

### **13. Criterion 5A & 5B (Transportation)**

*Note: Criterion 5B was added effective June 1, 2014. Criterion 5 became Criterion 5A.*

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

Criterion 5 provides that before granting a permit, the board or district commission shall find that the subdivision or development “[w]ill not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation, existing or proposed.” 10 V.S.A. §6086(a)(5); *In re Agency of Transportation*, 157 Vt. 203, 207 (1991), quoting 10 V.S.A. § 6086(a)(5); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839 -2-EB (Altered), Findings of Fact, Conclusions of Law, and Order at 36 (Nov. 4, 2005), appeal dktd. (Vt. S. Ct.); *Re: Susan Dollenmaier and Martha Dollenmaier Spoor*, #3W0125-5-EB, Findings of Fact, Conclusions of Law, and Order at 8 (Feb. 7, 2005); *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, Findings of Fact, Conclusions of Law, and Order at 20 (May 4, 2004).

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

The burden of proof is on a party opposing application, but the applicant has burden of producing sufficient evidence for Commission to make positive findings. 10 V.S.A. § 6088(b); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839 -2-EB (Altered), FCO at 37 (11/4/05), appeal dktd. (Vt. S. Ct.); *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, FCO at 20 (5/4/04) [EB #831]; *Casella Waste Management, Inc., and E.C. Crosby & Sons, Inc.*, #8B0301-7-WFP, FCO at 28-29 (5/16/00) [WFP #38]; *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, FCO at 32 (5/25/99), *aff d*, 10 V.S.A. § 6088(b). However, the applicant always has the burden of producing sufficient evidence for the Board to make positive findings.

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

A permit cannot be denied under Criterion 5. However, reasonable conditions and requirements may be attached to alleviate any burdens created by the development. 10 V.S.A. § 6087(b); *In re Agency of Transportation*, 157 Vt. 203, 207 (1991); *In re Pilgrim Partnership*, 153 Vt. 594, 597 (1990); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839 -2-EB (Altered), Findings of Fact, Conclusions of Law, and Order at 37 (Nov. 4, 2005), appeal dktd. (Vt. S. Ct.); *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Sep. 8, 2005); *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, Findings of Fact, Conclusions of Law, and Order at 20 (May 4, 2004)

#### **IV. Analysis**

##### **Causation and exacerbation**

##### **Causation**

Note that Criterion 5 states that a development cannot “*cause* unreasonable congestion or unsafe highways.” 10 V.S.A. § 6086(a)(5) (emphasis added). Criterion 5 does not require that a proposed development be the principal cause or original source of traffic problems. Several causes may contribute to a particular effect or result. *In re Pilgrim Partnership*, 153 Vt. 594, 596 (1990).

### **Exacerbation**

It would be absurd to permit a hazardous condition to become more hazardous. *In re Pilgrim Partnership*, 153 Vt. 594, 596 (1990). Thus, if a project will make a traffic problem worse, it can be conditioned to address the exacerbation. *Re: Nile and Julie Dupstadt*, #4C1013-EB, Findings of Fact, Conclusions of Law, and Order at 32 (Apr. 30, 1999); and see *Re: Shimon & Malka Shalit*, #8B0334-3-EB, Findings of Fact, Conclusions of Law, and Order at 12 (Feb. 8, 1991).

### **Two areas of inquiry: unsafe conditions and congestion**

#### **Unsafe conditions**

“Safe travel ... is in the public interest.” *In re Pilgrim Partnership*, 153 Vt. 594, 596 (1990); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839 -2-EB (Altered), Findings of Fact, Conclusions of Law, and Order at 37 (Nov. 4, 2005), appeal dkt. (Vt. S. Ct.); *Wildcat Construction Co.*, #6F0283-1-EB (Oct. 4, 1991), *aff'd*, *In re Wildcat Construction Co.*, 160 Vt. 631 (1993) (trucking operation creates unsafe traffic conditions under Criterion 5 where tractor-trailers driving on a narrow side street have driven over the yards of houses on the corner and hit the houses)

#### **Standards applied**

The AASHTO standards are informative with regard to conditions on existing roads as long as other factors (such as historical function and safety record) are taken into account. *Re: Rome Family Corporation*, #1R0410-3-EB (Oct. 11, 1990).

