

21. Criterion 9(A) (Impact of growth)

I. Requirements for Issuance of Permit

Criterion 9(A) requires the district commission to review the impact that the proposed project will have on the ability of the town and region to accommodate two separate items: (a) growth that will occur generally regardless of the proposed project; and (b) growth that will occur specifically because of the proposed project. *St. Albans Group and Wal*Mart Stores, Inc.*, 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 20 (Altered)(Jun. 27, 1995) *aff'd In re Wal*Mart Stores, Inc.*, 167 Vt 75, 81 (1997); *Maple Tree Place Associates*, #4C0775-EB, Findings of Fact, Conclusions of Law, and Order at 49 (Jun. 25, 1998).

The statute provides:

Impact of growth. In considering an application, the district commission shall take into consideration the growth in population experienced by the town and region in question and whether or not the proposed development would significantly affect their existing and potential capacity to reasonably accommodate both the total growth and the rate of growth otherwise expected for the town and region and the total growth and rate of growth which would result from the development if approved. After considering anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety and welfare, the district commission shall impose conditions which prevent undue burden upon the town and region in accommodating growth caused by the proposed development or subdivision. Notwithstanding section 6088 of this title the burden of proof that proposed development will significantly affect existing or potential financial capacity of the town and region to accommodate such growth is upon any party opposing an application, excepting however, where the town has a duly adopted capital improvement program the burden shall be on the applicant.

10 V.S.A. § 6086(a)(9)(A).

II. Burden of Proof

The burden of proof consists of the burdens of production and persuasion. *Re: Applewood Corporation Dummerston Management*, Declaratory Ruling # 325, Findings of Fact, Conclusions of Law, and Order at 8-9 (Sep. 25, 1996).

The burden of persuasion is on the applicant under Criterion 9(A) where the town has a duly adopted capital improvement program. 10 V.S.A. §6088(b), §6086(a)(9)(A).

The burden of persuasion is on the opponents where the town does not have a duly adopted capital improvement program. 10 V.S.A. §6086(a)(9)(A).

The applicant always has the burden of production, meaning that the applicant must produce sufficient information for the district commission to make affirmative findings. *Maple Tree Place Associates*, #4C0775-EB, Findings of Fact, Conclusions of Law, and Order at 37 (Jun. 25, 1998). A claim by the applicant that the project will not encourage growth is not enough. *Re: Central Vermont Public Service, Corp. and Verizon New England (Jamaica)*, #2W1146-EB (Altered), Findings of Fact, Conclusions of Law, and Order at 9 (Dec. 19, 2003). The applicant must present an assessment of factors in the area which may promote or discourage growth such as resources in the area, soil characteristics, topographic limitations, and access to employment. *Re: Washington Electric Cooperative, Inc.*, #5W1036-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Dec. 19, 1990).

III. Analysis

The party with the burden of proof must prove all of the following:

1. The growth in population experienced by the town and region in question.
2. The *total* growth and *rate* of growth which is otherwise *expected* for the town and region.
3. The *total* growth and *rate* of growth for the town and region which will result from the proposed project if approved.
4. The anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety and welfare.
5. Based on (a) through (d), that the proposed project will not cause an undue burden on the existing and potential financial capacity of the town and region in accommodating growth caused by the proposed project.

10 V.S.A. § 6086(a)(9)(A); *St. Albans Group and Wal*Mart Stores, Inc.*, 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 30 (Altered)(Jun. 27, 1995) *aff'd In re Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997).

Analysis Applied

In *St. Albans Wal*Mart*, the Board concluded that the applicant had not met its burden of proof where it failed to provide adequate information under (1) through (4) immediately above. In contrast, in *Maple Tree Place*, the applicant provided the information required in (1) through (4) above, along with secondary growth information. *Maple Tree Place, supra*, at 38. The Board concluded that the project would not cause an undue burden on the existing and potential financial capacity of the town and region in accommodating growth caused by the project where the worst case scenario was an impact of no greater than 2.7% on the City of Burlington's tax base. *Id.* at 25.

Financing

Whether a project is publicly or privately financed is a factor in the Commission's review, but this distinction does not mean that a privately financed project should avoid review. *Re: Central Vermont Public Service, Corp., supra*, at 14 (December 19, 2003).

Market Competition

A project's impact on market competition is a relevant factor under Criterion 9(A). *In re Wal*Mart Stores, Inc.*, 167 Vt. 75, 81 (1997).

Secondary Growth

Secondary growth is further development which may be attracted to an area by the creation of new development and infrastructure. *Re: Gary Savoie d/b/a WLPL and Eleanor Bemis, # 2WO991-EB, Findings of Fact, Conclusions of Law, and Order* at 16-17 (Oct. 11 1995). Infrastructure such as utility lines, sewers, and drinking water influence both the amount and rate of growth a town or region experiences. *Re: Central Vermont Public Service, Corp. and Verizon New England (Jamaica), supra*, at 10. The Commissions may require a secondary growth study to satisfy criterion 9(A) when they conclude that a proposed project would accelerate and attract substantial secondary growth. *In Re Wal*Mart Stores, Inc, supra*, 167 Vt. at 83.

Definition of "Growth"

The term "growth" in Criterion 9(A) includes economic as well as population growth. *Id.* at 85. In assessing population growth, actual and peak populations are the relevant considerations, not the average population based on seasonal shifts. *Re: Okemo Mountain, Inc. Timothy and Diane Mueller, Vermont Department of Forests, Parks and Recreation, and Green Mountain Railroad, Nos. 2S0351-30 (2nd Revision)-*

EB, 2SO351-31-EB, and 2S0351-25R-EB, Findings of Fact, Conclusions of Law, and Order at 67 (Feb. 22, 2002).

Definition of “Region”

In *Re: Maple Tree Place, supra*, at 22, the term “region” in Criterion 9(A) should be defined in terms of the area impacted by the project.

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