

State of Vermont  
NATURAL RESOURCES BOARD  
DISTRICT 5 ENVIRONMENTAL COMMISSION  
5 Perry Street, Suite 60  
Barre VT 054641

RE: Mountainside Condominium Association  
4036 Main Street  
Waitsfield, VT 05673

Application #5W0504-6  
Findings of Fact  
Conclusions of Law, and Order  
10 V.S.A. §§ 6001-6093 (Act 250)

## **I. INTRODUCTION**

On September 12, 2014, Mountainside Condominium Association filed an application for an Act 250 permit amendment for a project generally described as the reconstruction of Building 3 of a condominium development that was destroyed by fire. The tract of land consists of 4.3 acres. The Applicant's legal interest is ownership in fee simple described in a deed recorded on November 15, 1979 in the land records of Warren, Vermont.

The Commission held a hearing on this application on October 29, 2014. The Commission also conducted a site visit on October 29, 2014. At the end of the hearing, the Commission recessed the proceeding pending the submittal of additional information. The Commission adjourned the hearing on March 19, 2015 after receipt of the additional information, an opportunity for parties to respond to that information, and the completion of Commission deliberations.

As set forth below, the Commission finds that the Project does not comply with 10 V.S.A. § 6086(a) (Act 250).

## **II. JURISDICTION**

As determined in a Project Review Sheet (jurisdictional opinion) issued on September 9, 2014, jurisdiction attaches because the Project is a material change to a permitted development or subdivision, and thus requires a permit amendment pursuant to Act 250 Rules 2(C)(6) and 34.

## **III. AMENDMENT APPLICATION – RULE 34(E)**

The threshold question on an amendment application is “whether the applicant proposes to amend a permit condition that was included to resolve an issue critical to the issuance of the permit.” Act 250 Rule 34(E)(1).

In this application, the applicant does not seek to amend such a critical permit condition, so the Commission may consider the merits of the amendment application without conducting the rest of the Rule 34(E) analysis.

## **IV. PARTY STATUS AND FRIENDS OF THE COMMISSION**

A. Parties by Right

Parties by right to this application pursuant to 10 V.S.A. § 6085(c)(1)(A)-(D) who attended the hearing are:

1. The Applicants:

- Carl Lisman, Esq., through an Entry of Appearance, dated October 29, 2014;
- Rick DeWolfe and Alicia Feiler – DeWolfe Engineering Associates;
- Brad Ketterling - VHB;
- William Gallup and William Maclay – Maclay Architects; and
- Henry Erickson – Erickson Consulting.

2. The Agency of Natural Resources through an Entry of Appearance, dated October 28, 2014, by Jennifer Mojo, Regulatory Planning Analyst.

B. Interested Parties

Any person who has a particularized interest protected by Act 250 that may be affected by an act or decision of the Commission is also entitled to party status. 10 V.S.A. § 6085(c)(1)(E).

i. Preliminary Party Status Determinations

Pursuant to Act 250 Rule 14(E), the District Commission made preliminary determinations concerning party status at the commencement of the hearing on this application. The following persons requested party status pursuant to 10 V.S.A. § 6085(c)(1)(E), and were either admitted as parties or denied party status, as indicated below:

1. Margo Wade – Sugarbush Resort: Granted party status under criteria 1(B), 2 & 3; and 4.

ii. Final Party Status Determinations

Prior to the close of hearings, the District Commission re-examined the preliminary party status determinations in accordance with 10 V.S.A. § 6086(c)(6) and Act 250 Rule 14(E) and found no reason to change its preliminary determinations:

1. Margo Wade – Sugarbush Resort: Granted party status under criteria 1(B), 2 & 3; and 4.

**V. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Applicant has met the burden of proving compliance with the following criteria through submittal of the application:

- |                           |                          |
|---------------------------|--------------------------|
| 1(C) - Water Conservation | 6 - Educational Services |
| 1(F) – Shorelines         | 7 - Municipal Services   |
| 1(G) - Wetlands           | 8 - Aesthetics           |
| 5 - Transportation        | 8 – Natural Areas        |
|                           | 8 – Historic Sites       |

8(A) - Wildlife Habitat & Endangered Species  
9(A) - Impact of Growth  
9(B) - Agricultural Soils  
9(C) - Productive Forest Soils  
9(D) - Earth Resources  
9(E) - Extraction of Earth Resources

9(G) - Private Utility Services  
9(H) - Costs of Scattered Development  
9(J) - Public Utility Services  
9(K) - Effects on Public Investments  
9(L) – Settlement Patterns

Therefore, the application shall serve as the Findings of Fact on these criteria.

The findings of fact are based on the application, Exhibits # 1 – 39, and other evidence in the record. Findings made in this decision are not limited to the specific criterion in which they appear, and may apply to other sections of the decision. To the extent that any proposed findings of fact are included in this decision, they are granted; otherwise, they are denied.