Adequate sight distances are an element of the Board's safety consideration. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839 -2-EB (Altered), Findings of Fact, Conclusions of Law, and Order at 37 (Nov. 4, 2005), appeal dkt. (Vt. S. Ct.); *Re: Susan Dollenmaier and Martha Dollenmaier Spoor*, #3W0125-5-EB, Findings of Fact, Conclusions of Law, and Order at 8 (Feb. 7, 2005).. Whether sight distances are adequate is a function of the length of unobstructed views and speed limits. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839 -2-EB (Altered), Findings of Fact, Conclusions of Law, and Order at 37 (Nov. 4, 2005), appeal dkt. (Vt. S. Ct.); *Re: Old Vermonter Wood Products*, #5W1305-EB, Findings of Fact, Conclusions of Law, and Order at 17(Aug. 19, 1999). However, a Commission has no authority to impose a

speed limit on a town road. *Re: Okemo Mountain, Inc., #2S0351-10-EB*, Findings of Fact, Conclusions of Law, and Order at 3 (Oct. 23, 1991).

Accident data is helpful to determining whether site distances are adequate, but it is not dispositive. *Re: Richard and Barbara Woodard, #5W1262-EB*, Findings of Fact, Conclusions of Law, and Order at 14 (Dec. 18, 1997), cited in *Re: Old Vermonter Wood Products, #5W1305-EB*, Findings of Fact, Conclusions of Law, and Order at 16 - 18 (Aug. 19, 1999).

Any federal or state standard, however, is not controlling; rather, the Commission must use its own judgment to determine whether a project will cause unsafe conditions. *Re: Old Vermonter Wood Products, #5W1305-EB* Findings of Fact, Conclusions of Law, and Order at 16 - 17 (Aug. 19, 1999); and see *Re: Horizon Development Corp. #4C0841-EB* (Aug. 21, 1992) (Criterion 5 does not require conformance with town road standards regarding right of ways and minimum requirements for width and slope).

### **Unreasonable congestion**

Commissions are authorized to impose permit conditions to address congestion issues. *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000); *Re: Times and Seasons, LLC and Hubert K. Benoit, #3W0839 -2-EB* (Altered), Findings of Fact, Conclusions of Law, and Order at 37 (Nov. 4, 2005), appeal dktd. (Vt. S. Ct.)

### **The impact of the trip ends generated by the project on the existing Levels of Service (LOS) at intersections**

#### **Trip ends**

In order to determine a project's impact on the roads, one must know how many trips ends the project will generate. A "trip end" is defined as one vehicle either entering or exiting a given location; one car entering a project and then exiting the project constitutes two "trip ends." *Re: John J. Flynn Estate and Keystone Development Corp. #4C0790-2-EB*, Findings of Fact, Conclusions of Law, and Order at 9 n.3 (May 4, 2004), citing, *Re: Old Vermonter Wood Products and Richard Atwood, #5W1305-EB*, Findings of Fact, Conclusions of Law, and Order at 8 (Aug. 19, 1999)

Significant impacts can create traffic congestion. *In re Pilgrim Partnership*, 153 Vt. 594, 596 (1990) (30 additional vehicular trips per day). But small increases in traffic are generally not considered to create or contribute to congestion. See, *Re: Alpine Stone Corporation, ADA Chester Corporation, and Ugo Quazzo, #2S1103-EB*, Findings of Fact, Conclusions of Law, and Order at 27 - 28 (Feb. 4, 2002); *Re: Old Vermonter Wood Products, #5W1305-EB* (Aug. 19, 1999); *Re: Richard and Barbara Woodard, #5W1262-EB* (Dec. 18, 1997).

### **Level of service**

The impact of a project's traffic, of course, depends on the roads which the traffic will use; small increases on dysfunctional roads can lead to congestion. Thus, a Commission must make its own determination as to the nature of the area and the level of service appropriate for that area. *In Re Wal\*Mart Stores, Inc.*, 167 Vt. 75, 86 (1997); *In re Agency of Transportation*, 157 Vt. 203, 206, (1991).

Level of service below C is generally inconsistent with Criterion 5 at intersections that are not in compact, urban areas. *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, Findings of Fact, Conclusions of Law, and Order at 10 (Sep. 8, 2005); *In Re Wal\*Mart Stores, Inc.*, 167 Vt. 75, 86 (1997).

### **Mitigation measures to address safety and congestion concerns**

Projects can be required to mitigate their traffic impacts in order to come into compliance with Criterion 5.

