

31. Criterion 9(L) (Rural growth areas)

I. Requirements for Issuance of a Permit

10 V.S.A. §6086(a)(9)(L) provides that:

A permit will be granted for the development or subdivision of rural growth areas when it is demonstrated by the applicant that in addition to all other applicable criteria provision will be made in accordance with subdivision (9)(A) "impact of growth," (G) "private utility service," (H) "costs of scattered development" and (J) "public utility services" of subsection (a) of this section for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage.

Purpose of criterion

The purpose of Criterion 9(L) is to promote orderly and well-planned growth in rural growth areas by providing for reasonable population densities and rates of growth, using clustered development and new community planning techniques to conserve land and the costs of services that stem from development. *Stratton Corporation*, 2W0519-10-EB, Findings of Fact, Conclusions of Law, and Order at 30 - 35 (May 8, 2001); *Re: New England Land Ventures*, #6F0433-EB, Memorandum of Decision at 2-3 (Dec. 6, 1991).

II. Burden of Proof

The burden of proof under this criterion is on the applicant. 10 V.S.A § 6088(a).

III. Analysis

“Rural growth area” defined

The first determination under this criterion is whether the proposed development is in a “rural growth area.” Act 250 defines "rural growth areas" as:

lands which are not natural resources referred to in section 6086(a)(1)(A) through (F), section 6086(a)(8)(A) and section 6086(a)(9)(B), (C), (D), (E) and (K) of this title [Title 10].

10 V.S.A. § 6001(16).

Paradoxically, perhaps, a “rural growth area” is defined in terms of what it is *not*. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 35 (Nov. 24, 2004) (“lands which are not natural resources...”). To be a rural growth area, the area must be predominately rural in character and be an area in which resources referenced in §6001(16) are *absent*. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*,

#3W0865-EB, Findings of Fact, Conclusions of Law, and Order at 35 Nov. 24, 2004); *Re: Stratton Corporation*, 2W0519-10-EB, Findings of Fact, Conclusions of Law, and Order at 30 - 35 (May 8, 2001), citing *Re: New England Ventures*, #6F0433-EB, Memorandum of Decision at 3 (Dec. 6, 1991); *Re: Horizon Development Corp.*, #4C0841, Findings of Fact, Conclusions of Law, and Order at 26 (Aug. 21, 1992); and see *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 106 (Feb. 22, 2002) (because vast majority of proposed construction area is headwaters area, and other referenced natural resources are present in said area, there is no rural growth area).

“Rural”

The term "rural" is not defined in the statute. Board case law holds that the word "rural" describes "areas which are not densely settled and which may consist of small villages surrounded by mostly open, farmed, or undeveloped country." *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, Findings of Fact, Conclusions of Law, and Order at 37 n.9 (Nov. 24, 2004), quoting *Re: New England Ventures*, #6F0433-EB, Memorandum of Decision at 2 - 3 (Dec. 6, 1991); *Re: Stratton Corporation*, 2W0519-10-EB, Findings of Fact, Conclusions of Law, and Order at 30 - 35 (May 8, 2001) An area may be rural even if it is contiguous to an existing settlement. *New England Ventures*, #6F0433-EB, Memorandum of Decision at 2 - 3 (Dec. 6, 1991).

The existence of the referenced natural resources at the site

Over the years, the Board developed an "all or nothing" analysis - - that if any referenced natural resources listed in the definition of rural growth areas were present anywhere on the project site, none of the project site was a "rural growth area." *Re: Horizon Development Corporation* #4C0841-EB, Findings of Fact, Conclusions of Law and Order at 20 (Aug. 21, 1992). Not surprisingly, no rural growth areas were found under that test, since it is hard to conceive of a tract of land in Vermont without at least one referenced natural resource.

In *Stratton Corporation*, the Board overruled its earlier narrow interpretations of Criterion 9L.

The Board has determined that this "all or nothing" analysis essentially nullifies Criterion 9(L) because it may be difficult, if not impossible, to find a rural project site in Vermont without a referenced natural resource, such as a

stream, floodway, headwater, shoreline, necessary wildlife habitat, primary agricultural soil, forest or secondary agricultural soil, earth resource, or public investment present somewhere on the project site. As a result, lands proposed for development which contain a referenced resource have not been receiving the protection that Criterion 9(L) was intended to provide.

Nor do we believe that the statute requires an "all or nothing" analysis. A literal reading of the language of Criterion 9(L) is that if the land in question is a referenced natural resource, then that specific and limited land is not a rural growth area. However, other lands within the project site which are not referenced resources may constitute a rural growth area. For example, if a several hundred acre project site contains a stream, it does not automatically follow that the entire project site can not be a rural growth area. The stream and a buffer on either side may not be a rural growth area but the remainder of the project site, or portions of it, may be a rural growth area.

We believe this interpretation affords lands the protection the legislature intended when it adopted Criterion 9(L). Criterion 9(L) recognizes that lands that are the referenced natural resources already have protection under the other Criteria. Conversely, lands which are not the referenced natural resources do not have the benefit of protection from the other Criteria and will be under greater development pressure. As a result, Criterion 9(L) provides an alternative kind of protection that is not focused on specific resources but on preventing carte blanche development by requiring clustered development, reasonable rates of growth, reasonable population densities, and new community planning. This economizes the use of these lands and ultimately lessens development pressure on adjacent natural resources. Thus, an environmentally sensitive development that proposes developing in a rural growth area still needs to engage in the required planning to meet the complementary protection afforded rural growth areas. To the extent *Luce Hill [Partnership, #5L1055-EB, Findings of Fact, Conclusions of Law, and Order (Jul. 7, 1992)]* and *Horizon* relied on the "all or nothing" project site analysis, and are inconsistent with our holding in the instant case, they are overruled.

