Vtec, *Decision and Order* at 15 (May 22, 2010) (citing *In re: Times & Seasons, LLC*, 2008 VT 7, ¶ 8; *In re McShinsky*, 153 Vt. at 592).

(a) *Clear, Written Community Standard*

In evaluating whether a project violates a clear written community standard, the Commission looks to town plans, open land studies, and other municipal documents to discern whether a clear, written community standard exists to be applied in review of aesthetic impacts of a project. *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, *Findings of Fact, Conclusions of Law, and Order* at 18 (Vt. Envtl. Bd. 4/9/02). A clear, written community standard must be intended to preserve the aesthetics or scenic beauty of the area where the project is located. *Re: Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action*, #2WO694-I-EB, *Findings of Fact, Conclusions of Law, and Order* at 36 (Vt. Envtl. Bd. 12/21/00). A plan which states "consideration should be made . . ." is not a clear, written community standard. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, *Findings of Fact, Conclusions of Law, and Order* at 81 (Vt. Envtl. Bd. Dec. 8, 2000).

The Commission has reviewed relevant portions of the municipal plan. The Plan identified several standards relating to the aesthetics of the area in which the Project is located. Several goals or objectives are relevant to this Project (See Findings of Fact 84 and 85.) The Commission finds that the Project complies with the Municipal Plan's language. Therefore, the proposed Project does not violate a clear community standard.

(b) *Offensive or Shocking Character*

Criterion 8 "was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from their property will remain the same forever." *Re: Okemo Mountain, Inc.* #2S035 *Vergennes Designated Downtown Area Map1-S-EB Findings of Fact, Conclusions of Law, and Order* (Dec. 18, 1986). Criterion 8 was intended to ensure that as development occurs, reasonable consideration will be given to visual impacts on neighboring landowners, the local community, and on the special scenic resources of Vermont. *Rinkers, No. 302-12-08 Vtec, Decision and Order* at 11-12; *Horizon Development Corp.*, #4C0841-EB, *Findings of Fact, Conclusions of Law, and Order* (Vt. Envtl. Bd. Aug. 21, 1992).

The Commission finds that the building addition is not out of character with its surroundings. The building expansion has been designed as a series of connected buildings with similar design features, but less ornate than the historic front building, so as not to overwhelm it. The proposed building expansion has been designed to break up the mass, so that it appears more as two large buildings connected by a single hallway. Two of the additions will feature a flat roof, while one will feature a hipped roof. Additionally, the mass of the proposed addition has been broken up through the use of differing materials and color schemes. The exterior of the building addition uses glazing of the size and character of nearby residential homes as a means of minimizing impacts on the aesthetics of the neighborhood.

In addition, the Commission finds that the existing historic building will be restored as part of this Project, including the historic main entry facing the street. The proposed building addition has been designed to reflect the residential buildings immediately to the north. The Project proposes to expand the current structure in the direction away from the street, so that the fabric of the historic character of the structures along North Street is preserved.

The Commission finds that the aforementioned elements of the Project help to mitigate the adverse impact on aesthetic resources, and the Project does not so significantly diminish the scenic qualities of the area as to be offensive or shocking to the sensibilities of the average person. Given all of these considerations, we find that the Project is not offensive or shocking.

(c) Generally Available Mitigating Steps

The question under this factor of the aesthetics analysis is whether the Applicant has “failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings.” *In re Times & Seasons*, 2008 VT 7, ¶ 8. If a project does have an adverse aesthetic effect, the Applicant must “take generally available mitigating steps to reduce the negative aesthetic impact of a particular project,” otherwise, “[f]ailure to take advantage of available alternatives may render an aesthetic impact unduly adverse.” *In re Stokes Communications Corp.*, 164 Vt. 30, 39 (1995) (quoted in *In re Rinkers*, 302-12-08 Vtec, Decision and Order at 19 (May 22, 2010)). A generally available mitigating step “is one that is reasonably feasible and does not frustrate [either] the project’s purpose or Act 250’s goals.”

To mitigate the aesthetic impacts of the Project, the Applicant modified the final design to address concerns from neighbors. To preserve existing views from adjacent houses, the Applicant pulled back the east elevation upper stories and created open terraces in their place. The Applicant also modified grading on the east side of the addition to reduce the apparent scale of the building’s east elevation as directly visible from North Street. These changes diminish the Project size as viewed from the south and east, and improve neighbors’ sightlines to the northwest.

