



State of Vermont
Natural Resources Board
National Life Dewey Building
Montpelier, VT 05620-3201

CRITERION 9(L) PROCEDURE

(adopted eff. October 17, 2014)

This Procedure was adopted by the Natural Resources Board pursuant to 3 V.S.A. § 801(b)(8) on October 14, 2014, effective October 17, 2014, and supersedes the Criterion 9(L) Guidance adopted effective August 25, 2014. Its purpose is to provide interpretive guidance on Act 250 Criterion 9(L)(settlement patterns), 10 V.S.A. § 6086(a)(9)(L) (effective June 1, 2014). The Board invites input on this Procedure and on implementation of Criterion 9(L). Comments can be sent to the Board at the address above, or by email to: NRB.Comments@state.vt.us.

Overview

Criterion 9(L) supports Vermont's historic settlement patterns of compact village and urban centers separated by rural countryside, by encouraging development in existing settlements and setting requirements to guide and improve development in outlying areas. Under Criterion 9(L), the applicant must show that any project outside an existing settlement:

- i. Makes efficient use of land, energy, roads, utilities and other infrastructure, and either:
- ii. (I) Will not contribute to strip development, or
(II) If the project is "confined to" existing strip development, it incorporates infill and minimizes the characteristics of strip development.

Existing Settlement Determination

The threshold determination under Criterion 9(L) is whether the project is in an "existing settlement." An area that is designated by the state as a Downtown Development District, Village Center, Growth Center, New Town Center, Vermont Neighborhood or Neighborhood Development Area, is an existing settlement. The other definition of existing settlement is based on case law, and expressly excludes strip development. The full definition reads:

(16) (A) "Existing settlement" means an area that constitutes one of the following:

- (i) a designated center; or
- (ii) an existing center that is compact in form and size; that contains a mixture of uses that include a substantial residential component and that are



within walking distance of each other; that has significantly higher densities than densities that occur outside the center; and that is typically served by municipal infrastructure such as water, wastewater, sidewalks, paths, transit, parking areas, and public parks or greens.

(B) Strip development outside an area described in subdivision (A)(i) or (ii) of this subdivision (16) shall not constitute an existing settlement.

10 V.S.A. § 6001(16).

It is important to ensure that an area meets all the requirements in the definition of “existing settlement.” An existing settlement is either a state-designated center or a compact, walkable, mixed-use community center that is significantly more densely developed than outside that compact area, and that has a substantial residential component. The former Environmental Board described existing settlements as follows:

In these centers, retail shops are typically located near each other, within walking distance. Buildings in the centers often consist of multiple stories and have diverse uses. Offices and apartments are frequently on the second floor of the buildings with retail uses and services on the first floor. Combined parking facilities in the centers serve a variety of uses and developments are typically centrally located within the center. Street lighting is usually shared. The proximity of the buildings to each other often forces design and usage to be compatible.

Re: Waterbury Shopping Village, Inc., #5W1068-EB, Findings of Fact, Conclusions of Law, and Order, at 34 (Vt. Env'tl. Bd. Jul. 19, 1991)(quoted in *Re: Killington, Ltd., et al. (Master Plan)*, #1R0835-EB, Findings of Fact, Conclusions of Law, and Order (Vt. Env'tl. Bd. Jul. 20, 2000)).

Existing settlements do not have to be urban. For instance, an area in a rural town with a lot of homes, a country store and a post office people can walk to may be sufficient to meet the definition. However, the fact that an area is more densely developed than surrounding areas and has some mixed uses is not enough to meet the definition of “existing settlement.” There are many developed areas in rural Vermont that meet *some* of the requirements, but that do not constitute existing settlements. For instance, if the area is not truly walkable, based on distance or safe pedestrian connections between land uses, or does not have a “substantial” residential component, it is not an existing settlement.

To qualify as an existing settlement, an area must meet all of the factors in the definition. Misapplication of the definition to areas that are not real existing settlements would undermine the goals of Criterion 9(L).

Efficient Use Requirement

All projects outside existing settlements must make efficient use of land, roads, utilities and other infrastructure. Although much of the focus of Criterion 9(L) is on commercial development, the efficient use requirement applies to non-commercial projects, such as residential subdivisions, as well as to mixed-use projects.

Efficient use of land on the project tract is not a new concept. It is applied regularly under Criterion 9(B) as the “clustering” requirement. Efficient use of energy and roads on the project tract are also familiar from Criteria 9(F) and 5, respectively. The same efficient use requirement applies to other infrastructure on the project tract.

The efficient use requirement may also extend beyond the project tract, consistent with Criterion 9(L)’s goal of promoting historic settlement patterns. This question focuses on the use of land, energy, roads and other infrastructure given the project’s location. A project proposed for a greenfield outside an existing settlement, for instance, might raise questions of whether the project in its proposed location is efficient in terms of land, energy and infrastructure use.

If the project complies with this requirement, the next question is whether the project is “confined to” existing strip development.

