

STATE OF VERMONT

SUPERIOR COURT  
Environmental Division

ENVIRONMENTAL DIVISION  
Docket No. 130-11-18 Vtec  
Docket No. 44-3-19 Vtec

Hettinger Conditional Use and Act 250  
Approvals

DECISION ON THE MERITS

Rising Tide Towers, LLC and Black Diamond Consultants, Inc. (together, Applicants) propose to build a 190-foot cell tower (the Project) on property owned by Ronald and Donna Hettinger at Church Hill Road in Norton, Vermont (the Property). Applicants applied for and received conditional use approval from the Town of Norton Development Review Board (DRB) and Act 250 approval from the District #7 Environmental Commission (District Commission). John Luongo (Mr. Luongo), an adjacent property owner, timely appealed both decisions. The appeal of the conditional use approval was filed November 30, 2018 and was assigned Docket No. 130-11-18, while the Act 250 appeal was filed March 17, 2019 and assigned Docket No. 44-3-19. The Court coordinated both matters for a joint merits trial.

Applicants are represented in this proceeding by William J. Dodge, Esq. and Alexis L. Peters, Esq. Mr. Luongo is represented by Laura L. Wilson, Esq. The Town of Norton is participating as an interested party for informational purposes only, and Gina Vigneault, the Town Clerk testified at trial.

On August 9, 2019, and with Mr. Luongo's consent, Applicants filed a Stipulated Combined Statement of Questions (for purposes of this proceeding, the "Statement of Questions"). The Statement of Questions incorporates Questions 1-3 from the municipal appeal and the sole Question from the Act 250 appeal. Concerning the municipal appeal, Mr. Luongo asks whether 1) Applicants' conditional use request should be approved given the Project's impacts on "the character of the area" as defined by the relevant zoning district, zoning bylaw sections, and provisions in the town plan, 2) In what zoning district the Project is located and which standards should be applied in assessing impacts, and 3) whether the Project must satisfy the standards for

two different zoning districts because the area is “essentially bisected by two districts.” With respect to the Act 250 appeal, Mr. Luongo asks whether the Project will have an “undue adverse effect” on aesthetics or scenic and natural beauty under Criterion 8.

The Court conducted a two-day trial on September 24 and 25, 2019 at the Guildhall, Vermont courthouse. A site visit to the subject properties in Norton, Vermont was completed at the conclusion of the trial on September 25, 2019.

Based upon the evidence presented at trial, including that which was put into context by the site visit, the Court renders the following Findings of Fact and Conclusions of Law.

### **Findings of Fact**

1. Applicants propose to build 190-foot self-supporting communications tower on property owned by Ronald and Donna Hettinger in the Town of Norton, Vermont (Project).
2. Rising Tide Towers, LLC filed its application for local approval on or about August 2, 2018
3. The Project must comply with the Town of Norton Zoning Regulations adopted on July 1, 2014.
4. The Hettinger property is approximately 20 acres and includes forested areas, agricultural fields, orchards and a house and outbuildings. The Hettinger driveway is off Church Hill Road uphill or beyond the project site and drive.

### **I. Project Surroundings**

5. The Project is located just south of Church Hill Road in Norton, Vermont, designated as lot 03043.
6. The Project is in the Town’s Agricultural and Forest District.
7. The Agricultural and Forest District permits wireless telecommunications facilities as conditional uses.
8. Church Hill Road extends from Route 114 and runs easterly to its dead end near the highest elevation of land.
9. The neighborhood of the Project site includes an unused church (currently for sale), two cemeteries, and several single-family residences. These properties are accessed from Church Hill Road over short driveways. The structures are visible from Church Hill Road. There is also undeveloped land, forested land, and agricultural fields in the area.

