

30. Criterion 9(K) (Development affecting public investments)

I. Requirements for Issuance of Permit

10 V.S.A. § 6086(a)(9)(K) provides:

A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision 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.

II. Burden of Proof

The applicant bears the burden of proving that the proposed development will satisfy Criterion 9(K). 10 V.S.A. § 6088(a).

III. Analysis

Elements

1. If the project is not adjacent to governmental and public utility facilities, services, or lands then 9(K) does not apply.

2. If the project is adjacent to governmental and public utility facilities, services, or lands then the Commission asks if the applicant has demonstrated that the project will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands.

If this demonstration has not been made, then a permit is not be granted.

If the applicant has made this demonstration then the Commission asks if the applicant has demonstrated that the project will not materially jeopardize or interfere with the function, efficiency, safety, or the public's use or enjoyment of, or access to, the facility service or lands.

If this second demonstration has been made, assuming compliance with all other applicable criteria, then a permit may be issued.

Purpose

The purpose of 9(K) is to promote recreational values and to protect scenic and natural qualities of public lands. A project that promotes recreation but hinders scenic and natural quantities will not satisfy 9(K). *Re: Dept. Of Forests, Parks, and Recreation (Phen Basin), #5W0905-7-EB, Memorandum of Decision at 7 (July 15, 2004).*

Speculative Facilities

This criterion does not apply to “speculative facilities,” that is, those facilities that are merely planned and have only minimal steps taken towards actual commencement. Rather, the criterion applies to existing facilities or those that have had distinct and specific steps taken en route to their creation. *In re: Munson Earth Moving Corp., 169 Vt. 455, 564-6 (1999).*

Analysis Applied

The Board conducts two separate inquiries under Criterion 9(K) with respect to governmental and public facilities. First, the Board examines 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. *Re: Swain Development Corp., #3W0445-2-EB, Findings of Fact, Conclusions of Law, and Order at 33 (Aug. 10, 1990).*

In *Munson* a permit was denied under 9(K) because applicant's plan to build a large subdivision in Chittenden County would interfere with the proposed Chittenden County Circumferential Highway. The location of applicant's project would either raise the cost of highway construction by forcing AOT to condemn parts of the applicant's project or by rerouting the highway into a local park, in which case it would interfere with that public investment. The Board held that the project would interfere unreasonably with the investment in the highway if the costs increase due to condemnation. Otherwise, the project would interfere with the public's use and enjoyment of the park. *Re: Munson Earth Moving Corp., #4C0986-EB, Findings, Conclusions, and Order (April 4, 1997) rev'd In re: Munson Earth Moving Corp., 169 Vt.*

455 (1999). However, the Board's decision was reversed because the Supreme Court found that the construction of the highway was too speculative to rise it to the level of a "facility" under 9(K). *In re: Munson Earth Moving Corp.*, 169 Vt. 455 (1999).