

ENB 1999-007

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

RE: Nextel Communications
Land Use Permit Application #3R0703-EB-2A-EB
[EB #718]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding concerns the construction of a 10' by 20' equipment building with related infrastructure, the construction of fencing, and the installation of 12 panel antennae on an existing permitted tower off Route 66 and Rand Road in the Town of Randolph, Vermont ("Project").

As explained in more detail below, the Board concludes that the Project complies with 10 V.S.A. §§ 6086(a)(8) (aesthetics), (9)(K) (public investments), and (10) (local and regional plans) ("Criteria 8, 9 (K), and 10" respectively).

I. PROCEDURAL SUMMARY

On November 7, 1997, Atlantic Cellular Company, L.P. ("Atlantic"), Nextel Communications ("Nextel"), Idora Tucker, E&M92 Corporation ("E&M92"), and Stokes Communications, Inc. ("Stokes") filed a land use permit application requesting authorization for the Project under 10 V.S.A. §§ 6001-6092 ("Act 250"). The application also requested authorization to install two whip antennae and a four-foot open grid dish on the existing tower and to construct a 10' by 15' equipment building, with related infrastructure, and fencing ("Atlantic's Project"). At Atlantic's request, the District #3 Environmental Commission ("District Commission") bifurcated its consideration of the Project and Atlantic's Project.

On September 1, 1998, the District Commission issued Findings of Fact and Conclusions of Law #3R0703-EB-2A ("Decision") denying the land use permit application as it relates to the Project.

On September 30, 1998, Nextel filed an appeal with the Vermont Environmental Board ("Board") from the Decision contending that the District Commission erred in concluding that the Project fails to comply with Criteria 8, 9(K), and 10.

On October 30, 1998, Board Chair Marcy Harding convened a prehearing conference with the following entities participating:

Nextel by Liam L. Murphy, Esq. Two Rivers Ottauquechee Regional Planning Commission ("Regional Commission") by Don Bourdon Randolph Planning Commission ("Town Commission") by Mardee Sanchez

Also present was Chip Mason, Esq. on behalf of RCC Atlantic, Inc. ("RCC"), the successor in interest to Atlantic. Chair Harding instructed Attorney Mason that if RCC sought to participate in this proceeding, then an original and ten copies of a petition for party status must be filed with the Board prior to the end of office hours on that day, October 30, 1998.

On November 2, 1998, RCC filed a Petition for Party Status.

On November 3, 1998, RCC sent by facsimile transmittal a letter withdrawing its petition for party status.

On November 3, 1998, the Chair issued a Prehearing Conference Report and Order.

On November 12, 1998, John R. Ponsetto, Esq. filed his notice of appearance on behalf of E&M92 and Stokes.

On December 8, 1998, Nextel and the Regional Commission filed direct prefiled testimony and exhibits.

On December 9, 1998, the Town Commission filed direct prefiled testimony and an exhibit.

On December 23, 1998, the Town Commission filed ten copies of its prefiled testimony and exhibit list.

On December 24, 1998, the Chair issued a Preliminary Ruling accepting the Town Commission's prefiled testimony as a timely filing. No timely objection to the Preliminary Ruling was filed.

On February 2, 1999, Nextel filed proposed findings of fact and conclusions of law.

On February 12, 1999, the Chair convened a second prehearing conference by telephone, with the following party participating:

Nextel by Liam L. Murphy, Esq. and Eric M. Knudsen, Esq.

On February 16, 1999, the Board convened a hearing in Randolph Center, VT. The following parties participated:

Nextel by Liam L. Murphy, Esq. and Eric M. Knudsen, Esq. Regional Commission by Don Bourdon

The Board heard opening statements, conducted a site visit, and accepted evidence into the record. The Board stated that it was taking official notice of the Town Plan. After recessing the hearing, the Board deliberated on February 16, 1999, and announced to the parties its conclusion that the Project complies with Criteria 8, 9(K), and 10. The Board deliberated again on March 10, 1999.

Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned. The matter is now ready for final decision. To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. See *Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, Docket No. 96-369, slip op. at 13 (Vt. Nov. 7, 1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

II. ISSUES ON APPEAL

1. Whether, pursuant to 10 V.S.A. § 6086(a)(8), the Project will have an undue adverse effect on aesthetics.

2. Whether, pursuant to 10 V.S.A. § 6086(a)(9)(K), the Project will materially jeopardize or interfere with the public's use or enjoyment of Vermont Technical College, the Veterans Memorial Cemetery, and

the historic district in Randolph Center.