10. A cemetery is adjacent to the northwest of the gravel drive to the Project site.
11. Michael Branham's property and residence is located on the northwest side of the cemetery. This is a lower elevation than the Project site.
12. The church property is located across Church Hill Road to the north of the Project site.
13. A residential property owned by John Luongo is located next to the Church. The residence of this property has been removed and a stand-alone garage is on the property.
14. John Luongo owns a second undeveloped property, approximately 120 acres, to the southeast of the Hettinger property. Mr. Luongo has owned this property for over 40 years. He has no specific plans for development, however, he testified that he would like to build a residence on this property. Mr. Luongo also testified that he would prefer to build the residence close to Church Hill Road and the adjacent overhead power line because it would be less expensive than constructing a longer driveway and extending power a longer distance. The area where Mr. Luongo is interested in placing his new residence is at a higher elevation than the Project. Views looking northwest would include looking at/through the Project's upper portion of the tower.
15. Mr. Luongo's property is large enough for him to build a residence further to the south where views would be less impacted by the tower.
16. Mr. Luongo has never spoken with Mr. Hettinger about the Project.

## **II. Project Site and Specifications**

17. The tower is part of a larger communication network including some existing towers and some new towers.
18. The tower network will establish communication coverage along Route 114. Additionally, the tower may be used by border patrol security. Applicants considered a lower tower height, however, such an adjustment would significantly diminish the level of service.
19. The Project site is approximately 100 feet by 100 feet. A fenced "compound area" around the tower will be approximately 75 feet by 75 feet.
20. The tower is a self-supported lattice tower constructed of silver or gray galvanized steel.
21. Rising Tide and the Hettingers have a five-year lease for the 10,000 square foot tower site. The lease is renewable.

22. Access to the tower will be over an existing gravel drive. The project will utilize the first approximately 60 feet of drive from Church Hill Road. This section of drive includes an existing culvert which connects drainage to a swale on the opposite side of Church Hill Road.
23. The Project includes constructing a new portion of road starting from the existing drive approximately 60 feet from Church Hill Road. This new portion will be 12 feet wide and approximately 120 feet long.
24. The compound area will be enclosed with an 8 feet high chain link fence with 3 strands of barbed wire at the top. The fence will have a green mesh cover incorporated into the chain link to provide visual mitigation and screening of the equipment within the compound area. There will be small signage on the fence for safety and information.
25. The compound area ground cover will include geotextile material covered with crushed stone.
26. There will be two access gates to the compound area; one 12-foot wide vehicle gate and one 4-foot wide pedestrian gate.
27. The tower will be supported by a concrete and rebar foundation, to be installed after soil excavation on site.
28. There are existing overhead electric and telephone lines in the area of the Project. The poles for this service are approximately 30 feet high.
29. A parking area approximately 20 feet by 75 feet will be constructed at the Project.
30. Within the compound area, wireless partners that locate services on the tower will have an equipment area measuring 20 feet by 20 feet. Equipment will be placed within cabinets.
31. The subject tower is designed to connect with a second tower approximately 7 miles away.
32. The tower is designed for co-location of wireless carriers and additional communications.
33. Nine wireless voice antennas will be white/opaque in color and approximately 8 feet tall.
34. There will be two microwave dishes of approximately 2 square feet for communication data.
35. Remote Radio Heads (RRHs) will be mounted in the area of the antenna for energy efficiency.

- 36. At the top of the tower there will be a lightning rod of 2 to 6 feet tall to ground lightning strikes.
- 37. The tower will have a life expectancy of approximately 40 years.
- 38. The antennas will be connected to the equipment in the compound area by cables running down the tower and then across an “ice bridge” to the equipment.
- 39. The Project’s design is similar to other communications towers in Vermont and the northeast generally.