Under Act 250, projects are reviewed for compliance with the ten criteria of Act 250, 10 V.S.A. § 6086(a)(1)-(10). Before granting a permit, the District Commission must find that the Project complies with these criteria and, therefore, is not detrimental to the public health, safety or general welfare. The burden of proof under Criteria 1 through 4 and 9 and 10 is on the applicant, and on the opponent under Criteria 5 through 8, and 9A if the municipality does not have a duly adopted capital improvement program.

#### General Findings:

1. In 1979, the District 5 Commission issued the land use permit – 5W0504 – which approved the construction of 90, seasonal, condominium units in the Sugarbush Village:
  - a. 5W0504-1 (1979) – an amendment phasing the condominiums into 3 buildings, Building 1 with 30 units, Building 2 with 24 units, and Building 3 with 36 units;
  - b. 5W0504-2 (1979) – an amendment approving a commercial, non-residential, component of the project;
  - c. 5W0504-3 (1980) – an amendment approving a 20-seat restaurant on the tract;
  - d. 5W0504-4 (1980) – a *denial* for an amendment requesting a revised landscaping plan and plan to place rip rap in the Rice Brook. The project was denied under Criterion 1(E)(Streams) and 8(A)(Wildlife Habitat); and
  - e. 5W0504-5 (1991) – an amendment approving a 10' x 37' addition to the restaurant.
2. The subject of this land use permit amendment is Building 3 – 36 units – which was destroyed by fire in February of 2014. Specifically, Building 3 will consist of 24 one-bedroom units and 12 two-bedroom units. [Exhibits 3 and 29]

#### Criterion 1 - Air Pollution:

3. During construction dust will be controlled by the application of calcium chloride on gravel surfaces. There will only be typical construction noises for this project. No burning of debris

will occur as part of this project. After construction no emissions, dust, smoke, odors, or noises will be created due to this project. [Exhibit 3]

4. The residential building constructed as part of the Project will have multiple high efficiency LP gas-fired boilers in accordance with the recommendations of the Vermont Department of Public Service and the current version of the Vermont Guidelines for Energy Efficient Commercial Construction. Also, each unit will have LP gas-fired fireplaces with sealed combustion. [Exhibit 3]
5. Proposed construction hours were to be limited to 6 a.m. - 7 p.m., Monday through Saturday except in emergency situations. The Commission, however, would limit the hours to 7 a.m. – 6 p.m. had a Land Use Permit amendment been issued in this case.[Exhibit 3]

#### Conclusions of Law

The Commission concludes that this Project complies with Criterion 1(air).

#### **Criterion 1(B) - Waste Disposal:**

6. Waste generated by the Project will include sewage, residential solid waste, and stormwater runoff.
7. The estimated 5,880 gallons per day of wastewater from the Project will be disposed of through connection to the Mountain Water Company wastewater treatment facility. [Exhibit 26]
8. The Agency of Natural Resources (Agency or ANR) Department of Environmental Conservation issued Wastewater System and Potable Water Supply Permit WW-5-6698 on September 8, 2014. [Exhibit 26]
9. The Project does not have any floor drains.
10. The applicant will use erosion prevention and sediment control measures contained in a site specific Erosion Prevention and Sediment Control (EPSC) Plan that conforms to the Vermont Standards and Specifications for Erosion Prevention and Sediment Control (2006) to control stormwater runoff during construction. [Exhibit 7]
11. Coverage under both the Construction General Permit and a Stormwater Discharge Permit is not required for the Project. [Exhibit 3]
12. The project is sub-jurisdictional and does not require an operational stormwater permit from ANR as the existing impervious was constructed prior to 2002 and the expansion (2,234 square feet) is less than 5,000 square feet. [Exhibits 36 and 37]

13. The Association has retained Mad River Property Management to clear snow from parking areas and the driveway as well as to remove accumulated snow from the site when necessary. The contract includes the following requirements: "Snow will be plowed from parking aisles and spaces for a single snow event or cumulative snow events that produce 3 or more inches of snow. Snow will be removed from the site, when necessary, to maintain the limits of the parking spaces and aisles." Snow piles will be permitted on site provided that parking aisles and spaces are maintained. [Exhibit 36]
14. The parking area will be unpaved, and will remain as a gravel lot. [Exhibit 36]
15. Grading has been design to direct stormwater runoff, as it did previously, to the northern side of the parking area (away from the stream) through an existing grass- and stone-lined swale. [Exhibit 36]
16. The gravel parking area drains to the northern side of the parking lot, is collected in stone and grass swales, flows through a culvert and into an existing stabilized swale. The flow patterns are the same as was prior to the fire. [Exhibit 36]
17. There are areas between the building entryways and the parking area that will collect roof water and convey it through a closed drainage system to an existing storm drain. The existing and proposed closed drainage system along the front of the building outlets to the same location that it did previously: To the south of the 205 Mountainside Condominium building. This point is 117.6 feet from the top of the bank and discharges parallel to the bank, not toward it. [Exhibit 36]
18. The only stormwater runoff that will flow toward the stream is that which falls on the area between the building to be reconstructed and the stream bank, approximately one-third of the roof (which will drop onto a stone drip strip to dissipate the energy of the runoff) and the riparian buffer planted area to the south of the building to be reconstructed following the existing contours. [Exhibit 36]
19. The post-project stormwater will be conveyed through sheet flow to grass swales and by using a closed system of drain basins. Stormwater drainage patterns will follow previous patterns. [Exhibit 3]
20. The Project will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells.