Mitigation can take many forms. *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 83 (Feb. 22, 2002) (installation of street light, paying for police traffic control during peak periods, setting up traffic cones, operating shuttle bus, offering mid-week ski vacations and ski packages with Amtrak); *Re: Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 76 (Dec. 8, 2000) (road improvements; truck traffic is specifically conditioned including maximum truck length, restrictions are imposed during school busing hours and winter seasons, condition imposes limitation on trucking routes, and maximum truck speeds are established); *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, Findings of Fact, Conclusions of Law, and Order at 37 (Jun. 7, 2005) (intersection should be upgraded to include exclusive left turn lanes); *Pilgrim Partnership, Stephen Van Esen, and Green Mountain Coffee Roasters, Inc.*, #5W0894-6/5W1156-6B-EB (Jan. 28, 1999) (signs); *Re: Eastern Landshares, Inc.*, #4C0790-EB (Nov. 19, 1991) (traffic lights); *Re: Roger Loomis d/b/a Green Mountain Archery Range*, #1R0426-2-EB (Dec. 18, 1997) (limitations on traffic / use); *In re Alpen Associates*, 147 Vt. 647 (1986) (traffic and other environmental studies are well within the scope of activity contemplated by Act 250, and the Commission clearly has jurisdiction over this sort of consideration).

### **Determining an Impact Fee**

Aside from the mitigation measures historically incorporated into permits by the district commissions, Act 145, effective July 1, 2015 provides flexibility for projects that require transportation mitigation pursuant to Criterion 5 and 9(K).

If a proposed project is located in a Transportation Infrastructure District (these districts or “TIDs” will be established by VTrans pursuant to ACT 145), VTrans is responsible for setting the mitigation fee to be paid by the applicant to VTrans, and the fee will be included in the Act 250 permit. If a project is not located in a TID and it has impacts on either state or municipal transportation infrastructure, the district commission may set a mitigation fee through the Act 250 process, if there is a proposed capital project (either state or municipal) to alleviate congestion in the area of the proposed subdivision or development and the subdivision or development will benefit from the planned capital project.

In setting such a mitigation fee, the District Commission should seek input from VTrans and the involved parties in order to obtain evidence that will help determine the appropriate mitigation fee. The District Commission shall either apply a formula that reflects the performance standards of the area in which the project is proposed or the mitigation that the Commission determines is required to address the transportation impacts of the development or subdivision. In either case, the formula shall account for each of the following:

- (1) the vehicle trips generated by the land use project estimated pursuant to a generally accepted methodology;
- (2) the capital costs of highway infrastructure, pedestrian and bicycle facilities, public transportation, and other transportation infrastructure that benefit or mitigate the transportation impacts of the land use project;
- (3) conditions not attributable to the transportation impacts of the land use project including forecasted growth in background traffic and existing infrastructure and capacity deficiencies;
- (4) the proportional share of the capital costs of transportation infrastructure that provides benefit to or is attributable to the transportation impacts of the land use project and determined pursuant to a reasonably accepted methodology; and
- (5) other funding sources available to finance the capital transportation project.

When determining a transportation impact fee for a development or subdivision, the Commission may adjust the result of the formula established to account for one or more of the following:

- (1) a traffic allocation, if any, set for the land use project by a prior permit;
- (2) the net change in vehicle trip generation of a proposed land use project considering pass-by-trips and the amount of traffic already generated by the tract of land on which the land use project is to be located;

- (3) municipal traffic impact fees paid by the applicant to the extent that those fees fund improvements on which the transportation impact fee is based;
- (4) the fair market value of dedications of land, interests in land or transportation infrastructure improvements provided by the developer to mitigate offsite traffic impacts;
- (5) TDM programs offered by the applicant that reduce vehicle trips; and
- (6) the siting of a proposed land use project in a downtown, village center, new town center, growth center, Vermont neighborhood, or neighborhood development area designated under 24 V.S.A. chapter 76A.

If the proposed development or subdivision will not benefit from a recently built or proposed capital project, the District Commission may still require the developer to pay the full cost of any necessary transportation mitigation. The District Commission also has the authority to require subsequent developments that benefit from such a transportation mitigation project to reimburse a developer for the proportional share of the capacity created by the mitigation project that is being used by the subsequent development.

### **Transportation Demand Management**

Criterion 5(B), effective July 1, 2014, 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 should consider whether a proposed measure is reasonable, “given the type, scale and transportation impacts” of the proposed project.

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