To address Commission concerns about construction noise, the Applicant has agreed to accept limits on construction hours, including interior construction. The Commission will include special conditions on construction hours in its Order (Section VII).

Given all of these considerations, we find that the Applicant has taken the available mitigating steps to minimize the adverse impacts of the proposed Project on the aesthetics and scenic or natural beauty of the area.

(d) Conclusion

Based on the above, the Commission concludes that the Project, as conditioned, will not have an undue adverse effect on the aesthetics or natural and scenic beauty of the area.

Conclusions of Law: Historic Sites

The Commission uses a three-part test to determine whether the Project meets the portion of Criterion 8 relating to historic sites. The Commission determines:

- Whether the Project site is or contains a historic site;
- Whether the proposed Project will have an adverse effect on the historic site; and
- Whether the adverse effect will be undue.

Re: Steven L. Reynolds and Harold and Eleanor Cadreact, #4C1117-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Vt. Env'tl. Bd. May 27, 2004); Re: Manchester Commons Associates, #8B050 Cover Letter 8/26/200-EB Findings of Fact, Conclusions of Law, and Order at 18 (Vt. Env'tl. Bd. Sept. 29, 1995).

1. Whether the proposed project site is or contains a historic site.

“Historic site” is defined as “any site, structure, district or archeological landmark which has been officially included in the National Register of Historic Places and/or the State Register of Historic Places or which is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant.” 10 V.S.A § 6001(9).

Listing on the National and State Registers is a question of fact. *Re: Manchester Commons, supra, at 19.* If a structure is listed on the State Register as a historic site, Act 250 has no discretion to declare such structure not to be historic. *Re: Stonybrook Condominium Owners Association, Declaratory Ruling #385, Findings of Fact, Conclusions of Law, and Order at 9 (Vt. Env'tl. Bd. Sep. 18, 2001); Re: OMYA, Inc. and Foster Brothers Farm, Inc., #9A0107-2-EB, Findings of Fact, Conclusions of Law, and Order at 39 (Vt. Env'tl. Bd. May 25, 1999), aff'd, OMYA Inc. v. Town of Middlebury, 171 Vt. 532 (2000).*

Even if a site has not been listed on the National or State Register, 10 V.S.A § 6001(9) allows the Commission to declare it to be a “historic site” if it is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant. Accordingly, the Commission must consider whether such testimony establishes a site, structure, district, or archeological landmark as historically significant. The Commission is not bound by the opinion provided by the Council, but rather, must weigh the testimony and make the determination. *Re: Manchester Commons, supra, at 20.*

The Commission concurs with VHDP’s testimony that the building at 40 North Street is not eligible for the State Register of Historic Places. We conclude that 40 North Street does not qualify as a “historic site” for purposes of Act 250. However, the building at 34 North Street is listed as a contributing resource to the Vergennes Historic District, and therefore, is considered a “historic site.”

2. Whether the proposed Project will have an adverse effect on the historic site

The next question is whether the Project will have an adverse effect on the historic site, or whether the Project is in harmony with or fits the historic context of the site.

Important guidelines in evaluating this fit include the following: (1) whether there will be physical destruction, damage, or alteration of those qualities which make the site historic, such as an existing structure, landscape, or setting; and (2) whether the proposed project will have other effects on the historic structure, landscape, or setting which are incongruous or incompatible with the site’s historic qualities, including, but not limited to, such effects as isolation of an historic structure from its historic setting, new property uses, or new visual, audible or atmospheric elements. *Re: Middlebury College, #9AO177-EB, Findings of Fact, Conclusions of Law and Order at 10 (Vt. Envtl. Bd. Jan. 26, 1990); cited in Re: OMYA, Inc. and Foster Brothers Farm, Inc., #9A0107-2-EB, Findings of Fact, Conclusions of Law, and Order at 39 (Vt. Envtl. Bd. May 25, 1999), aff’d, OMYA Inc. v. Town of Middlebury, 171 Vt. 532 (2000).*

The Project involves significant enlargement and alteration of a historic structure. The Project will introduce significant new visual elements, including a large multi-story addition and an expansion of pavement and parking areas associated with the property’s expanded use. Therefore, the Commission concludes that the proposed impact on the historic site will be adverse.