#### Conclusions of Law

The ANR Wastewater System and Potable Water Supply Permit creates a presumption pursuant to Act 250 Rule 19 that the disposal of wastes through the installation of wastewater and waste

collection, treatment and disposal systems authorized by the permit will not result in undue water pollution. Technical determinations made by ANR in issuing the permit are entitled to substantial deference. 10 V.S.A. § 6086(d).

The Project will meet all applicable Department of Environmental Conservation (DEC) regulations on waste disposal, and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells. In addition, the Project will not cause undue water pollution.

The Project complies with Criteria 1(water) and 1(B).

**Criterion 1(D) - Floodways:**

21. The Project is located adjacent to Rice Brook. Rice Brook is a small tributary of Clay Brook, which in turn flows into the Mad River, a major Winooski River tributary. At the project site, Rice Brook drains a total watershed area of 0.45 square mile, or about 290 acres. Rice Brook forms the southern property line for the parcel. The previous building was located 3.75 feet at its closest point to the top of bank of Rice Brook. The proposed building is roughly parallel to the brook and located as close as 4.6 feet from the top of bank of Rice Brook. [Exhibit 3]
22. The north bank of the brook is steep and about ten feet high near the upper end of the building. [Exhibit 36]
23. Since 2003, ANR has considered both inundation and fluvial erosion hazards when determining the Act 250 Floodway under Criterion 1D. ANR consults both Federal Emergency Management Agency (FEMA) flood hazard information and ANR River Corridor (Fluvial Erosion Hazard Area) information to support this determination. ANR comments are based on the 2009 *ANR Technical Guidance for Determining Floodway Limits Pursuant to Act 250 Criterion 1(D)*. [Exhibit 33]
24. At this location, FEMA has not developed Special Flood Hazard Area maps to defining the 100-year flood elevation and inundation zone and the conveyance-based floodway limits. Rice Brook, due to the small watershed area and the bank height, presents a minimal risk of flooding assuming unobstructed flow. The Act 250 Floodway is, therefore, defined according to the ANR River Corridor and the fluvial erosion hazard. Because the Rice Brook watershed area at this location is less than 2.0 square miles, the ANR technical guidance defines the River Corridor limit as a simple setback of 50' measured horizontally from the top of the stream bank. The proposed rebuild locates the structure well within the Act 250 Floodway. [Exhibit 33]
25. Because the pre-fire development already had significant encroachment on Rice Brook, and the proposal essentially duplicates that high level of encroachment, the proposal will not

increase fluvial erosion hazards and therefore meets the 2009 *Technical Guidance* according to ANR. [Exhibit 33]

26. The proximity of the project to the streambank and its location within the River Corridor means the rebuilt condominium will be at direct risk of fluvial erosion damage and perpetuates a situation that will likely lead to a managed, channelized stream. Beyond potential damage to the new building, such channelized streams exhibit increased erosive power which often corresponds with fluvial erosion damages downstream. ANR recommends that every effort be made to relocate the new condominium farther from Rice Brook. [Exhibit 33]
27. The project includes installation of buried propane tanks that will be at least 64 feet from the top of the streambank. An existing propane tank is located at the swimming pool directly below the project; the tank is 22 feet from the top of bank.
28. The Commission takes administrative notice of 5W0504-4 Findings of Fact and Conclusions of Law – issued August 26, 1980.

#### Conclusions of Law

The Project will involve the development of lands and location of the structure within the Act 250 Floodway. The proposed development encroaches 45 feet into the defined Rice Brook floodway. The proposed development will be at direct risk of fluvial erosion damage due to potential bank erosion and lateral stream movement under flood conditions. Further, the risk of damage perpetuates the possibility of a managed, channelized stream. Rice Brook is a small, mountainous stream that can rapidly reach flood conditions limiting reaction time for evacuation of the building during a catastrophic event. The encroachment, and risk of fluvial erosion, will restrict the flow of flood waters and endanger the health, safety, or welfare of the public or riparian owners during a flooding event.

The Project does not comply with Criterion 1(D).