Infill of Existing Strip Development

Projects that are confined to existing strip development must infill and minimize the characteristics of strip development. Strip development is defined as:

(36) “Strip development” means linear commercial development along a public highway that includes three or more of the following characteristics: broad road frontage, predominance of single-story buildings, limited reliance on shared highway access, lack of connection to any existing settlement except by highway, lack of connection to surrounding land uses except by highway, lack of coordination with surrounding land uses, and limited accessibility for pedestrians. In determining whether a proposed development or subdivision constitutes strip development, the District Commission shall consider the topographic constraints in the area in which the development or subdivision is to be located.

10 V.S.A. § 6001(36). A project is “confined to” existing strip development if it is surrounded by strip development on both sides of the project along the same side of the public highway, not merely near other strip development or in an area of scattered development or sprawl. Consistent with legislative intent, the “confined to” requirement ensures that this provision can apply only to sites fully within existing strip development, to guard against leapfrog development, rural sprawl, and any extension of existing strip.

Criterion 9(L) requires, in part, that projects confined to existing strip development “infill.” The statute defines infill as “the use of vacant land or property within a built-up area for further construction or development.” 24 V.S.A. § 2791. The reference to a “built-up” environment in the statute defining infill indicates that strip development must also be in a built-up environment.

The following explanation of infill helps to define “built-up area,” and is instructive on the purpose and context of infill under Criterion 9(L):

Infill is new construction or redevelopment that “fills in” empty lots or adds units or uses in areas that are already developed. For example, a new infill building would be constructed in an empty lot between existing buildings. Infill most commonly occurs within a densely built-up area and is designed to increase density in order to create a more walkable, vibrant and aesthetically pleasing community. Infill replicates historic city, town and village development patterns and is an important tool for concentrating development in walkable neighborhoods rather than sprawling into undeveloped areas. Infill should also foster appropriate connections to an existing settlement.¹

Criterion 9L does not allow a project to contribute to strip development under the guise of infill. Otherwise, the exception swallows the rule. To read “infill” so broadly as to allow the enlargement, lengthening, initiation or other contribution to strip development would perpetuate inefficient uses of land and other resources, contrary to the goals of Criterion 9(L). Accordingly, the Criterion 9(L) analysis in less densely developed areas is more likely to focus on whether the project will contribute to strip development.

Projects surrounded by existing strip development in built-up areas must also minimize the characteristics of strip development to the extent reasonably feasible. Minimization must be meaningful to count under Criterion 9(L). For instance, adding second-story façades would not change a predominance of single-story buildings, but adding a second story would.

By ensuring that the infill provision is limited to projects surrounded by built-up, existing strip development, and by requiring that any infill minimize the characteristics of strip development in a meaningful manner, Criterion 9(L) provides a valuable tool to make existing strips more efficient, walkable, and connected to existing settlements and other land uses.

¹ This definition was adapted from the Pioneer Valley Planning Commission and Massachusetts Partnership for Health Promotion and Chronic Disease Prevention and publication, *Healthy Community Design Toolkit – Leveraging Positive Change*, at page 27 (2nd ed. 2014) (available online at: http://www.pvpc.org/sites/default/files/files/HCDT_2ndEdition_140624_01.pdf).

Contributes to Strip Development

If a project is not surrounded by existing strip development, Criterion 9(L) requires the applicant to prove that the project does not contribute to strip development. A project that lengthens existing strip development or initiates new strip development is a project that contributes to strip development.

Project design is an important consideration in determining whether or not a development contributes to strip development, but design is not necessarily determinative. A poorly designed project that has characteristics of strip development may be more likely to contribute to strip development than a project with smart growth design. Design that minimizes strip development characteristics is helpful. However, in some cases, good design may not be enough to prevent a project from contributing to strip development.

Other factors that may indicate that a project will contribute to strip development include:

- Does the Project itself have characteristics of strip development? If the Project has one or more strip characteristics, it is more likely to contribute to a pattern of strip. However, even if the Project itself has no strip characteristics, there could still be evidence that the Project will contribute to a pattern of strip development.
- Zoning of adjacent land, especially along a highway, so it is available for commercial development in strip form. Does local zoning prevent or enable strip development?
- Project location in relation to existing strip development. If the project lengthens strip development, it contributes to strip development.
- High traffic counts. There may be evidence in a given case that higher traffic counts increase the likelihood that a project will contribute to strip development.
- Absence of a local street network. Can it only be accessed from the main road? This factor also has bearing on the efficient use of roads question.
- Presence or extension of municipal services. Will the Project require a sewer, water, power or other utility extension? Can the extension of municipal services open other land to development? This factor also has bearing on the question of efficient use of infrastructure.
- Project type. Does the type of land use lend itself to strip? Industrial might not, for instance. Retail might. Land uses that generate more trips may be more likely to contribute to strip development.

Other considerations may also be relevant. Ultimately, whether a proposed project contributes to strip development will depend on the particular facts and circumstances of the case.