

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A. CHAPTER 151

Re: Peter Guille, Jr.
Guilford, Vermont
Application #2W0383-EB

Findings of Fact and
Conclusions of Law
10 V.S.A. Chapter 151
(Act 250)

This appeal concerns a proposal by the applicants, Peter Guille, Jr. and others, to develop roads in excess of 2½ miles to serve 49 parcels in a subdivision to be called Green Hill Farms, located on approximately 600 acres in Guilford, Vermont. The District #2 Environmental Commission received this application on July 24, 1975 and held hearings on August 24, September 21, and October 26, 1975. On November 14, 1975 the District Commission issued Findings of Fact and Conclusions of Law denying a permit for the proposed project.

The applicants filed an appeal from the decision of the District Commission on November 30, 1975. The Guilford Planning Commission filed a cross-appeal on December 13, 1975, but subsequently sought to withdraw that appeal.

An initial pre-hearing conference was convened on December 14, 1975. Because the applicants were not prepared to go forward with the appeal due to a lack of necessary engineering information, it was agreed by the parties that the appeal would be convened on January 9, 1976 and would be recessed without the taking of evidence until such time as the applicants were prepared to proceed. Following notification that the applicants were prepared to present their appeal, a second pre-hearing conference was held on October 24, 1976, with the Chairman of the Environmental Board, Margaret P. Garland, presiding.

Based upon the notices of appeal filed by the parties, and as required by 10 V.S.A. 36089, the Board held de novo proceedings on the following substantive criteria of Act 250, 10 V.S.A. §6086(a): 1(B), 1(C), 1(E), 2, 3, 4, 5, 7, 8(A), 9(F), 9(G).

The parties also raised four preliminary procedural issues in this appeal. Those issues were:

1. Whether those persons who had purchased parcels from the applicants within the project boundaries must be joined as co-applicants to the appeal under Board Rule 6(A) ;
2. Whether one of those purchasers, William Halikias, could be granted Party status in the appeal;

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3. Whether the applicants' alleged violations of Act 250 for road construction and lot sales without a permit should be reviewed as part of the appeal; and
4. Whether the Town of Guilford could withdraw its appeal on Criteria 2 and 3 and thus remove **consideration** of those criteria by the Board.

The Board held a hearing on these preliminary issues on **December** 11, 1979 and ruled on them in a written order dated December 12, 1979. The substance of that order, and the findings and conclusions upon which it is based, are incorporated in this decision.

Upon resolution of the preliminary issues, the Board held subsequent hearings on the merits on December 18, 1979 and February 5, 1980. The latter hearing was recessed at the request of the parties to consider whether sufficient evidence had been submitted for the Board to make final **determinations** on Criteria 7, 9(F) and 9(G). On February 29, 1980, the Board notified the parties that the record was sufficient for a final decision and that the hearing on the appeal was therefore closed.

The following statutory parties participated in this appeal:

The applicants by Timothy J. O'Connor, Esq.
The Town of Guilford and the Guilford Planning Commission (the Town) by J. Garvan Murtha, Esq.
Windham Regional Planning and Development Commission by Charles **VanGorder**
Vermont Agency of Environmental Conservation by Stephen B. Sease, Esq.

In addition, several adjoining property owners were admitted as parties and participated in the proceedings with respect to the potential direct effects of the applicants' development on their property under the following criteria of the Act:

Mary **VanWagenen**: Criteria 1, 3, 4, 8
Helen **Mahoney**: Criteria 1, 3, 4
Avis **Phillips** : Criteria 1, 4, 5
Gerald and Karen **Baker**: Criteria 1, 3, 4
William **Halikias** : Criteria 1, 2, 3, 5

FINDINGS OF FACT - Procedural Issues

1. By separate conveyances in 1970, 1971, and 1972, the applicants, Peter Guille, Jr., Leverage Property Corporation, and others, acquired four parcels of property in Guilford, Vermont. These **parcels** totlsled **853⁺** acres in size. Between 1972 and 1977 the applicant conveyed 14 parcels of

land out of this acreage, all in parcels over 10 acres in size. The applicants also constructed improvements in Lake Ridge Road for a stretch of approximately 3800' and cleared a right-of-way for 1800' of additional subdivision roadway in 1971. The land remaining in the control of the applicants total 596⁺ acres, out of which they propose to sell 44 additional parcels.