3. Whether the adverse effect will be undue.

An adverse effect is undue if any of the following factors exists:

1. the applicant has failed to take generally available mitigating steps which a reasonable person would take to preserve the character of the historic site;

2. the proposed project will interfere with the ability of the public to interpret or appreciate the historic qualities of the site;
3. the cumulative effects on historic qualities of the site by the various components of a proposed project, when taken together, are so significant that they create an unacceptable impact;
4. the project violates a clear, written community standard which is intended to preserve the historic qualities of the site.

Middlebury College, supra at 10; cited in Re: OMYA, Inc. and Foster Brothers Farm, Inc., #9A0107-2-EB, Findings of Fact, Conclusions of Law, and Order at 40 (May 25, 1999), aff'd, OMYA Inc. v. Town of Middlebury, 171 Vt. 532 (2000); see also, Manchester Commons, supra at 22.

The Project includes construction of a new addition to the rear of an existing historic building within a historic district. The Applicant's agreement to work with VDHP to develop and incorporate plan revisions and treatments into the design of 34 North Street and its documentation of 34 North Street according to VDHP's Historic Resource Documentation Package Guidelines constitute appropriate mitigation for the adverse effect. The Commission concludes that the Applicant has taken generally available mitigating steps which a reasonable person would take to preserve the character of the historic site.

The Project's large mass, expanded paving, and close proximity to other historic resources will have a significant spatial impact on its surroundings. However, that impact will not be so great as to interfere with the ability of the public to interpret or appreciate the historic qualities of the site. The historic structure already has a non-historic addition on the rear and a large, paved driveway and parking area. The proposed addition will be down gradient from street level, obscuring views of much of the addition from North Street. Therefore, the cumulative effects of the various components of the Project on the historic qualities of the site, when taken together, are not so significant that they create an unacceptable impact.

The Project's architectural design reflects the historic residential character and development pattern of the surrounding neighborhood and respects the character-defining features and historic integrity of homes in the Historic District. The Applicant proposes dense development with maximum lot coverage and minimal setbacks. The Project has been designed to reduce visual massing and height to be harmonious with nearby structures. The Applicant has chosen to preserve, rather than demolish, the existing historic structure. The Commission has no evidence that the Project violates any clear, written community standard that is intended to preserve the historic qualities of the Vergennes Historic District.

To ensure that the Applicant implements the design revisions or treatments requested by VDHP and the documentation of 34 North Street according to VDHP's Historic Resource Documentation Package Guidelines, the Commission will include a condition in its Order

(Section VII). As conditioned, the Commission concludes that the Project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, or historic sites.

Conclusions of Law: Rare and Irreplaceable Natural Areas

Under Criterion 8, before issuing a permit, the Commission must find the proposed Project will not have an undue adverse effect on rare or irreplaceable natural areas.

The Project is not located in a natural area. Therefore, the Project complies with Criterion 8, Rare & Irreplaceable Natural Areas.

SUMMARY CONCLUSION OF LAW: Aesthetics, Historic Sites and Rare & Irreplaceable Natural Areas

The Commission concludes that the Project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas.

Criterion 8(A) - Wildlife Habitat and Endangered Species:

The following exhibits shall serve as Findings of Fact under this criterion:

111. 001 Application
112. 034 Location Map
113. 035 Vergennes Designated Downtown Area Map
114. 059 ANR Comments

Conclusions of Law

The burden of proof is on the opponent under Criterion 8(A). *Id.* § 6088(b).

Necessary wildlife habitat is defined by Act 250 as “concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species or wildlife at any period in its life including breeding and migratory periods.” 10 V.S.A § 6001(12).

The Project does not impact any necessary wildlife habitat or endangered species. Therefore, the Project complies with Criterion 8A.