#### **Criterion 1(E) - Streams:**

29. Rice Brook supports a self-sustaining wild brook population. Extensive fisheries assessments by Vermont Department of Fish and Wildlife (VDFW) in this vicinity document a population with multiple age classes of brook trout including larger adult fish. Interactions with local anglers indicate that this brook is actively fished. Rice Brook has also been the subject of chronic sedimentation due to surrounding roadways and developed areas. The brook was only removed from the state impaired waters list in 2010. When Rice Brook was delisted, the stream was rated as good/very good based on the two previous years of positive bio-monitoring data. Since the removal of Rice Brook from the impairment list, 2013 macro-invertebrate sampling shows the backsliding of several parameters resulting in

the stream being rated as good to fair condition at locations above and below the wastewater treatment facility. The 2013 data indicates that the stream is on the threshold of meeting versus not meeting water quality standards and is considered by the Agency as stressed. Both sampling locations are downstream of the project. [Exhibit 33]

30. Water quality impacts to Rice Brook as reflected at the sampling stations are a cumulative result of upstream activities. The riparian area adjacent to Rice Brook has been extensively developed in some areas. Across from the proposed development are existing and proposed buildings and parking infrastructure. Downstream areas are constrained by tennis courts, a roadway and the health and exercise facility. The current riparian encroachments on Rice Brook and its history of degradation only increase the importance of functional riparian areas along the remaining stream channel. [Exhibit 33]
31. The Agency's understanding, procedures and regulations regarding development and riparian buffers have changed significantly since the original 1979 permit was issued. In 2005, the Agency developed the *Guidance for Agency Act 250 and Section 248 Comments Regarding Riparian Buffers* with the goal of sustaining and enhancing the functions and values of the State's waters and natural ecosystems through maintenance and restoration of riparian buffer zones. Under the current guidance document, the Agency recommends a 50 foot undisturbed naturally vegetated riparian buffer from the top of bank of Rice Brook to protect water quality and aquatic and terrestrial habitats based on its *Riparian Buffers and Corridors Technical Papers*, which are companion to the guidance document. [Exhibit 33]
32. The existing permit allows buffer encroachment that is inconsistent with current Buffer Guidance standards. Although the applicant proposes a riparian management plan and plantings for portion of the area behind the building, the building footprint remains virtually the same with a minimal setback from the top of bank. However, the parking area (number and size of parking spaces) was increased. Additionally, construction activities and stormwater infrastructure are proposed within 2' from the top of bank. [Exhibit 33]
33. Support for the current proposal would be inconsistent with current riparian buffer practices within Act 250. The project has not demonstrated that adequate protection of water quality, aquatic and terrestrial habitat, and bank stability will occur with the expansion of impervious surfaces and reconstruction of the structure. The ANR recommends the project be developed in a manner to maximize conformance with Riparian Buffer Guidance recommendations and provide additional room to allow for a more robust riparian buffer between the stream and structure. [Exhibit 33]
34. Rice Brook, in the vicinity of the project, has been subject to habitat degradation resulting from development within the watershed and encroachment into riparian areas. Chronic sedimentation, attributed to construction erosion, was noted in a 1991 VDFW report evaluating the trout populations of Clay Brook, Chase Brook, and Rice Brook over an eleven year period. Ultimately these impacts lead to the listing of Rice Brook as impaired,



which prompted significant measures to improve water quality and subsequent delisting. [Exhibit 37]

35. Coldwater populations, such as those present in and downstream of Rice Brook, require stringent water quality and aquatic habitat conditions that are influenced by surrounding land use practices, particularly within adjacent riparian areas. The ecological and physical functions provided by undisturbed, naturally vegetated riparian areas are required to “maintain the natural condition of the stream” as described in Criterion 1(E). These functions include:
  - Moderating Stream Temperatures;
  - Energy Productions;
  - Instream Habitat;
  - Sediment Control; and
  - Nutrient Retention. [Exhibit 37]
36. Water quality impacts to Rice Brook are a cumulative result of upstream activities. Based on the project’s limited buffer width and early stormwater system, it is likely the project did contribute to, to some extent, the former impairment. [Exhibit 37]
37. The Cross Section Plan depicts the location in which the building is at its closest proximity to the top of the bank of Rice Brook. It shows the location of the existing grade, proposed grade, limits of parking area, entrance walkway, drip strips, building, planting area, top of banks and channel for Rice Brook, and the vegetated path on the opposite side of the brook. [Exhibit 36]
38. The building foundation wall, which runs parallel to Rice Brook, is set back approximately nine and a half feet at its closest proximity. The westerly-most section of the building contains four first floor condominium apartments, each of which has an exterior deck that is supported by five foot wing walls; there are five wing walls. The end of the wing wall nearest to Rice Brook is approximately four and a half feet away from the top of the bank. [Exhibit 36]
39. While the application included a landscaping plan that included the stream buffer and a description of management for that zone, the applicant filed a more detailed plan in response to the Commission’s recess order. The goals of the plan are to improve existing conditions in the area between the building to be reconstructed and the stream and to restore the riparian buffer functions. Because the area to be protected will be fenced, the vegetation will be undisturbed and allowed to prosper. The applicant proposes heavy vegetation on either side of the fences and additional ground cover plantings, all as more detailed in the Plan. [Exhibit 36]
40. There will no longer be a need for annual mowing. [Exhibit 36]