3. Whether, pursuant to 10 V.S.A. § 6086(a)(10), the Project fails to conform with the Randolph Town Plan ("Town Plan").

4. Whether, pursuant to 10 V.S.A. § 6086(a)(10), the Project fails to conform with the Two Rivers Ottauquechee Regional Plan ("Regional Plan").

III. FINDINGS OF FACT

1. Nextel is an FCC licensed provider of Enhanced Specialized Mobile Radio ("ESMR") services using digital technology. In comparison to traditional analog or cellular technology, Nextel provides increased call volume, an increased number of services (e.g. paging, dispatch, cellular service, voice mail, caller ID), and enhanced clarity of sound. Nextel's ESMR wireless network is the largest in the nation.

2. Nextel does not have an operating network in Vermont. Nextel began its Vermont communications facility siting efforts in May 1998. The initial design provides corridor coverage along U.S. Interstate 91 from the Massachusetts border north to White River Junction, then north on U.S. Interstate 89 to Burlington. The design was conceived by conducting field cataloging sessions identifying all existing structures (towers, water tanks, buildings, and other tall structures) along these corridors. The information was reviewed in conjunction with the radio frequency design in order to utilize as many existing structures as possible. Nextel estimates that it will use existing structures for approximately 85% of its facilities.

3. In order to meet coverage needs, Nextel intends to have the majority of its planned Vermont telecommunications facilities in place before it activates the network. It is in the process of seeking local and state approvals.

4. The Project site is located off Route 66 and Rand Road in the Town of Randolph, Vermont. There are two small shelters housing radio equipment on the Project site surrounded by an existing fence. Additionally, there is another equipment shelter located outside of the fenced area. There is an existing 290' Andrew guyed tower ("Existing Tower") on the site with three sets of guy wires anchored to the ground.

5. Nextel chose the Project site as its primary candidate for a telecommunications facility because of the site's proximity to Interstate 89 and because of the way in which the site fits into the Nextel network by connecting to potential sites to the north and south. Nextel will not need to construct a communications tower in the immediate vicinity of the Project site because it will utilize the Existing Tower.

6. The District Commission and the Board have issued the following permits for the Existing Tower: #3R0703, #3R0703-EB, #3R0703-EB-1, #3R0703-EB-2 (collectively, the "Permits").

7. Nextel seeks approval of the Project as an amendment to the Permits.

8. The Project consists of: (i) the addition of twelve (12) panel type antennae at a height of 199 feet above ground level on the Existing Tower ("Antennae"); (ii) the addition of a ten foot by twenty foot (10' x 20') pre-fabricated equipment shelter at the base of the Existing Tower with associated coaxial cable bridging from the shelter to the Antennae ("Equipment Shelter"); (iii) the addition of fencing

around the area of the Equipment Shelter for security purposes; (iv) the connection of the Equipment Shelter to power and telephone grids via underground utilities; and (v) minor structural additions to the Existing Tower.

9. The Equipment Shelter will house Nextel's radios. The Equipment Shelter will be light brown in color with an aggregate pebble exterior finish. The Antennae will be connected to the radio equipment via twelve (12) coaxial cables, each measuring one and 5/8 inches in diameter. The coaxial cables will be black and run down the tower legs and across a coaxial cable ice bridge into the Equipment Shelter. The coaxial cables will be fastened to the tower legs with clips as specified by the structural engineer. The coaxial cable ice bridge will be constructed of gray galvanized posts topped with a gray galvanized waveguide. The coaxial cables hang from the waveguide and will be fastened with unistrut mounted every four feet.

10. Nextel will connect the Equipment Shelter to both the power and telephone utility grids. The connections will be made from the existing demarcation points of the utility providers to the Equipment Shelter via underground placement of wires as depicted in Nextel's Exhibits. The total distance of the underground trench will be approximately 210 feet. The electric requirement for the Equipment Shelter is a 200 amp, 120/240 volt, single phase, three-wire service. Nextel will also use two (2) T-1 and two (2) P.O.T.S. telephone connections as serviced by a 50 pair telephone cable to the telephone utility providers' demarcation. The Equipment Shelter will have one (1) exterior light fixture with a 100 watt light bulb which is mounted adjacent to the door in order to provide lighting in the immediate vicinity of the Equipment Shelter.