### **III. Project Aesthetics**

- 40. The Project site has an elevation of 1,353 feet. This site is not the highest elevation in the area. The top of the hill east of the Project is approximately 1,500 feet in elevation.
- 41. The Project will be located in a forested area of the Hettinger property. The trees run along Church Hill Road and surround the 100’ by 100’ Project leased area. The one side of the leased area along the open agricultural field of the Hettinger property will be without trees. This open area slopes from the Hettinger residence down to Route 114. Some tree clearing will occur to accommodate the 10,000 square foot leased area. The remainder of the trees will be retained. From the perspective of the surrounding properties other than the Hettinger’s, the leased area will be tucked into the forested area.
- 42. The Project was relocated from the open agricultural field and moved into the forested area.
- 43. The tower will extend above the trees and will be visible. The chain link fence and equipment within the compound area will not extend above the trees. The forested area will provide an aesthetic buffer for the ground level compound area for the surrounding properties and views from Church Hill Road.
- 44. People visiting the abutting cemetery will have views of the upper portion of the tower.
- 45. There will be brief views of the Project from Route 114.
- 46. There is an overhead utility line running from Route 114 along Church Hill Road through the forested area of the Project. This utility line will be maintained to be free of trees.
- 47. A VAST snowmobile trail that crosses the property will not be physically disturbed.
- 48. To the south of the Project is an agricultural field on the Hettinger property.

49. The Gore Mountain hiking trail, Norton Pond, and Averill Pond are located over 4 miles from the Project and are not visible from the Project location. The Project itself is not visible from these scenic view locations.
50. The scenic view of Little Averill Pond faces away from the Project site, in the opposite direction. The Project will not be visible from the viewing location.
51. Construction of the tower will take 6 to 8 weeks. During construction there will be approximately 2 to 3 truck trips to the site per week.
52. Once construction of the Project is completed, access or activity at the site will be approximately once per month.
53. The lattice style tower is intended to decrease the aesthetic impacts.
54. The tower's silver or grey color and lattice design will reduce its visual impact by increasing the effect of looking through the tower rather than looking at a solid monopole tower.
55. There are no guy-wires; the tower is self-supporting to minimize the footprint.
56. Construction will comply with ANSI Standard TIA 220ZG.
57. Because the tower is less than 200 feet in height, tower lighting is not required. Temporary lighting may be used only during construction.
58. The Project will not generate significant noise.

### **Conclusions of Law**

We review the legal issues within the context of each of the municipal and Act 250 matters.

#### **I. Conditional Use Review**

Before we reach the merits of the conditional use review, we must address two issues that Mr. Luongo raises.<sup>1</sup> First, whether the Project is located in the Agricultural and Forest Zoning District or the Rural Residential District? See Statement of Questions (SOQ) 1 and 2. Second, whether the Project must comply with the standards for both districts given its close proximity to the district boundary. See SOQ 3.

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<sup>1</sup> The parties filed a Stipulated Combined Statement of Questions which establishes our scope of review for trial. See trial Exhibit B.

a. *Applicable Zoning District*

Rising Tide Towers, LLC filed its application for local approval on or about August 2, 2018. The Town of Norton Zoning Regulations (Bylaws) in effect at that time were adopted on July 1, 2014.<sup>2</sup> Bylaw Section 201: Zoning Map and Districts, states as follows:

The zoning map officially entitled “Town of Norton Zoning Map” is hereby adopted in accordance with Section 4414 of the Act as part of this bylaw. The Zoning Map shows a division of the Town of Norton into the following districts:

Rural Residential District (RRD)  
Lakeshore and Streambank Overlay District (LSOD)  
Agriculture & Forest District (AFD)  
Flood Hazard Overlay District (FHO)

Furthermore, Bylaw Section 202: Official Zoning Map states:

Regardless of the existence of other printed copies of the zoning map, which from time to time may be made or published, the official zoning map shall be located in the office of the Norton Town Clerk and shall be the final authority as to the current zoning status of the land and water areas, buildings and other structures in the town.

The Town Map applying to Rising Tide Towers, LLC’s application is dated July 2, 2014.<sup>3</sup> This map was available at the Town Clerk’s office. Gina Vignault, Town Clerk, testified that the original map is/was maintained in the vault at the Town Office. The copy of this map entered into evidence at trial, Exhibit AA, is maintained at the Northeastern Vermont Development Association (NVDA). Based upon this map, the Project is located in the Agricultural & Forest District (AFD).

