

17. Criterion 8 (Historic sites)

I. Requirements for Issuance of Permit

Under Criterion 8, before issuing a permit, the Commission must find the proposed project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare or irreplaceable natural areas. 10 V.S.A. § 6086(a)(8).

II. Burden of Proof

While the burden of proof under Criterion 8 is on those who oppose the project, 10 V.S.A. § 6088(b), the applicant must provide sufficient information for the Commission to make affirmative findings. *Re: Susan Dollenmaier and Martha Dollenmaier Spoor, #3W0125-5-EB*, Findings of Fact, Conclusions of Law, and Order at 9 (Feb. 7, 2005); *Re: Hannaford Brothers Co. and Southland Enterprises, Inc., #4C0238-5-EB*, Findings of Fact, Conclusions of Law, and Order at 13 (Apr. 9, 2002); and see, *Re: Southwestern Vermont Health Care Corp., #8B0537-EB*, Findings of Fact, Conclusions of Law, and Order at 28 (Feb. 22, 2001); *Re: Black River Valley Rod & Gun Club, Inc., #2S1019-EB*, Findings of Fact, Conclusions of Law, and Order at 19 (June 12, 1997) and cases cited therein.

III. Analysis - Historic Sites

Three-Part Test

To determine compliance with Criterion 8(A) (historic sites) the Commission applies three-stage analysis: (i) whether project site is or contains a historic site, (ii) whether project will have an adverse effect on historic site, and (iii) whether such 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 (May 27, 2004); *Re: Manchester Commons Associates, #8B0500-EB* Findings of Fact, Conclusions of Law, and Order at 18 (Sept. 29, 1995).

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 an historic site, Act 250 has no discretion to declare such structure not to be historic. *Re: Stonybrook Condominium Owners Association, DR #385*, Findings of Fact, Conclusions of Law, and

Order at 9 (Sep. 18, 2001); *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, Findings of Fact, Conclusions of Law, and Order at 39 (May 25, 1999), *aff d*, *OMYA Inc. v. Town of Middlebury*, 171 Vt. 532 (2000); *Re: New England Kurn Hattin Homes*, #2W0082-4-E, Memorandum of Decision at 4 (Jun. 14, 1995).

Even if the 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 an “historic site” if it is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant. Accordingly, under the third part of the “historic site” definition, the Commission must examine the testimony of the Advisory Council to determine whether such testimony establishes a site, structure, district, or archeological landmark as historically significant. The district commissions are not bound by the opinion provided by the Council. *Re: Manchester Commons, supra*, at 20. Instead, as with any witness, the Commission may believe all of the Council’s testimony, none of it, or some of it. *Id.*

Adverse Effect

The next question is whether the project will have an adverse effect on the historic site.

In evaluating adverse effect on a site, it is central to determine whether a proposed project is in harmony or fits with the historic context of the site. Important guidelines in evaluating this fit include: (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 (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 (May 25, 1999), *aff d*, *OMYA Inc. v. Town of Middlebury*, 171 Vt. 532 (2000).

Undue Adverse Effect

If an adverse effect is found, the next inquiry is whether the effect is undue.

Similar to the determination of “adverse effect,” the determination of “undue” is solely within the province of the district commission, based on the evidence presented. 10 V.S.A. § 6086(a); *Manchester Commons, supra* at 22; *Re: New England Kurn Hattin Homes*, #2W0082-4-EB, Memorandum of Decision at 5 (May 3, 1995)

There are four factors to consider in determining whether an adverse effect is undue. *Manchester Commons, supra* at 22; *Middlebury College, supra* at 10. An affirmative conclusion on any one of these factors is sufficient to support a conclusion that an adverse effect is undue. *Manchester Commons, supra* at 22;

1. the failure of an applicant to take generally available mitigating steps which a reasonable person would take to preserve the character of the historic site;
2. interference on the part of the proposed project with the ability of the public to interpret or appreciate the historic qualities of the site;
3. cumulative effects on historic qualities of the site by the various components of a proposed project which, when taken together, are so significant that they create an unacceptable impact;
4. violation of 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).

Where a project involves the rehabilitation of a historic building, the Commission may consider whether the project conforms to the Department of Interior's Standards for the Treatment of Historic Properties, 36 C.F.R. Part 68 (2012) (Appendix A), in evaluating whether an applicant has taken generally available mitigating steps which a reasonable person would take to preserve the character of the historic site, or whether a project will interfere with the public's ability to interpret or appreciate the historic qualities of the site. The Standards for Rehabilitation apply to work on buildings, except in unusual cases involving reconstruction or museum-quality restoration of buildings when the Standards for Reconstruction or Restoration apply.

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