11. The Project includes the installation of twelve Antennae to the Existing Tower. The Antennae will be DB844H80 panel antennae ("DAPA"). Each of the Antennae will have a solid vertical element with the following dimensions: length of 48 inches; width of 6 inches; and depth of 8.5 inches.(FN1) A rendering of the DAPA antenna is depicted on Exhibit N-24. The Antennae will be manufactured of aluminum with a polyester radome and will be non-reflective and painted a neutral color to reduce their visibility. The Antennae are of a similar mass and scale as existing and approved devices. They are of an open structure that increases their translucence and reduces visual impact.

12. The Antennae will be configured in a triangular array with four (4) Antennae on each face of the array. The three faces of the array will point in azimuths of 0 degrees, 120 degrees and 240 degrees of true north as depicted in Nextel's Exhibits.

13. The Antennae will be mounted on the Existing Tower at a centerline height of 199 feet above ground level, just below the existing Atlantic whip antennae.

14. Each of the three arrays of Antennae will require a mechanical sector frame mount comprised of pipe segments which span fourteen feet as measured from the centerline of one outside antenna to the centerline of the other outside antenna on the array and five feet from top to bottom. The Antennae sector frame mounts will be fabricated from galvanized steel and will be clamped onto the tower legs utilizing mechanical U-bolts. The Antennae will be individually attached to pipes on the sector frame mounts via downtilt brackets. All related connections will be torqued to manufacturer's specifications. Mounting plans are as depicted in Exhibit N-2 on sheet numbered N-2D.

15. The mounts, brackets and Antennae will project approximately three feet from the vertical plane of the Existing Tower as depicted in Exhibit N-2 on sheet numbered N-2D.

16. Bolt-on leg bracing will be required on the legs of the Existing Tower at the 170 foot to 190 foot

elevation in order to increase the leg capacity. This type of tower modification is not unusual in the industry. It is accomplished by adding galvanized steel (1 «" x 1 «" x 3/16" angles) to each face of the Existing Tower in six locations (172', 175', 178', 182', 185', and 188'). The steel will be attached to the tower legs utilizing U-bolts. From the ground, the leg bracing will appear as another cross "web" of the lattice of which the entire Existing Tower structure is constructed. The foundation of the Existing Tower does not require modifications to support the proposed Nextel Antennae loading.

17. The Existing Tower is a 290 foot telecommunications tower with attached antennae located approximately 100 feet below and to the south of the summit of Randolph Hill.

18. The landscape surrounding the Existing Tower consists of a series of valleys oriented in a north-south direction. The primary viewshed is contained within one of these valleys and is bound by Route 66 to the west and a series of low rolling hills to the east. The landscape consists of a patchwork of open farm lands and meadows, institutional and recreational facilities, and the historic village of Randolph Center along the western ridgeline.

19. The valley has a moderate degree of contrast with the patchwork of open meadows and agricultural uses together with the uses of the Veterans Cemetery and the Vermont Technical College Campus. Although these rolling hills define the primary viewshed and create the landscape pattern, the topography within the area is fairly uniform, with no great rises or depressions.

20. Human influence is evident at the Project site and in the surrounding landscape. The pattern of woods and open lands, as well as the specific cultural uses within the landscape, have resulted in an ordered landform. The north-south orientation has a higher degree of layering because of the undulating nature of the hills. Views to the east and west can be isolated due to topographic and vegetative constraints.

21. Randolph Hill is the dominant natural focal point in the immediate area. The Existing Tower and the water tower to the south are focal points within the landscape. The area near the Project site contains an historic district and a memorial cemetery that contribute to the landscape and to the overall visual appeal of the Project site. The existing towers detract from the landscape.

22. The water tower and the Existing Tower are incongruous visual elements. The Vermont Technical College Campus is also out of character with the surrounding working landscape. These have a negative effect on the landscape's intactness.

23. The primary viewshed of the Existing Tower and the Antennae is located within a long narrow valley running north-south from Randolph Hill towards Fish Hill for approximately two (2) miles.

24. Within a one-half mile radius of the Existing Tower, the Antennae will be visible from portions of Rand Road, Route 66, and Ridge Road. From the one-half mile distance to about 1 mile, the views of the Antennae are distant and will appear as a thin vertical expansion of the existing Atlantic Cellular whip antennae framework.