2. By warranty deed dated November 19, 1976, and recorded December 4, 1976 the applicants conveyed to Kathleen M. Miller and Eleanor H. Miller a parcel of land containing 11.23 acres. This parcel was part of the Franklin property acquired by the applicants in 1971 as part of their proposed Green Hill Farms project. On July 24, 1978, the applicants filed their application with the District Environmental Commission for a land use permit for the development of the Green Hill Farms project. The Miller parcel is designated as parcel NW #11 on the applicants' plot plan for the project. The Millers conveyed their parcel to William Halikias by warranty deed dated March 13, 1979 and recorded March 22, 1979.
3. The District Environmental Commission's decision of November 14, 1978 contained consolidated findings on Criteria 2 and 3 of 10 V.S.A., 56086(a), and concluded that sufficient water was available and that no existing water supply would be unreasonably burdened by the project. The applicants' appeal of November 30, 1978 did not place these findings in issue. The cross-appeal of the Guilford Planning Commission, filed December 13, 1978, challenged the findings of the Commission "in relation to the sufficiency of water availability" for the project; the notice of appeal referred only to Criterion 2. On December 20, 1978, 7 days after the 30-day appeal period had expired, the Planning Commission filed a document entitled "Withdrawal of Appeal", stating that the Commission did not wish to address Criterion 2 before the Environmental Board.
4. **Because** the District Commission did not distinguish between Criteria 2 and 3 in its decision, and because the evidence before the Commission on the question of water supply concerned the relationship between water availability for the project and the project's potential effect on the existing local wells, an appeal of the Commission's findings with respect to Criterion 2 necessarily brought the factual basis of the findings with respect to Criterion 3 into dispute. We find that the parties to the application proceedings and the appeal reasonably so concluded. We also find that the other parties to the proceedings failed to file an appeal on Criteria 2 and 3 because they reasonably concluded that the criteria were in issue by virtue of the Planning Commission's appeal.

FINDINGS OF FACT - Substantive Criteria

Criterion 1(E): We find that this project, as limited in the **application** and conditioned herein, will not result in undue **water** pollution, and will not involve the injection of waste materials or any **harmful** or toxic substances into groundwater or wells.

1. The soils in **the** project area are heavy and often wet. The depth of soil to **bedrock** is shallow in many areas. The project site is characterized by steep slopes.
2. The applicants have not demonstrated that a suitable **area** for septic disposal exists on each of the parcels delineated on their site plan. Testing done to date indicates that suitable septic disposal areas may exist on these parcels, but the results also suggest that some parcels may have to be withdrawn from the **development** or altered in size or location to include a septic field.
3. The applicants have agreed **to** a condition in any land use permit that may be issued for this project that would require percolation testing and septic field design to meet state standards for **each** parcel before it is sold, conveyed or otherwise transferred. If each parcel is so tested, and if each system is **designed** by a professional engineer and approved by the Protection Division of the Vermont Agency of Environmental Conservation, no undue water pollution will result from this project.

Criterion 1 (C) : We find that the applicants' project design **has** not considered or incorporated water conservation techniques and thus does not satisfy the requirements of this criterion.

1. **The** use of water-conserving techniques in this project is **signi**ficant for two reasons: (a) lower flows of wastewater will help insure the viability of septic fields in an area of difficult soils and topography; and (b) lowered water demand will help insure that this project does not deplete **the** groundwater resource in **the** project area.
2. The applicants have not shown any plan to incorporate water-conserving techniques into the design of the project, stating that water conservation measures would be left entirely to the discretion of the purchasers and builders within the project. We find that this position fails to satisfy the requirements of Act 250. We would include conditions regarding water conservation in any permit that may be granted for this **project**.

Criterion 1 (E): The applicants have not demonstrated that **this development** will, whenever feasible, maintain the natural condition of streams in the project area, and will not endanger the public health, safety and welfare during potential flooding.