Re: Stratton Corporation, 2W0519-10-EB, Findings of Fact, Conclusions of Law, and Order at 34 (5/8/01).

In *Re: Okemo Mountain, Inc., #2S0351-30(2nd Revision)-EB, #2S0351-31-EB, and #2S0351-25R-EB Findings of Fact, Conclusions of Law, and Order at 104-5 (Feb. 22,*

2002), the Board defined the correct analysis for Criterion 9(L):

The correct inquiry is not whether there is a referenced natural resource located anywhere on the Project site. The correct inquiry is first to delineate the area on which the proposed development will occur. Second, determine what part of that area is one or more of the referenced natural resources. Third, determine whether such land that is not one or more of the referenced natural resources is of sufficient acreage that it is possible to carve out a meaningful and usable rural.

Requirements on a project in a rural growth area

Should a Commission determine that a project is proposed for a rural growth area, it would then need to meet the requirements of Criterion 9(L) concerning reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage.

Criterion 9(L) requires clustering of all projects in rural growth areas; the language of the criterion is mandatory. *New England Ventures*, #6F0433-EB (Dec. 6, 1991).

Criterion 9(L) does not weigh costs vs. benefits; rather public costs must be reduced to the extent possible through the planning techniques listed in criterion. *New England Ventures*, #6F0433-EB (Dec. 6, 1991).

Thoughts on rural growth areas

Of all the Act 250 criteria, Criterion 9(L) is perhaps the strangest, as it seems to make it more difficult to develop in an area where resources are absent than in an area where resources are present. In *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, Findings of Fact, Conclusions of Law, and Order at 35 - 37 (Nov. 24, 2004), the Board discussed the philosophy behind 10 V.S.A. §6086(a)(9)(L); and why what appears to be “curious” and paradoxical is not:

One commentator has described the definition of “rural growth areas” as “curious.” Brooks, *Toward Community Sustainability: Vermont’s Act 250*, Vol. I, Criterion 9(L) at 1(1996). The Board agrees; it seems illogical to provide special protection to lands which appear not to warrant such protection because they lack important environmental resources. Board precedent, however, resolves this apparent paradox and provides guidance as to the purpose of Criterion 9(L). In *New England Ventures*, for example, the Board wrote:

The Board concludes that Criterion 9(L) requires clustering of all projects in rural growth areas. The language of the criterion is clearly mandatory. Further, the General Assembly established Act 250 to promote well-planned land use and to protect natural resources

Accordingly, the General Assembly required that developments and subdivisions be reviewed for compliance with ten criteria which seek to ensure that natural resources are protected and that sound planning principles are applied in designing projects. See 10 V.S.A. 5 6086(a).

Viewed in this light, the Board concludes that the purpose of Criterion 9(L) is to promote orderly and well-planned growth in rural growth areas. The legislature defined rural growth areas as places where most of the resources protected by Act 250 are absent. 10 V.S.A. §6001(16). Since, by definition, most of those resources are not present in rural growth areas, it is reasonable to infer that the General Assembly intended them as places where growth should occur.

The legislature also emphasized that developments in rural growth areas provide for reasonable population densities and rates of growth and for use of cluster planning and new community planning. *Thus, the Board infers that the General Assembly intended that growth in these areas be orderly and make use of all of the planning techniques enumerated in Criterion 9(L).*

Similar to other resources protected by Act 250, rural growth areas are resources to be protected. However, unlike those other resources, *the Board believes that the rural growth areas are to be protected so that future development may be concentrated in them. Projects in such areas must use all the planning techniques in Criterion 9(L) in a way which does not use up all available land in the growth areas and allows room for orderly future growth.* Accordingly, all projects in rural growth areas must cluster. The level of clustering may vary depending on the nature of the rural growth area and of the project.

For example, clustering may be different for an industrial than for a residential subdivision. Reasonable provision for clustering,

however, must be demonstrated. The Board's resolution of the issues raised by the Applicant means that a hearing is needed to take evidence on whether the application complies with Criterion 9(L) as interpreted by this decision.

Re: New England Ventures, supra, at 4 – 6 (emphasis added).

In *Re: Stratton Corporation, #2W0519-10-EB*, Findings of Fact, Conclusions of Law, and Order at 33 - 34 (May 8, 2001), the Board further explained the philosophy behind Criterion 9(L):

The correct inquiry is first to delineate the area on which the proposed development will occur. Second, determine whether that area is one or more of the referenced natural resources. Third, if so, determine whether such land is of sufficient acreage that it is possible to carve out a meaningful and usable rural growth area.

We believe this interpretation affords lands the protection the legislature intended when it adopted Criterion 9(L). Criterion 9(L) recognizes that lands that are the referenced natural resources already have protection under the other Criteria. Conversely, lands which are not the referenced natural resources do not have the benefit of protection from the other Criteria and will be under greater development pressure. As a result, Criterion 9(L) provides an alternative kind of protection that is not focused on specific resources but on preventing carte blanche development by requiring clustered development, reasonable rates of growth, reasonable population densities, and new community planning. This economizes the use of these lands and ultimately lessens development pressure on adjacent natural resources. Thus, an environmentally sensitive development that proposes developing in a rural growth area still needs to engage in the required planning to meet the complementary protection afforded rural growth areas.

(Footnote omitted). Seen in this light, Criterion 9(L)'s apparently paradoxical language and intent become clear and logical.

Last Revised: February 8, 2007