25. The Existing Tower and the Antennae are not and will not be visible from the Interstate 89 corridor south of the Exit 4 interchange. To the north of the interchange, the northbound lane is visually isolated due to the presence of coniferous woodlands and a rising slope. The southbound lane will have views of the Antennae. The photographic simulation from a site located approximately 1 mile north of the Exit 4 interchange shows a slight horizontal expansion of the Existing Tower at a position just below the existing Atlantic whip antennae. This photographic simulation is based on a worse case scenario.

26. The Existing Tower is visible from the following public or quasi-public investments: Interstate 89, Rand Road, Ridge Road, Route 66, Vermont Technical College, and portions of the Vermont Veterans Cemetery. It is visible from the northern edge of the historic district of Randolph Center, to the north of the intersection of Furnace Road and Route 66.

27. The Project's Antennae will be most visible within one-half mile of the Project site, which includes portions of Route 66, Rand Road and Ridge Road, but does not include any of the other public investments. The views of the Existing Tower and proposed Antennae from these public highways within one-half mile of the Existing Tower, while traveling at posted speeds, are of short duration and are frequently interrupted by buildings, trees, and other objects.

28. The Randolph Center historic area is more than one-half mile from the Existing Tower. Views of the Project within the historic district will be largely screened by existing structures, trees, and slight changes in grade.

29. There will be little direct view of the Project from most locations within the Veterans Cemetery.

30. The Langevin House will have no direct or indirect views of the proposed Antennae.

31. A portion of the Vermont Technical College Campus is located within the primary viewshed of the proposed Antennae. Within the campus, the presence of structures, trees, and other obstructions largely limit unobstructed views. A small ridgeline that moves through the campus also visually isolates some areas. Views from the Campus are distant.

32. The Town Plan was prepared by the Randolph Planning and Zoning Board and was adopted by the Randolph Selectboard on December 20, 1994.

33. The Town Plan was in effect at the time of Nextel's application for an amended Act 250 permit for the Project in 1997.

34. The Town Plan does not contain any provision specific to the siting or construction of telecommunications facilities.

35. The Town Plan provides the following policy statement "New development should be coordinated with and in close proximity to existing structures."

36. The Town Plan identifies zoning regulation as the primary method by which the Town Plan's policies for land use development are to be implemented, and to that end, the Town Plan includes in its Appendix a map of the town's zoning districts and a table showing the permitted and conditional uses within those districts.

37. The Existing Tower is in the R-5 zoning district. The Project has received zoning approval from the Town of Randolph as a "utility services facility," which is a conditional use in the R-5 zoning district.

38. The Project is located in the Two Rivers-Ottauquechee region.

39. On June 26, 1996, the Regional Commission adopted the Regional Plan pursuant to 24 V.S.A. § 4348a.

40. The Regional Plan was in effect at the time of Nextel's application for an amended Act 250 permit for the Project in 1997.

41. The Regional Plan provides the following goals and policies with respect to the location and construction of telecommunications facilities:

Goals

- (1) To enable new economic opportunities through the use of telecommunications technology.
- (2) To support the enhancement of telecommunications network when such facilities do not have significant adverse environmental, health, or aesthetic impacts.
- (3) To work towards a State of Vermont telecommunications policy to give guidance to the industry and to ensure that such a policy is compatible with the [Regional] Plan and municipal plans.

Policies

- (1) In order to minimize tower proliferation, it is the policy of the Region to encourage applicants to exhaust all reasonable options for sharing space on existing towers or tower sites prior to proposing new tower[] sites and related facilities. The principle of co-location is the favored alternative. In making such a determination on the feasibility of co-location, proposers should evaluate space available on existing towers, the tower owners['] ability to lease space, geographic service requirements, mechanical or electrical incompatibilities, the comparative costs of co-location and new construction, and regulatory limitations.
- (2) One of the Region's principal scenic qualities are its ridgelines and mountainsides. These areas are significant contributors to the maintenance and enjoyment of rural character. The ridges are predominately undeveloped and provide an unbroken skyline viewed from the valley floor. The use of the Region's ridges for telecommunication towers and related facilities needs to be undertaken in a manner that will not unduly detract nor adversely affect these scenic values. Accordingly, protection of these areas from insensitive developments are matters of public good. To minimize conflict with scenic values, facility design and construction should employ the following princip[le]s:
 - (a) where feasible, be sited in areas not visible to the traveling public, or from residential areas, historic districts, and public use areas or outdoor recreation area such as hiking trails and beaches;
 - (b) be located in forested areas or be sufficiently landscaped to screen the lower sections of towers and related ground fixtures from public vantage points, such as trails, roads, or water bodies;
 - (c) utilize materials, architectural styles, color schemes, lighting fixtures, mass and other design elements to promote aesthetic compatibility with surrounding uses and to avoid adverse visual impacts;
 - (d) where prominent views of a site exist, be located downgrade of the ridge so as not to