1. The applicants' plans for road construction do not contain specific details for the treatment of streams that have been or may be encountered during construction.
2. The applicants' **proposed** protective covenants do not contain any provision for the protection of streams and streambanks in connection with construction to be undertaken by lot purchasers.

Criteria 2&3: There is sufficient water available for this **development**, and no existing water supply will be unreasonably burdened.

1. Well data from the area involved in this project reveal that this is an area of relatively low **ground-water** yield. We accept the testimony of the State Geologist that yields of $\frac{1}{2}$ gal/min to 5 gal/min are likely for **the** homes to be built in this project. Wells drilled on these sites would probably have to **exceed** 300' in depth to tap and **store** a suitable yield for an average home. The yield from wells in this area might drop below $\frac{1}{2}$ gal/min during the driest part of the year, but this period would not last long enough to be a serious problem.
2. The aquifers underlying the project site have sufficient recharge capacity to sustain the demand that would be placed on them by the proposed development. Additional wells spaced throughout the project area at the density proposed by the applicants would not **have** an undue adverse effect on the yield of existing wells.

Criterion 4: We find that the **applicants** have not carried **their burden** of proof to demonstrate that this project will not cause unreasonable soil erosion.

1. The applicants have already **construcfd**, or intend to construct approximately two miles of roads within this development. The terrain is hilly and in some places, very steep. The project roadways will have slopes as great as 12% to 14% in some places. The project roadways will cross **streams** and watercourses. These roads and the bank cuts and other soil disturbance related to their construction present the potential for **severe** soil erosion on the **sitc**. Severe erosion problems have arisen in the past along the existing town roads in the area of the project.

2. The applicants' sedimentation control plan is very general in nature, does not address the specific problems of this site, and **leaves** all decisions on erosion control measures in the hands of **the** developer and town officials who may supervise construction. This proposal is too uncertain to satisfy the requirement of Act 250.
3. We are **therefore unable** to find that this project satisfies Criterion 4 and we will be unable to so find until the applicants submit plans including, at a minimum, the following:
 - culvert locations, sizes and downstream discharges;
 - **headwall** details;
 - locations and sizes of ditch **lines**;
 - typical cross-sections of ditch lines and culverts;
 - locations and flows of all streams and watercourses to be crossed by roadways in this project ; and
 - protective covenants governing erosion control in the construction of driveways and other development by lot purchasers.

Criterion 5: We find that this project, as presently proposed, **will** cause unreasonable congestion and unsafe conditions with respect to the use of the existing town roads serving the project area:

1. The applicants **propose** to create a total of 58 **parcels**, including at least 44 new homesites along the hillside and ridge line of East Mountain, **between** one and two miles off Vermont Route 5 in Guilford, Vermont. Access to the development is to be provided by East Mountain Road and Slate Rock Road, two existing town roads.
2. Slate Rock Road presently serves six families on a year-round basis; the applicants propose to expand its use to serve 33 additional homes. **Slate** Rock Road is not capable of handling safely the increase in traffic that this additional **development** would cause:
 - a. In at least two areas, the road reaches 14% slopes for stretches of **200'**;
 - b. The road is not **capable** of safely carrying a school bus, and no school bus now uses the road for that reason;
 - c. The road is narrow in many spots, and oncoming cars are not able to pass safely in those places. The town **currently** plows turnouts for cars to pull off in, because the road is effectively a one-lane road in the winter.

- d. Slate Rock Road is a Class III town road, and according to town officials is in worse condition than most Class III roads.
 - e. Residents who use the road testified that there are several "blind" curves on the road, and town officials agree that there are "two or three" "bad" curves.
 - f. Because of the steepness of the road and its narrowness, cars are often stuck on this road in the winter; when a car is stuck on the road, other vehicles cannot pass and must park at the bottom of the hill. In these circumstances, emergency vehicles could not utilize this road.
3. East Mountain Road currently serves approximately 20 homes; the applicants propose to add 11 homes to be served by this road. The road is classified in two segments: a Class III segment and a Class IV segment. This road is not capable of safely providing access to the proposed development for the following reasons :
- a. It is a steep road, reaching 14% slope in at least two areas, one stretch of 300' and one stretch of 75';
 - b. Sections of the road are so narrow that two cars cannot pass safely. In the winter it is effectively a one-lane road;
 - c. Along much of its length, this road is cut into a steep hillside; there is a precipitous drop on one side of the road and a steep hillside on the other. There is no guardrail. Increased traffic on this road presents substantial safety hazards, especially when oncoming cars cannot safely pass.
 - d. Town officials testified that the road is not now plowed along its Class IV segment, and that it would be a hardship on the town to plow that segment because substantial road improvement would be necessary to accommodate a plow.
4. The Town of Cuilford has no capital improvement program that assures that improvements will be made to either of the roads planned to serve this project. A previous proposal to improve Slate Rock Road was denied by the town. This proposal is again before the town, but there is no assurance that it will be passed.
5. The interior roads in this project, to be built by the applicants, will be built to town specifications, and