41. Protection of the integrity of the area between the rear of the reconstructed building and the top of the bank of Rice Brook is a continuing concern for the applicant. The area has been an informal access for occupants of uphill properties for a number of years. Attempts to limit - or prohibit - skier access through the area was previously unsuccessful. [Exhibit 36]
42. To address the historic pattern of use by uphill skiers, the applicant proposes to install two chain link fences to prevent skier use of the stream buffer area at the rear of the proposed building. [Exhibit 36]
43. One fence will be installed at the southwestern corner of the building and extend to the northeastern edge of an existing pedestrian bridge that spans Rice Brook at the upstream end of the site. The other fence will be installed from the southeastern building corner of Unit 1-68 to the existing pool fence. Together, the fencing will prevent travel across the stream buffer. [Exhibit 36]
44. The proposed Building Elevation drawing submitted with the application indicated stair access from the exterior first floor decks. [Exhibit 36]
45. The plans for the building have been revised to (a) eliminate the stairs at the end of the eight decks within the 50-foot setback area; and (b) install railings along the rear end of the decks; together, these changes should eliminate the possibility of skier access from the units themselves. [Exhibit 36]
46. The applicant also proposes signage as follows: SENSITIVE STREAMSIDE MANAGEMENT AREA – NO MOW – NO ACCESS. [Exhibit 36]

#### Conclusions of Law

The Commission concludes that the applicant will not maintain the natural condition of Rice Brook.

No attempt has been made by the applicant to maintain the stream in its natural condition by scaling the project to the site such that an appropriate buffer is provided. Options include reducing the number of units and/or developing off-site parking. Rice Brook has already been affected by previous development on this project tract. In fact, rip rap was placed in the Rice Brook, which limits some of the growth of trees and other vegetation on the streambank and attainment of a natural condition. The Commission takes administrative notice of Findings of Fact and Conclusions of Law 5W0504-4 (issued August 26, 1980) which was denied for a failure to maintain the Rice Brook in its natural condition and therefore found to be inconsistent with 10 VSA §6086(a)(1)(E). Because the building encroaches into the floodway, there would be a continuing potential for the need to actively manage the brook to prevent damage to the structure. Relocation, channelization, and installation of additional rip rap are actions that would be inconsistent with maintaining the brook in its natural condition and are avoidable with relocation of the building outside of the floodway.

Therefore, the Project does not comply with Criterion 1(E).

**Criteria 2 and 3 – Water Availability and Impact on Existing Water Supply:**

47. This Project will use 6,480 gallons per day of water. [Exhibit 25]
48. Water Supply and Wastewater Disposal Permit, WW-5-6698 was issued by the Regional Engineer for the Agency of Natural Resources on September 8, 2014, which permits this project to utilize the Mountain Water Company as a water supply source. The Mountain Water Company system is a fully permitted public water supplier that previously provided water to the building that was destroyed by fire and intends to continue this service. [Exhibits 25 and 36]
49. The project is designed and permitted to require water conservation measures in line with 2014 technology. These new fixtures will use less water than typical fixtures installed in the 1980's. As proposed, the reconstructed building will utilize less water than the originally permitted building. [Exhibit 36]

Conclusions of Law

The ANR Wastewater Management Division issued Permit WW-5-6698, which creates a presumption pursuant to Act 250 Rule 19 that the Project has sufficient water available for its reasonably foreseeable needs and complies with Criterion 2. No evidence was presented to rebut the presumption or challenge the technical determinations made by ANR.

The Commission concludes that there is sufficient water available to meet the reasonably foreseeable needs of this Project. The Project complies with Criterion 2.

The Project will not place an unreasonable burden on an existing supply. The Project complies with Criterion 3.

**Criterion 4 - Soil Erosion:**

50. The existing conditions of the area are sloping with gravel and grassed surfaces. The grades slope from west to east. Where the building is proposed is terraced ground with its high side on the west. A large boulder retaining wall and steep bank surround the parking area to the west and north. The existing 205 Mountainside Condo building is to the east of the proposed building. Rice Brook is the southern property line boundary. [Exhibit 3]
51. The project does not require a construction stormwater permit from ANR as the project is disturbing less than 1 acre during the construction phase. [Exhibit 37]

52. The applicant will use erosion prevention and sediment control measures contained in a site specific Erosion Prevention and Sediment Control (EPSC) Plan that conforms to the Vermont Standards and Specifications for Erosion Prevention and Sediment Control (2006) to control stormwater runoff. The following describes the erosion control measures (a) during construction, (b) permanent measures, (c) measures proposed for inspection, and (d) site plans for Erosion Prevention and Sediment Control (Specifically, see sheets C0.02, C1.03, C5.03):

- Erosion control measures to be taken during construction include silt fence, erosion control matting, turf establishment, stone check dams, and catch basin protection.
- Turf establishment, permanent check dams, and gravel parking areas will result in a stabilized site after construction is completed.
- The erosion controls shall be inspected weekly and after any rain event which produces runoff. The on-site coordinator will be responsible for identifying and rectifying any problems that may occur. [Exhibits 3, 6, 7, and 11]

#### Conclusions of Law

The water quality of streams – such as Rice Brook – can be negatively impacted by the input of eroded sediment. Sediment entering Rice Brook can directly cause a harmful alteration and/or destruction of fish habitat and other aquatic organisms. Sediment also serves as a transportation system for chemicals that diminish water quality. Excessive sediment loading – due to close proximity to the Rice Brook – can also contribute to stream bank erosion and channel erosion. These factors are present in the current proposal will lead to unreasonable soil erosion.