exceed the elevation of the immediate ridge;

(e) where construction of access roads are involved to minimize visibility, be situated to follow the contour of the land and avoid open fields or meadows; and

(f) avoid peaks and ridges which function as regional focal points.

(3) In planning for telecommunications facilities, consideration should be given to the environmental limitations of any given site. Impacts of the use on wildlife habitat, soil erosion, forestry and agricultural lands, and similar resources should be carefully addressed. Projects which materially impact these resources are discouraged.

(4) For telecommunication projects situated on lands owned by the State, design plans should be compatible with current Management Plans for Public Lands adopted by the Agency of Natural Resources.

(5) Towers, antennae and related fixtures that fall into disuse, or are discontinued should be removed to retain the values set forth above. Local and state land use permits should incorporate such as an approval condition.

42. Don A. Bourdon, the principal author of the Regional Plan and past executive director and present professional planner for the Regional Commission, provided unopposed testimony in support of the Project under Criterion 10. On behalf of the Regional Commission, Mr. Bourdon concluded that the Project "is in conformance with the duly adopted Two Rivers-Ottawaquechee Regional Plan."

IV. CONCLUSIONS OF LAW

A. Scope of Review and Jurisdiction

When a party appeals from a District Commission determination, the Board provides a "de novo hearing on all findings requested by any party that files an appeal or cross-appeal, according to the rules of the [B]oard." 10 V.S.A. § 6089(a)(3). Board rules provide for the de novo review of a District Commission's findings of fact, conclusions of law, and permit conditions. EBR 40(A). Thus, the Board cannot rely upon the facts stated or conclusions drawn by the District Commission in this matter. Rather, it must regard the Decision as evidence to be offered by the parties.

There is Act 250 jurisdiction over the Project because it involves the construction of improvements for a commercial purpose on a tract of land of more than the jurisdictional acreage and because it constitutes a material change to a previously permitted project. EBR 2(A)(2), EBR 34(A), and EBR 2 (P).

B. Criterion 8 (aesthetics)

Before issuing a permit, the Board must find that a proposed project will not have an undue adverse effect on the aesthetics of the area. 10 V.S.A. § 6086(a)(8). The burden of proof is on the opponents under Criterion 8, id. § 6088(b), but an applicant must provide sufficient information for the Board to make affirmative findings. See, e.g., Re: Black River Valley Rod & Gun Club, Inc., #2S1019-EB, Findings of Fact, Conclusions of Law, and Order at 19 (June 12, 1997)[EB #651R] and cases cited therein. Thus, even when there is no opposing party or evidence in opposition with respect to Criterion 8, the applicant will not automatically prevail regarding the aesthetics issue. See, e.g., Re: Herndon and

Deborah Foster, #5R0891-8B-EB, Findings of Fact, Conclusions of Law, and Order at 12 (June 2, 1997) [EB #665].

The Board relies upon a two part test to determine whether a project satisfies Criterion 8. First, it determines whether the proposed project will have an adverse effect under Criterion 8. *Id.* See also *Re: James E. Hand and John R. Hand, d/b/a/ Hand Motors and East Dorset Partnership, #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 24-25 (Aug. 19, 1996)[EB #629R]*; *Re: Quechee Lakes Corp., #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1985)[EB #241]*.

[T]he Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. In making this evaluation, the Board 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 for the project's context 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.

Hand, *supra* at 25.

Second, if the Board concludes that the Project will have an adverse effect under Criterion 8, then the Board must evaluate whether the adverse effect is "undue." *Id.* The Board will conclude that the adverse effect is undue if it reaches a positive finding with respect to any one of the following considerations:

1. Does the proposed project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?
2. Has the applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings?
3. Does the proposed project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

See, e.g., *Black River, supra* at 19-20; *Hand, supra* at 25-29; *Quechee Lakes, supra* at 19-20.

