

Act 250 Legal Standards

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Points to hit in the next 45 minutes...

- What do “undue” & “adverse” mean?
- What current criteria incorporate “undue” or “adverse” or both?
- The Quechee Analysis
- Other legal standards in Act 250 (just for frame of reference)
- Authority to condition
- Avoid Minimize Mitigate (current examples in Act 250)
- The Greenhouse Gas, Forest Blocks, and Connecting Habitat proposals

“Undue” & “Adverse” Defined

The term “*undue*” generally means that which is more than necessary – exceeding what is appropriate or normal. The word “*adverse*” means unfavorable, opposed, hostile. “Scenic and natural beauty” pertain to the pleasing qualities that emanate from nature and the Vermont landscape. In short, through Criterion 8 the Legislature has directed that no project within our jurisdiction be approved if it has an *unnecessary or inappropriate negative impact* on the enjoyment of surrounding natural and scenic qualities. Criterion 8 is, therefore, sufficiently specific to constitute a proper delegation [of power, as prescribed by the U.S. Constitution].

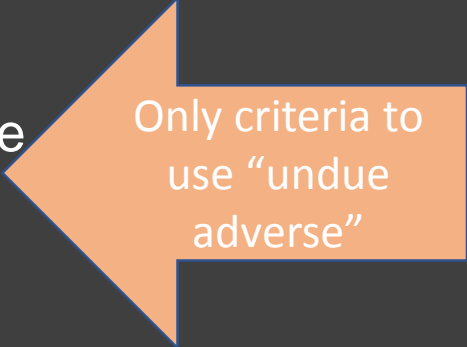
In re: Rivers Dev. Act 250 Appeal, 68-3-07 Vtec, Decision on the Merits at 49-50 (3/25/10). citing Re: Brattleboro Chalet Motor Lodge, Inc., #4C0581-EB, FCO at 6 (10/17/84).

Existing criteria that incorporate “undue” or “adverse” or both

(1) **Will not result in undue water or air pollution.** In making this determination it shall at least consider: the elevation of land above sea level; and in relation to the flood plains, the nature of soils and subsoils and their ability to adequately support waste disposal; the slope of the land and its effect on effluents; the availability of streams for disposal of effluents; and the applicable Health and Environmental Conservation Department regulations.

(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.

(9)(A) ... After considering anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services, and other factors relating to the public health, safety, and welfare, the District Commission shall impose conditions which **prevent undue burden upon the town and region in accommodating growth** caused by the proposed development or subdivision.



Only criteria to use “undue adverse”

The Quechee Analysis/Test: how the commissions/court apply “undue & adverse” in practice

...will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics...

- First Prong: will a project have an adverse impact on aesthetics and the scenic and natural beauty of an area because it would not be in harmony with its surroundings.
 - If the answer is in the affirmative the inquiry then advances to the second prong to determine if the adverse impact would be “undue.”
- Second prong: an adverse impact is undue if any one of three questions is answered in the affirmative:
 1. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area?
 2. Does the project offend the sensibilities of the average person?
 3. Have the applicants failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings?

(An affirmative answer to any one of the three inquiries under the second prong of the *Quechee* test means the project would have an undue adverse impact.)

Other Act 250 Legal Standards

- (1)(C) **Water conservation.** A permit will be granted whenever it is demonstrated by the applicant that... the design has considered water conservation, incorporates multiple use or recycling where technically and economically practical, utilizes the best available technology for such applications, and provides for continued efficient operation of these systems.
- Many of the other criteria use the **Unreasonable** standard:
 - Criteria 3 (burden on existing water supply)
 - Criteria 5 (congestion)
 - Criteria 6 (burden on municipality to provide educational services)
 - Criteria 7 (burden on local governments to provide municipal or governmental services)