The Commission concludes that the construction of the Project will cause unreasonable soil erosion or a reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

Therefore, the Project does not comply with Criterion 4.

#### **Criterion 8 - Aesthetics, Historic Sites and Rare and Irreplaceable Natural Areas:**

##### Aesthetics, Scenic or Natural Beauty

53. The project is a reconstruction of an existing building on essentially the same footprint. The site is presently open and grassed over.
54. The site is adjacent to Rice Brook. The upper Rice Brook watershed is predominantly forested. The riparian corridor on the southwest side of the brook near the proposed development remains largely forested; however, there is extensive residential development to the brook's northeast both upstream and downstream of the site, and some of the development is in close proximity to the brook.

55. The building would be a 3 1/2 story gabled structure with multiple gabled entries. Off-white fiber cement panel siding and fiber cement trim will be used along with red asphalt shingle roofing. [Exhibits 3, 13 and 14]
56. The use will be residential in nature. This project will not create any significant noise during or after construction. The project will require traditional construction equipment on-site but no blasting or drilling is expected. After construction the project should appear to be functionally the same as the prior building. [Exhibit 3]
57. Style and colors will be compatible with adjacent buildings. Fiber cement panel siding has a similar monolithic aesthetic to the stucco siding of the adjacent buildings. [Exhibits 3, 13, and 14]
58. The Project will be landscaped as outlined on Exhibit 36 (Landscaping Plan L400). The applicant agreed to continually maintain the landscaping as approved.
59. Exterior lighting, consisting of five pole lights mounted at 15', will be located along the side of the parking lot. Six 17.95 watt LED wall mounted lights will be at the entries. These lights will be mounted in the ceiling of the entry and will be down-casting. The lights will be controlled by timer and occupancy sensor. The pole lights are fully shielded. Wall mounted lights are also located near each of the corners main building ends. [Exhibits 3, 13 and 14]
60. The project is a redevelopment of an existing residential facility. It will not be larger in scope and/or scale.

#### Historic Sites

61. There are no historic sites or rare and irreplaceable natural areas which will be affected by this Project. [Exhibit 3]

#### Conclusions of Law

Prior to granting a permit, the Commission must find that the subdivision or development under Criterion 8 "will 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). This Project involves concerns under Criterion 8 related to aesthetics, and noise.

#### AESTHETICS and NATURAL AND SCENIC BEAUTY

The Commission uses a two-part test to determine whether a Project meets the portion of Criterion 8 relating to aesthetics and natural and scenic beauty. First, it determines whether the Project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. In re

Rinkers, Inc., No. 302-12-08 Vtec, Decision and Order at 12 (Vt. Env'tl. Ct. May 17, 2010)(citations omitted); see also, Re: Quechee Lakes Corporation, #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 18-20 (Vt. Env'tl. Bd. Nov. 4, 1985); In re Halnon, 174 Vt. 514 (mem.)(applying Quechee test in Section 248 context).

The burden of proof under Criterion 8 is on any party opposing the Project, 10 V.S.A. § 6088(b), but the applicant must provide sufficient information for the Commission to make affirmative findings. In re Rinkers, No. 302-12-08 Vtec, Decision and Order at 10-11 (Vt. Env'tl. Ct. May 17, 2010)(citing Re: Susan Dollenmaier, #3W0125-5-EB, Findings, Conclusions and Order at 8 (Vt Env'tl. Bd. Feb. 7, 2005); In re Eastview at Middlebury, Inc., No. 256-11-06 Vtec, slip op. at 5 (Vt. Env'tl. Ct. Feb. 15, 2008), aff'd, 2009 VT 98. "Either party's burden, however, may be satisfied by evidence introduced by any of the parties or witnesses . . . ." In re McShinsky, 153 Vt. 586, 589 (1990) (quoting In re Quechee Lakes Corp., 154 Vt. 543, 553-54 (1990)).

#### 1. Adverse Effect

To determine whether the Project will have an adverse aesthetic effect, the Commission looks to whether the Project will "fit" the context in which it will be located. In making this evaluation, the Commission examines a number of specific factors, including: the nature of the project's surroundings; the compatibility of the project's design with those surroundings; the suitability of the colors and materials selected for the project; the locations from which the project can be viewed; and the potential impact of the project on open space. Quechee Lakes Corp et al. #3W0411-EB and #3W0439-EB Findings of Fact, Conclusions of Law and Order at 18 (Vt. Env'tl. Bd., Nov. 4, 1985)(cited in Rinkers, No. 302-12-08 Vtec, Decision and Order at 12-13).