Criterion 9(B) - Primary Agricultural Soils:

The following exhibits shall serve as Findings of Fact under this criterion:

115. 001 Application
116. 003A C1.0 Existing Conditions Site Plan 6/24/20
117. 005C Proposed Conditions Site Plan 12/15/20
118. 012B C3.2 Soils Mapping 12/15/20
119. 034 Location Map
120. 035 Vergennes Designated Downtown Area Map
121. 038 Archaeological Resources Assessment
122. 046 AAFM Review
123. 047 AAFM Intake Form
124. The Project Tract contains ±0.55 acres of soil with an agricultural value of 1-7. Exhibits 046 AAFM Review, 047 AAFM Intake Form
125. 0.23 acres of the mapped soils referenced in the above finding have been previously disturbed by prior development on the Project Tracts. Exhibit 046 AAFM Review
126. The proposed impacts to primary agricultural soils [VgB] total 0.25 acres and 0 acres of Criterion 9(B) mitigation is recommended by AAFM because the proposed impact is *de minimis* in light of the site plan, existing impacts, and soils acreage. Exhibit 046 AAFM Review

Conclusion of Law

The District Commission concludes that previously constructed improvements negatively impact the agricultural potential of the soils, and that the remaining primary agricultural soils on the Project Tract have lost their agricultural potential.

Based on the above factors, the District Commission concludes the proposed impact to mapped primary agricultural soils on the site is *de minimis*. Consequently, the District Commission concludes that the Project will not result in any reduction in the agricultural potential of primary agricultural soils.

Criterion 9(C) - Productive Forest Soils:

The following exhibits shall serve as Findings of Fact under this criterion:

127. 001 Application

128. 012B C3.2 Soils Mapping 12/15/20
129. 034 Location Map
130. 035 Vergennes Designated Downtown Area Map
131. 059 ANR Comments

Conclusions of Law

No productive forest soils are located on the Project Tract because the property's soils have been developed and have no reasonable potential for commercial forestry. The Project Tract is not of a size and location to be capable of supporting or contributing to a commercial forestry operation.

The Commission concludes that there are no productive forest soils on the Project Tract. The Project complies with Criterion 9(C).

Criterion 9(F) - Energy Conservation:

The following exhibits shall serve as Findings of Fact under this criterion:

132. 001 Application
133. 079 Applicant Response to Commission Supplemental Information Request

Conclusions of Law

Criterion 9(F) requires the Applicant to show that the planning and design of the Project "reflect the principles of energy conservation, including reduction of greenhouse gas emissions from the use of energy, and incorporate the best available technology for efficient use or recovery of energy." 10 V.S.A § 6086(a)(9)(F). Criterion 9(F) requires the Applicant to "provide evidence that the subdivision or development complies with the applicable building energy standards under 30 V.S.A. §51 (e)(RBES Stretch Code) or 53 (CBES)."

The Applicant will construct and operate the Project in accordance with the Commercial Building Energy Standards issued by the Vermont Department of Public Service pursuant to 30 V.S.A. § 53 (CBES) and will follow the Natural Resources Board Criterion 9F Procedure effective at the time of construction. In addition, the Applicant will construct the building with design features that increase energy efficiency and reduce greenhouse gas emissions in exceedance of the standards required under the CBES. These features include improvements to exterior wall insulation, the installation of energy recovery units on most ventilation equipment, and the installation sensors on LED lighting fixtures throughout the building that will conserve energy.

Therefore, the Project complies with Criterion 9(F).

Criterion 9(K) – Development Affecting Public Investments:

The following exhibits shall serve as Findings of Fact under this criterion:

134. 001 Application
135. 034 Location Map
136. 035 Vergennes Designated Downtown Area Map
137. 059 ANR Comments
138. The Project is adjacent to the Vergennes City Green. Exhibit 001 Application
139. The Project will not unreasonably or unnecessarily endanger the public or quasi-public investment in the facility, service, or lands because the park has ample capacity to host additional visitors. Exhibit 001 Application

Conclusions of Law

Criterion 9(K) applies to projects that are adjacent to governmental and public utility facilities, services, or lands. With regard to such projects, the Applicant bears the burden of proving that the Project 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 Commission finds that public lands such as the Vergennes City Green were established and intended to provide opportunities for public use and enjoyment by visitors and constituencies like the Project's current and future residents. The Commission concludes that the Project complies with Criterion 9(K).

VI. SUMMARY CONCLUSION OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes that the Project, if completed and maintained as represented in the application and other representations of the Applicant, and in accordance with the findings and conclusions and conditions of this decision, will comply with the applicable Act 250 criteria. 10 V.S.A § 6086b.