Act 250—Authority to condition a project

- *A permit may contain such requirements and conditions as are allowable proper exercise of the police power and which are appropriate within the respect to [the criteria]... 10 VSA § 6086(c)*
 - Permit conditions are "reasonable" and within the proper exercise of the police power when they are intended to alleviate an adverse impact that would otherwise be caused by a project. 10 V.S.A. § 6086(c); *Re: Times and Seasons, LLC and Hubert K. Benoit, #3W0839-2-EB* (Altered).
 - The exercise of the police power is justified if there is a reasonable relationship between the agency action and the legislative ends sought and if the agency action is premised on an appropriate overriding public interest. *Southwestern Vermont Health Care Corp., #8B0537-EB, FCO at 58 n. 5 (2/22/01).* [EB #758]
- **Limitations on the Police Power:**
 - Regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause. *Southview Associates, Ltd., et al v. Bongartz, et al., 980 F.2d 84, 96 (2d. Cir., 1992), cert. denied, 507 U.S. 987 (1993).*

Avoid Minimize Mitigate: an existing model (Primary Agricultural Soils)

- **(9)(B) Primary agricultural soils.** A permit will be granted for the development or subdivision of primary agricultural soils only when it is demonstrated by the applicant that..., either, the subdivision or development **will not result in any reduction in the agricultural potential of the primary agricultural soils**; or:
 - (i) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential;
 - (ii) except in the case of an application for a project located in a designated area listed in subdivision 6093(a)(1) of this title, there are no lands other than primary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose of the development or subdivision;
 - (iii) except in the case of an application for a project located in a designated area listed in subdivision 6093(a)(1) of this title, the subdivision or development has been planned to minimize the reduction of agricultural potential of the primary agricultural soils through innovative land use design resulting in compact development patterns, so that the remaining primary agricultural soils on the project tract are capable of supporting or contributing to an economic or commercial agricultural operation; **and**
 - (iv) suitable mitigation will be provided for any reduction in the agricultural potential of the primary agricultural soils caused by the development or subdivision, in accordance with [section 6093](#) of this title and rules adopted by the Natural Resources Board.



AVOID



MINIMIZE



MITIGATE

Proposed Criteria 6086(a)(1)(B): Greenhouse Gas Emissions

(B) Greenhouse gas emissions; climate change. A permit will be granted whenever it is demonstrated by the applicant that...:

(i) The construction, use, operation, and maintenance of the development or subdivision will:

(I) **avoid** the emission of greenhouse gases, including greenhouse gases from the vehicular traffic to be generated by the development or subdivision;



(II) if it is not feasible to avoid such emissions, will **minimize** them; **or**



(III) if it is not feasible to avoid or minimize such emissions, will **mitigate** them in accordance with rules adopted by the Board. Any offsets used shall be third-party verified and enforceable by the applicant and its successors and assigns and by the State of Vermont. The rules shall be adopted in consultation with the Secretary of Natural Resources and shall comply with the greenhouse gas reduction goals of section 578 of this title.



Proposed Criteria 6086(a)(8)(B)&(C): “Forest Blocks” & “Connecting Habitat”

- Similar approach as “Greenhouse gas emission criteria”
- BUT more legislative guidance here:
 - ❖ See “Methods for avoiding or minimizing the fragmentation of forest blocks” at page 40 of Draft 6.1, (and 7.1), and
 - ❖ See “Methods for avoiding or minimizing the fragmentation of a connecting habitat” at page 41 of Draft 6.1 (and 7.1)
- Draft 6.1 sets up a mitigation process at 10 VSA 6094 and requires NRB to draft rules (proposed greenhouse gas emission criteria defers on mitigation requirement to rules to-be-issued by the NRB).
- BUT--Draft 7.1 deletes the “mitigation” requirement for both Forest Blocks and Connecting Habitat and 10 V.S.A. 6094.

Proposed Criteria 6086(a)(8)(B)&(C): “Forest Blocks” & “Connecting Habitat”

- Draft 7.1 (Forest Blocks and Connecting habitat) is in some ways more similar to the current 8(A) (Necessary Wildlife Habitat)
 - Requires via statute, “avoidance” and “minimization”
 - No explicit statutory requirement to mitigate
 - Commissions regularly do require (with input from ANR—and other parties) either on-site or off-site mitigation for impacts to Necessary Wildlife Habitat