The Project is in an area that is a previously developed ski area resort with a residential component. The Project will have an impact on noise during construction, but will resume its residential use once construction is completed. The building will be the same scope and scale as the previously approved building and consistent with the dense residential development surrounding the site. The riparian area at the site is no longer forested, and other development upstream and downstream has similarly encroached on the riparian area to the northeast of the brook. Although the scenic beauty of the brook's riparian corridor has been degraded by development, the proposed project fits its context.

We conclude that the Project is compatible with its surroundings and will have no adverse aesthetic impact. Accordingly, it complies with Criterion 8.

#### **Criterion 9(F) - Energy Conservation:**

62. LED's and occupancy sensors will be used for site lighting. High efficiency fluorescent or LED lighting will be used for interior lighting. Dual flush option toilets will be installed in each of the unit bathrooms. Energy-Star rated range hoods will be installed in the kitchens. [Exhibit 3]

63. The boilers are high-efficient LP gas boilers that burn clean. There are indirect hot water heaters for domestic hot water heating that are heated from the boiler system. Magna3 ECM motor pumps will be utilized to distribute heating to the spaces. The exhaust fans in the bathroom are high efficient Panasonic two-speed fans. [Exhibit 3]
64. The applicant will construct and operate the multi-family dwellings in accordance with the Residential Building Energy Standards issued by the Vermont Department of Public Service pursuant to 30 V.S.A. § 51 RBES, which is evidenced either by a RESCheck report submitted as Exhibit 22.

#### Conclusions of Law

Criterion 9(F) requires the Applicant to show that the planning and design of the Project “reflect the principles of energy conservation, including reduction of greenhouse gas emissions from the use of energy, and incorporate the best available technology for efficient use or recovery of energy.” 10 V.S.A. § 6086(a)(9)(F).

Criterion 9(F) requires the Applicant “provide evidence that the subdivision or development complies with the applicable building energy standards under 30 V.S.A. §51 (RBES) or 53 (CBES).”

“Substantial and reliable evidence of compliance with the RBES and, when adopted, the stretch code established and updated under this section shall serve as a presumption of compliance” with Criterion 9(F), except with regard to electric resistance space heating. 30 V.S.A. § 51(e).

The applicant will construct and operate the multi-family dwellings in accordance with the Residential Building Energy Standards issued by the Vermont Department of Public Service pursuant to 30 V.S.A. § 51 RBES which is evidenced either by a RESCheck report submitted as Exhibit 22.

Therefore, the Project complies with Criterion 9(F).

#### **Criterion 10 – Town and Regional Plans:**

65. The municipal plan that applies to this application is Warren Town Plan, adopted April 26, 2011. [Exhibits 3 and 28]
66. The municipal plan states:
  - Sugarbush Commercial Village – the district focuses on the continued development of the Sugarbush Village area.
  - Sense of Place – Chapter 3:
    - i. Fragile Features are those distinct environmental resources which serve important ecological functions, such as water filtration, wildlife habitat and stormwater retention, and which are susceptible to degradation due to land use

- and development activities. In Warren, these include wetlands, floodplains, steep slopes, Natural Heritage Sites, rivers and streams, groundwater, and wildlife habitat and corridors. [Page 3-6]
- ii. As human activities like bridge construction, filling and the removal of vegetation alter flood prone areas and destabilize stream banks, it becomes increasingly important to identify areas that are outside the mapped floodplain but still susceptible to flood damage. [Page 3-8]
  - iii. Non-point pollution: Proper stormwater management and erosion control, especially in close proximity to streams and for any projects involving extensive clearing and on steep slopes, is absolutely critical to the health of the river. [Page 3-10]
  - iv. Riparian Vegetation: Maintaining a vegetated buffer along all streams is critically important to the overall health and well-being of the river because it provides shade, stabilizes stream banks, and provides habitat for a variety of wildlife. [Page 3-10]
  - v. Riparian Habitat: [R]iparian vegetation is not only important for maintaining water quality – and therefore fish populations – but also for providing necessary habitat for amphibians, several mammals, and a variety of bird species. Stream buffers that limit encroachment and maintain vegetation is an effective way to protect this resource. [Page 3-12]
  - vi. Objective 3.2: To prevent degradation of water resources and improve water quality. Control runoff and erosion during all stages of development through stormwater and erosion control standards in the town’s Land Use and Development Regulations and by enforcing standards and conditions during and after construction. [Page 3-23]
- Land Use – Chapter 10
    - i. Goal 10.B – The regulation of land development in a manner which protects important natural and community resources including...water quality...[Page 10-17]
    - ii. Maintain standards to protect natural resources and fragile features, including wetlands, headwater streams, steep slopes, view sheds and wildlife habitat.” [Page 10-18]
    - iii. Maintain the Special Flood Hazard Overlay District provisions and update as needed to maintain the Town’s eligibility for the National Flood Insurance Program and to support the Town’s disaster preparedness efforts. Consider updating the Land Use and Development Regulations to reflect the need to protect high risk areas that are in the Special Flood Hazard Area. [Page 10-18]
    - iv. Maintain standards for the protection and enhancement of surface and ground water quality throughout Town, including but not limited to maintaining setbacks from streams and a 50' minimum undisturbed setback along all streams. [Page 10-18]