Mr. Luongo asserts that the Project is located in the Rural Residential District (RRD). Mr. Luongo bases this offer on a 1980 version of the Town Map. We do not agree with Mr. Luongo’s theory for several reasons. First, the 2014 regulations apply to the application, and therefore, the corresponding 2014 map controls. Second, the 1980 map only locates three zoning districts (RRD, LSD, and AFD) even though the 2014 Bylaw Section 201 calls for four districts (RRD, LSOD, AFD, and FHO). Lastly, Ms. Vignault testified at trial that she provided Mr. Luongo with a copy of

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<sup>2</sup> Admitted at trial as Exhibit Z.

<sup>3</sup> Town Clerk Gina Vignault testified that she believed that this date was a mistake and it should be July 1, 2014.

the 1980 town map because he requested it, not because that version of the map controlled. We also note that this issue has little impact on our review because Rising Tide Towers, LLC's surveyor, Arthur York, testified that regardless of whether the 1980 or 2014 versions of the Town Map controls, the Project is located within the AFD using either map. Even considering the 1980 map, all of the Project is within the AFD.<sup>4</sup>

*b. Relevant Zoning Standards*

As the Project is located in the AFD, the AFD regulations apply. We do not consider the Project's compliance with RRD regulations. Cf. McLaughry v. Town of Norwich, 140 Vt. 49, 54–55 (1981) (where property split between two districts, “that part of it which lies within the business district could be used for business purposes, and that part of the property lying within the residential district could be used for residential purposes”). We find no authority within the Bylaws to apply zoning regulations from a neighboring zoning district, and no precedent endorsing that proposition. Bylaw Section 205 states that no construction or land use shall be allowed “unless in conformity with the regulations specified for the district in which it is located.” Bylaws § 205 (emphasis added). As such we will apply only the AFD regulations.<sup>5</sup>

*c. Conditional Use Review*

Applicants seek conditional use approval for the Project. Wireless telecommunications facilities are conditional uses in the AFD. Bylaws § 205.03. The municipal issues before the Court raised in the parties' Stipulated Combined Statement of Questions, focus on whether the Project will have an undue adverse effect on the character of the area pursuant to Bylaw Section 607(2)(B). Under Bylaw Section 607(2)(B), applicants must demonstrate that their uses will not have undue adverse effects on: “The character of the area affected, as defined by the purpose or purposes of the zoning district within which the project is located, and specifically stated policies and standards of the municipal plan.” Bylaws § 607(2)(B).

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<sup>4</sup> We note that the existing gravel driveway connecting Church Hill Road to the Project area would be in the RRD per the 1980 map, however, the driveway extension and the Project are all within the AFD when considering both the 1980 and 2014 maps.

<sup>5</sup> Mr. Luongo contends that the Court should consider existing uses in the RRD as part of our conditional use review concerning “the character of the area.” As explained below, the development surrounding the Project is relevant to that analysis.



The statute empowering towns to regulate conditional uses provides that towns' conditional use standards

[S]hall require that the proposed conditional use shall not result in an undue adverse effect on . . . the character of the area affected, as defined by the purpose or purposes of the zoning district within which the project is located, and specifically stated policies and standards of the municipal plan.

24 V.S.A. § 4414(3)(A)(ii).

The statutory language in 24 V.S.A. § 4414 sets a “floor” for municipalities’ conditional use regulations, but it does not displace the requirements of municipal bylaws. See In re Hurricane Auto CU Permit, No. 92-7-11 Vtec, slip op. at 5 (Vt. Super. Ct. Envtl. Div. Oct. 12, 2012) (Walsh, J.) (quoting In re White, 155 Vt. 612, 619–20 (1991)). While towns’ regulations must, at the very least, ensure that conditional uses will not have an undue adverse effect on the character of the area “as defined by the purpose or purposes of the zoning district,” the regulations may *also* require that conditional uses not have an undue adverse effect on the character of the area as it actually exists. See, e.g., *id.*; In re Twin Pines Housing Trust Conditional Use, No. 95-7-11 Vtec, slip op. at 10 (Vt. Envtl. Ct. Sept. 20, 2012) (examining a conditional use bylaw requiring conformity with purpose statements and existing uses).