Criterion 8 "was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from his or her property will remain the same forever." *Re: Okemo Mountain, Inc., #2S0351-8-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Dec. 18, 1986)[EB #305]*. Nevertheless, projects that result in the alteration of vistas for passing motorists can have an adverse effect on aesthetics and scenic beauty. E.g., *Re: Thomas W. Bryant and John P. Skinner, #4C0795-EB, Findings of Fact, Conclusions of Law, and Order at 21 (June 26, 1991)[EB #466]*. See also *Re: Maple Tree Place Associates, #4C0775-EB, Findings of Fact, Conclusions of Law, and Order at 48-49 (June 25, 1998)[EB #700]*; *Re: George, Mary, and Rene Boissoneault, #6F0499-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Jan. 29, 1998)[EB #678]*.

The area near the Project site includes an historic district and a memorial cemetery that contribute to the landscape and the site's overall visual appeal. The Existing Tower does not "fit" the context within which it will be located. The Project will have an adverse effect on the scenic resources within one-half mile of the Existing Tower, including a portion of Route 66 and the historic district. There will be little

impact on the scenic resources beyond this distance due to the size, design, color and placement of the Antennae on the Existing Tower.

The Board concludes that the Project will have an adverse aesthetic effect. Therefore, it must determine whether that effect will be "undue."

The Board concludes that this Project does not violate a "clear, written community standard" regarding aesthetics. The only evidence of a community standard presented by the parties is found in the Regional Plan which adopts a policy of "co-location" in order to preserve the aesthetics of the area. As discussed in the findings and conclusions regarding Criterion 10 below, the Project complies with the Regional Plan, including all portions that pertain to aesthetics.

The Board concludes that Nextel did not "fail to take generally available mitigating steps." Nextel has taken advantage of the site's location and the design and placement of the Antennae to mitigate the proposed impacts. The selection of a co-location site located downgrade of the hilltop is a mitigating step, as is the placement of the Antennas on the Existing Tower. The Antennae are positioned not at the top, but more towards the middle of the tower, reducing their visibility and potential impact. Nextel has also selected an antennae system which is of open structure, is painted a non-reflective neutral color, and is of a similar mass and scale to other existing structures, all of which mitigate the Project's adverse effect.

The Board concludes that the Project does not "offend the sensibilities of the average person" and is not otherwise "offensive or shocking." The Antennae are of a similar scale and mass to the existing and approved devices currently attached to the tower. Viewed from a distance in excess of 1/2 mile, the Antennae will appear as a thin vertical expansion of existing antennae.

Accordingly, the Board concludes that the Project will not have an undue adverse effect on aesthetics in violation of 10 V.S.A. § 6086(a)(8).

C. Criterion 9(K) (public or quasi-public investments)

Under 10 V.S.A. § 6086(a)(9)(K), a permit will be granted for development adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development will not materially jeopardize or interfere with the public's use or enjoyment of or access to the facility, service, or lands. See, e.g., Re: Mt. Mansfield Co., #5L1125-10 and 10R-EB, Findings of Fact, Conclusions of Law, and Order (Altered) at 13 (Mar. 27, 1996)[EB #639 (R)]. The burden of proof, which consists of both the burden of production and the burden of persuasion, is on Nextel. 10 V.S.A. § 6088(a).

Due to the limited visibility of the proposed Antennae from the identified lands and facilities and the fact that the Board has concluded that the Project will not have an "undue adverse effect" on aesthetics, the Board concludes that the Project will not "unnecessarily or unreasonably endanger the public or quasi-public investment" in the identified facilities and lands or "materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to" Vermont Technical College, the Veterans Memorial Cemetery, and the historic district in Randolph Center in violation of 10 V.S.A. § 6086(a)(9)(K).

D. Criterion 10 (town plan and regional plan)

Before issuing a permit, the Board must find that the Project is in conformance with the Town Plan and the Regional Plan. 10 V.S.A. § 6086(a)(10). The burden of proof, which consists of both the burden of production and the burden of persuasion, is on Nextel. Id. § 6088(a).