67. The Project will not have substantial regional impacts. [Exhibit 30]



68. The regional plan that applies to this application is Central Vermont Regional Plan, adopted September 9, 2008. [Exhibit 29]
69. The regional plan states:
- “Streams, rivers and lakes with adequate vegetative buffers...protect shorelines from flood flow and ice damage, prevent bank erosion.” [Page 2-7]
  - “[F]luvial erosion, including bank failure and changes in river channel courses during floods...causes more damage” than inundation flooding. [Page 2-8]
  - Goal 1: To promote sound management, conservation and use of the Region’s natural resources.
    - i. (1) When land development does occur on important resource lands, it should be designed to minimize or compensate for its impact on productive use.
    - ii. (8) Trees and other vegetation along streams, rivers and lake shores serve to: protect property from flood flow and ice jams, prevent bank erosion...[Page 2-19 and 2-20].
  - Goal 4: To protect environmentally sensitive or unique areas.
    - i. (1) Natural and fragile area identified in this Plan should receive protection from harmful uses.
    - ii. (3) Where a potentially harmful development or activity is proposed in proximity to a natural or fragile area, measures should be taken to ensure adequate protection. [Page 2-24]

#### Conclusions of Law

Before issuing a permit the District Commission must find that the Project is in conformance with any duly adopted local or regional plan or capital program. 10 V.S.A. § 6086(a)(10).

The Commission has reviewed the Town Plan and has determined that the Town Plan is sufficiently specific. Re: The Mirkwood Group #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Vt. Env'tl. Bd. August 19, 1996). Because the Town Plan is clear and unambiguous it is unnecessary to review the zoning bylaws. See In re Frank A. Molgano Jr. 163 Vt. 25 (1994).

The Project will not change the historic settlement patterns or reduce farmland, forest resources, or important wildlife. The Project will reconstruct the previously existing residential building of similar scale and close proximity of Rice Brook. The project is inconsistent with the Warren Town Plan’s objectives of providing 50-foot buffers along streams, protecting water quality, and limiting development of areas with a high risk of flood damage. Similarly, it is inconsistent with the Central Vermont Regional Plan, which seeks to limit development in close proximity to natural or fragile areas, to recognize areas susceptible to fluvial erosion hazards, and to provide adequate vegetative buffers along streams.

Therefore, the Project does not comply with Criterion 10.

**V. SUMMARY CONCLUSION OF LAW**

Based upon the foregoing Findings of Fact, the Commission concludes that the Project *does not comply* with 1(D)(Floodways); 1(E)(Streams); 4(Soil Erosion); and 10 (Town and Regional Plans). 10 V.S.A. § 6086(a).

**VI. ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, Land Use Permit 5W0504-6 is hereby *denied*.

Dated at Barre, Vermont, this 3<sup>rd</sup> day of April 2015.

By /s/ Clifford Johnson  
Clifford Johnson, Vice Chair  
District #5 Environmental Commission

Commissioners participating in this decision:

Jeffrey Cueto  
Ginny Callan

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Any party may file a motion to alter with the District Commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A).

The applicant may file an application for reconsideration with the District Commission within six months of this decision, pursuant to Act 250 Rule 31(B).

Any appeal of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date of this decision, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (VRECP). The appellant must file with the Notice of Appeal the \$265.00 entry fee required by 32 V.S.A. § 1431.

The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Dewey Building, Montpelier, VT 05620-3201, and on other parties in accordance with VRECP 5(b)(4)(B).

For additional information on filing appeals, see the Court's website at: <http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 828-1660. The Court's mailing address is: Vermont Superior Court, Environmental Division, 32 Cherry Street, 2nd Floor, Suite 303, Burlington, VT 05401.

CERTIFICATE OF SERVICE

I hereby certify that I sent a copy of the foregoing **FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER 5W0504-6 (MOUNTAINSIDE CONDOMINIUM ASSOCIATION)** by U.S. Mail, postage prepaid, on this 3<sup>rd</sup> day of April, 2015, to the individuals without email addresses and by electronic mail, to the following with email addresses:

**Note: Any recipient may change its preferred method of receiving notices and other documents by contacting the District Office staff at the mailing address or email below. If you have elected to receive notices and other documents by email, it is your responsibility to notify our office of any email address changes.**

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