Before the enabling statute was amended and recodified in 2004, the meaning of “character of the area” was the character as it actually exists rather than as it is defined in the abstract. See In re LiCausi, No. 203-11-98 Vtec, slip op. at 2 n.2 (Vt. Envtl. Ct. Nov. 4, 2005) (Wright, J.) (noting that, because the 2004 amendments were not applicable to the application before the Court, “character of the area remains assessed as including the working landscape as the area currently exists, with all approved uses.”), *aff’d* 182 Vt. 647; cf. In re Gaboriault, 167 Vt. 583, 584–85 (1997); In re Miller, 170 Vt. 64, 69–71 (1999); In re Sardi, 170 Vt. 623, 625 (2000) (all affirming character-of-the-area reviews in which the lower court examined existing uses).

Recognizing that historic understanding among towns, we have looked to existing uses when reviewing conditional uses under bylaws that mimic the post-2004 statutory language, defining “character of the area” by purpose statements in town plans and bylaws. See In re Willowell Found. CU, No. 142-10-12 Vtec, slip op. at 3, 22 (Vt. Super. Ct. Envtl. Div. July 10, 2014) (Walsh, J.), *aff’d* 2016 VT 12. Nothing in the conditional use statute prohibits towns from carrying

forward the pre-2004 meaning of “character of the area,” provided their bylaws also require harmony with purpose statements in town plans and bylaws. See In re Hurricane Auto CU Permit, No. 92-7-11 Vtec at 5 (Oct. 12, 2012) (citing In re White, 155 Vt. at 619–20). Thus, in keeping with our precedent and efforts to reconcile pre- and post-2004 standards, we interpret the Bylaws’ character-of-the-area standard to mean that proposed conditional uses in the Town must harmonize with existing uses and with purpose statements in the town Bylaws and plan.

Our review is guided by the two-prong analysis, known as the “Quechee test,” used in reviewing state land use (Act 250) permits. See In re Grp. Five Invs. CU Permit, 2014 VT 14, ¶ 14, 195 Vt. 625 (approving use of the Quechee test as guidance in defining undue adverse impacts in zoning bylaws), overruled on other grounds by In re Confluence Behavioral Health, LLC, 2017 VT 112, 206 Vt. 302. Under the Quechee test,

“[the Court first] determines if the proposed project will have an adverse . . . impact, and if so, it considers whether the adverse impact would be undue. An adverse impact is considered undue if any one of the three following questions is answered in the affirmative: (1) does the project violate a clear, written community standard . . . ; (2) does the project offend the sensibilities of the average person; and (3) has the applicant failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings.”

In re Times & Seasons, LLC, 2008 VT 7, ¶ 8, 183 Vt. 336 (citations omitted).

The Bylaws express the following purpose for the AFD District:

[T]o protect lands which are best suited for agricultural and forestry use and are now essentially undeveloped except for uses associated with agriculture. This district contains significant natural features, trail systems and scenic views.

Bylaws § 205.03 (expressing the “objective” for the zoning district). This purpose does not provide any specific or concrete prohibition. It merely reflects an attempt to conserve agricultural and forestry land.

To the extent this purpose statement imposes enforceable limits on conditional uses in the AFD District, the Project is within these limits. The Project involves new construction, however, land disturbance is limited to a 100 by 100 square foot wooded area thereby conserving agricultural land and resulting in a minimal disturbance to the forested area. The forested area is already disturbed by overhead electric and telephone utility lines and associated poles running

parallel to Church Hill Road. The Project will not conflict with existing uses in the area. The Hettinger property will continue its residential and agricultural activities. A VAST snowmobile trail that crosses the property will not be physically disturbed. Lastly, the Church Hill Road area contains year-round homes which will continue in use.