1. Town Plan

If the town plan provisions are specific, they are applied to the proposed project without any reference to the zoning by-laws. A provision of a town plan evinces a specific policy if the provision: (a) pertains to the area or district in which the project is located; (b) is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and (c) is sufficiently clear to guide the conduct of an average person, using common sense and understanding. Re: The Mirkwood Group and Barry Randall, #1R0780-EB, Findings of Fact, Conclusions of Law and Order at 29 (Aug. 19, 1996)[EB #641].

If the provisions are ambiguous, however, the Board examines the relevant zoning by-laws for provisions which resolve the ambiguity. This does not mean that the Board conducts a general review of a project for its compliance with the zoning by-laws, but rather it sees if there are provisions in the zoning by-laws that address the same subject matter that is at issue under the town plan. Re: Fair Haven Housing Limited Partnership and McDonald's Corporation, #1R0639-2-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Apr. 16, 1996), aff'd, In re Fair Haven Housing Limited Partnership and McDonald's Corporation, Docket No. 96-228 (Vt. Apr. 23, 1997) (unpublished)[EB #643].

The Town Plan does not contain any provision specific to the siting or construction of telecommunications facilities. It does, however, state that "[n]ew development should be coordinated with and in close proximity to existing structures." The Project satisfies the Town Plan's policy on new development since it utilizes the Existing Tower. Because the Town Plan is not ambiguous, the Board does not examine the Randolph zoning regulations.

Accordingly, the Board concludes that the Project conforms with the Town Plan pursuant to 10 V.S.A. § 6086(a)(10).

2. Regional Plan

Concerning the role of regional plans in Act 250 proceedings, Title 24 of the Vermont Statutes provides:

In proceedings under 10 V.S.A. chapter 151 . . . in which the provisions of a regional plan or a municipal plan are relevant to the determination of any issue in those proceedings:

- (1) the provisions of the regional plan shall be given effect to the extent that they are not in conflict with the provisions of a duly adopted municipal plan;
- (2) to the extent that such a conflict exists, the regional plan shall be given effect if it is demonstrated that the project under consideration in the proceedings would have a substantial regional impact.

24 V.S.A. § 4348(h).

The Regional Plan has adopted a policy of "co-location" in order to minimize tower proliferation. The Project conforms to this policy by utilizing the Existing Tower. In addition, the Project is designed and constructed in a manner that minimizes its aesthetic impact and conforms to the other aesthetic principles expressed in the Regional Plan. Furthermore, the Project's use of ESMR digital technology will advance the Regional Plan's goals of enabling economic opportunity through telecommunications technology and enhancing the telecommunications network without significant adverse environmental, health, or aesthetic impacts.

Accordingly, the Board concludes that the Project conforms with the Regional Plan pursuant to 10 V.S.A. § 6086(a)(10).

V. ORDER

1. The Board takes official notice of the Town Plan.
2. The Project will not have an undue adverse effect on aesthetics in violation of 10 V.S.A. § 6086 (a)(8).
3. The Project will not materially jeopardize or interfere with the public's use or enjoyment of Vermont Technical College, the Veterans Memorial Cemetery, and the historic district in Randolph Center in violation of 10 V.S.A. § 6086(a)(9)(K).
4. The Project conforms with the Town Plan pursuant to 10 V.S.A. § 6086(a)(10).
5. The Project conforms with the Regional Plan pursuant to 10 V.S.A. § 6086(a)(10).
6. Land Use Permit Amendment #3R0703-EB-2A-EB is issued on even date herewith.
7. Jurisdiction is returned to the District #3 Environmental Commission.

Dated at Montpelier, Vermont this 10 day of March, 1999.

March 10, 1999

ENVIRONMENTAL BOARD

/s/Marcy Harding

-
- Marcy Harding, Chair
 - John T. Ewing
 - George Holland
 - Samuel Lloyd
 - William Martinez
 - Rebecca M. Nawrath
 - Alice Olenick

Board Members Arthur Gibb (now an Alternate Board Member) and Robert H. Opel did not participate in the consideration of this appeal. Board Member John Drake was an Alternate Board Member until after the public hearing in this appeal and did not participate in the Board's consideration of this appeal.

Footnotes:

(FN1) The Board acknowledges that the Antennae in the proposal before the Board are slightly smaller than those reviewed by the District Commission.

© Lawriter Corporation. All rights reserved.

The Casemaker™ Online database is a compilation exclusively owned by Lawriter Corporation. The database is provided for use under the terms, notices and conditions as expressly stated under the online end user license agreement to which all users assent in order to access the database.