VII. ORDER

The Applicant and its assigns and successors in interest are obligated to complete, operate, and maintain the Project as approved by the District Commission in accordance with the following conditions.

1. The Applicant shall comply with the following Agency of Natural Resources permits:
 - Wastewater System and Potable Water Supply Permits WW-9-2788, issued on August 25, 2020. Exhibit 044 WW-9-2788
 - Authorization of Notice of Intent 8980-9020 under Construction General Permit 3-9020 issued on July 29, 2020, by the ANR Watershed Management Division. Exhibit 043 Stormwater CGP 3-9020
2. Any nonmaterial changes to the permits listed in the preceding condition shall be automatically incorporated herein upon issuance by the Agency of Natural Resources.
3. Construction hours shall be limited to Monday through Friday from 7:00 AM to 7:00 PM and Saturday from 8:00 AM to 5:00 PM, with no construction on Sundays and federal holidays.
4. Given the proximity of the Project to the Vergennes City Green, the Project operators are encouraged to coordinate construction activities with Vergennes City government, in order to be sensitive to, and avoid conflict with, any public events planned for the City Green and the nearby downtown area.
5. The building may have up to seventeen (17) floor drains located inside of the building in the Parking Area, North Mechanical Room, South Mechanical Room, Waste room, North Elevator Equipment Room South Elevator Equipment Room, Housekeeping/Maintenance Room, Electrical Room, Mechanical Room, Storage Room, North Resident Laundry, Country Kitchen (1), Staff Laundry, Tub Room, Commercial Kitchen, and Country Kitchen (2), which shall have trap seals and shall be piped into the City of Vergennes municipal sanitary sewer system. No additional floor drains may be installed without first obtaining a permit or submitting other necessary documentation, as required by the Vermont Department of Environmental Conservation. Exhibits 050 Cover Letter 8/26/20, 051 Cover Letter 9/10/20, 052 Basement Level Floor Plan, 053 Ground Level Floor Plan, 056 Level 2 Floor Plan, 054A Level 1 Floor Plan 9/11/20, and 056 Level 2 Floor Plan.
6. The Applicant shall comply with and ensure that the "Responses" in the October 30, 2020 Memorandum from D. Scott Newman on behalf of the Applicant to the Vermont Division

for Historic Preservation are implemented and completed. Exhibit 070 Response Letter to VDHP

7. The Applicant shall construct and operate the Project in accordance with the Commercial Building Energy Standards issued by the Vermont Department of Public Service pursuant to 30 V.S.A. § 53 (CBES) and will follow the Natural Resources Board Criterion 9F Procedure effective at the time of construction.

Based upon the foregoing, Findings of Fact, Conclusions of Law, and Order 9A0376 is hereby issued.

DATED this 28th day of January 2021.

By /s/ Fred Baser
Fred Baser, Chair
District 9 Environmental Commission

Commissioners participating in this decision:

Allen Karnatz

Pennie Beach

Any party may file a motion to alter with the District Commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A).

Any appeal of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings. The appellant must file with the Notice of Appeal the relevant entry fee required by 32 V.S.A. § 1431.

The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, 10 Baldwin Street, Montpelier, VT 056 Level 2 Floor Plan33-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

Decisions on minor applications may be appealed only if a hearing was held by the district commission. Please note that there are certain limitations on the right to appeal, including appeals from Administrative Amendments and interlocutory appeals. See 10 V.S.A. § 8504(k), 3 V.S.A. § 815, and Vermont Rule of Appellate Procedure 5.

For additional information on filing appeals, see the Court's website at:

<http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 951-1740. The Court's mailing address is: Vermont Superior Court, Environmental Division, 32 Cherry Street, 2nd Floor, Suite 303, Burlington, VT 05401.

CERTIFICATE OF SERVICE

I hereby certify on this 28th day of January, 2021 a copy of the foregoing **Act 250 Notice Site Visit 6086b Downtown Development Findings 9A0376 Vergennes Village, LLC**, was sent by U.S. mail, postage prepaid to the following individuals without email addresses and by email to the individuals with email addresses listed.

Note: any recipient may change its preferred method of receiving notices and other documents by contacting the District Office staff at the mailing address or email below. If you have elected to receive notices and other documents by email, it is your responsibility to notify our office of any email address changes. All email replies should be sent to nrb-act250barre@vermont.gov.

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