The Court recognizes that the immediate neighborhood is composed of single-family residences, properties that are undeveloped, an inactive church that is presently for sale, and two cemeteries. People visiting the abutting cemetery will have views of the upper portion of the tower. Similarly, Mr. Branham will have views of the upper portion of the tower from several windows, although this viewpoint looks uphill and the more expansive view from Mr. Branham's property will be in the opposite direction from the tower. Mr. Luongo testified that he hopes to build a home on his undeveloped property on the upper portion of Church Hill Road and that he would like to do so close to the road and overhead power to save costs. As such, this new home would have the upper portion of the tower in westerly views. We find that constructing the 190-foot tower will result in adverse effects on the character of the area in that the Project varies from the residential nature of the area and will alter views. We note that "the word 'adverse' means unfavorable, opposed, hostile" to the character of the area. See Quechee Lakes Corp., Nos. 3W0411-EB and 3W0439-EB, Findings of Fact, Conclusions of Law, and Order, at 17 (Vt. Env'tl. Bd. Nov. 4, 1985).

Although we conclude that the Project will have an adverse effect on the character of the area, this impact is not undue. First, we cannot say that the project violates any clear written community standards. We do find evidence that the Town, through the Norton Town Plan (Town Plan), has established an "overarching goal" of preserving "traditional ways of life and land use patterns." Town Plan at 3. The Town Plan identifies two nearby cemeteries as historic resources. Id. at 29. With respect to these historic resources, the Town Plan states that it generally supports preservation. Id. at 31. To the extent these provisions rise to the level of clear written community standards, the Project fits within these standards. The Project does not inhibit traditional ways of life and has a minimal impact on traditional land use patterns. The Project also preserves the two cemeteries. The tower project is not located in a designated scenic corridor or public recreation area. Appellant offers that the Town Plan protects scenic views including the Gore

Mountain hiking trail, Norton Pond, Averill Pond and Little Averill Pond. The scenic view of Little Averill Pond faces the opposite direction from the Project site, and the site is located over 4 miles from the other scenic features. The Project will not be visible from any of these viewing locations.

Second, the Project will not offend the sensibilities of the average person. While the neighbors are concerned about the height of the Project and its alleged non-compatibility with their neighboring residential properties, they did not provide evidence that the Project would be shocking or offensive to an average person. Though Mr. Luongo and Mr. Branham testified as to how they expect the Project to be offensive and how potential views from specific locations may shock them, we must consider the Project's impacts from the perspective of an average person. Cf. In re Goddard College CU, Docket Nos. 175-12-11 and 173-12-12 Vtec, slip op. at 14 (Vt. Super. Ct. Envtl. Div. Jan. 6, 2014) (Walsh, J). Mr. Luongo has owned his property for more than 40 years and yet he has never built on it. The property is large enough that Mr. Luongo could build his home further to the south where views would be less impacted by the tower. There will be brief views of the Project from Route 114 and some views from surrounding properties and residences. Under present-day conditions, there are views of power lines and associated poles in the area. The Project is similar in scale, material, and form to existing towers throughout Vermont and the northeast. Thus, we conclude that the sensibilities of the average person would not be offended or shocked by the addition of the Project.

Finally, Applicants have taken reasonably available mitigating steps to improve the harmony between the Project and the surrounding area. The Project was relocated from the open agricultural field and moved into the forested area where a vegetated buffer will be maintained. The Project is designed to incorporate green slats into the chain link fencing surrounding the compound area screening and softening views. This screening and fencing will mitigate negative impacts to the views from neighboring properties. There will be no Project lighting. Furthermore, the tower's silver or grey color and lattice design will reduce its visual impact by increasing the effect of looking through the tower rather than looking at a solid monopole tower. Mr. Luongo has not suggested additional mitigation.<sup>6</sup> There was some evidence at trial that Blackrock considered a lower tower height, however, such an adjustment would significantly diminish the level of service or would require a greater number of towers for

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<sup>6</sup> In a pre-trial decision we ruled that suggested relocation of the Project was not relevant to our review.

the network. We find that Applicants have taken all reasonably available mitigating measures. In sum, we find that the Project is consistent with the stated purpose of the AFD and that it will not be incompatible with the existing uses in the area. We conclude that some of the Project's aesthetic impacts may be adverse, but we also conclude that none of the aesthetic impacts will be "undue." Because we find that the Project conforms to the conditional use requirements, we **APPROVE** Applicants' conditional use application, subject to any conditions imposed by the Town.

## **II. Act 250 Review**

The sole Act 250 issue raised in the parties' Stipulated Combined Statement of Questions is whether the Project conforms with the aesthetic and scenic or natural beauty requirements of Criterion 8.<sup>7</sup> At trial, the parties agreed that historic sites are not at issue with respect the Act 250 review. Furthermore, we received no evidence of rare or irreplaceable natural areas at the Project site or in the surrounding area.

If an applicant satisfies the initial burden of production, then the ultimate burden of proving that a project does not conform to Criterion 8 rests upon the project's opponents. 10 V.S.A. § 6088(b); In re Rivers Dev., Nos. 7-1-05 Vtec and 68-3-07 Vtec, slip op. at 33 (Vt. Env'tl. Ct. Mar. 25, 2010) (Durkin, J.) (citing In re Route 103 Quarry, No. 205-10-05 Vtec, slip op. at 8 (Vt. Env'tl. Ct. Nov. 22, 2006) (Durkin, J.), *aff'd*, 2008 VT 88, 184 Vt. 283).

The cornerstone of the Criterion 8 analysis is the question: "[w]ill the proposed project be in harmony with its surroundings—will it 'fit' the context within which it will be located?" Re: Quechee Lakes Corp., Nos. 3W0411-EB and 3W0439-EB, at 18 (Nov. 4, 1985). We use the two-part "Quechee test" to determine whether a project's impacts satisfy Criterion 8. See Id. at 18–19. First, we consider whether a project will have adverse impacts. Id. Whether an impact is "adverse" depends on whether the development will "fit" its aesthetic context. Id. If we find a development will have adverse impacts, we consider whether those impacts are "undue." Id. at 19–20. Adverse impacts are "undue" if: (1) the project violates a clear, written community

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<sup>7</sup> To receive an Act 250 land use permit, an applicant must provide evidence sufficient to enable the Court to find that the proposed project "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." 10 V.S.A. § 6086(a)(8).

standard; (2) the project offends the sensibilities of the average person; or (3) the applicant has failed to implement reasonable and generally available mitigating measures. Id.

As analyzed at length above, we conclude that the Project will not have an undue adverse effect on the aesthetic and scenic or natural beauty of the area. Although we conclude that the Project will have an adverse effect on its surroundings, the effect is not undue, and it therefore satisfies Act 250 Criterion 8. Because this is the only criterion challenged in this appeal, we **APPROVE** Applicant's Act 250 application, subject to any conditions in the District Commission approval.

### **Conclusion**

We conclude that: the Project is located in the Town AFD zoning district; that the RRD zoning regulations do not apply to the Project; that the Project conforms to the conditional use requirements of the Town's Bylaws; and that the Project will not have an undue adverse effect on the aesthetic and scenic or natural beauty of the area. We **APPROVE** Applicants' conditional use application and the Act 250 application, subject to any conditions imposed by the Town or District Environmental Commission.

A Judgment Order accompanies this Merits Decision. This concludes the proceedings currently before this Court.

Electronically signed on November 20, 2019 at 9:43 AM pursuant to V.R.E.F. 7(d).

A handwritten signature in black ink, appearing to read "Tom Walsh", is written over a horizontal line.

Thomas G. Walsh, Judge  
Superior Court, Environmental Division