we find that they will not create any undue congestion or unsafe conditions if built as proposed. The proposed protective covenants for the development require common maintenance of roads not accepted by the town.

Criterion 7: We find that this project, as presently proposed, will place an unreasonable burden on the ability of the local government to provide certain municipal or governmental services:

1. We incorporate herein the findings set forth with respect to Criterion 5, traffic and roads, above. In summary, we find that this project will create unreasonable congestion and unsafe conditions with respect to the use of the existing town roads serving the project area.
2. The applicants have neither created nor proposed any mechanism for improving the town roads serving the project area aside from suggesting that the town should pay for any improvements. Due to the condition of the roads, their locations, and the physical limitations on widening them, necessary road improvements would be quite expensive and quite possibly would involve significant adverse environmental impacts. Similarly, significant improvements in road maintenance and plowing on these roads would also be quite expensive.
3. Access to some of the parcels proposed to be sold by the applicants is to be provided by a so-called "pent road", which ties into Slate Rock Road. There is a small wooden bridge on this road. The Town states that this is a private road and bridge that it has not maintained and does not wish to maintain; however, an upgrading or replacement of the bridge would be necessary if this project were approved. The applicants have stated an intention to dedicate the road to the Town but have not offered any financial support to the Town for upgrading or maintaining the road and bridge.
4. The roads that the applicants have built or will build in the project will be constructed to town standards, are of reasonable length, and consequently will not impose any unreasonable burdens on the Town. The proposed protective covenants for the development require common maintenance of roads not accepted by the Town. We would, at a minimum, include these protections as conditions to any permit that may be issued for this project.
5. The applicants have agreed to provide a dry hydrant adjacent to an existing pond within the project in

order to assist the Town in fighting **any fires** that may occur in the area.

6. The parties opposing this project have not carried their burden of proof to show that this development would result in any **unreasonable** burden on the ability of the Town to provide any other municipal or governmental services.

Criterion 8 (A): We find that this development, if built in conformance with the plans presented with the application, would destroy or significantly imperil necessary wildlife habitat. **However**, we also find that this adverse **effect** could be mitigated by the addition of conditions to any permit that may be granted for this project.

1. Three **separate** areas of the project site were identified by the State's wildlife biologist as deer wintering areas; however, only one of those areas possesses the characteristics of and exhibits the signs of use of a critical winter deeryard. We find that the area designated as a deeryard in Lots NW 6, 7, 9, 12 and 20 and the "R. Canon" lot of the applicants' plot plan is "**necessary wildlife habitat**".
2. Potential interference with the role of this habitat can be reduced to an **acceptable** level by a reduction in housing density and the control of dwelling locations; it is not necessary to prohibit human habitation in the area altogether. We find that the critical features and use of this deeryard can be protected by:
 - (a) merging parcels NW #6 and 7 and merging parcels NW #9 and 12 to reduce the density of development in the area, and
 - (b) limiting any construction on the resulting parcels NW #6-7 and NW #9-12 to a maximum of 250' from the road.

Criterion 9(F): We find that the applicants have not **demonstrated** that the proposed project has been planned **to** reflect the principles of energy **conservation** or to **incorporate** the **best** available technology for efficient **use** and recovery of energy.

1. The applicants have **stated** that energy conservation measures within this development would be entirely left to the discretion of purchasers and builders within the project, and that they would not impose any standards or requirements for energy conservation. We find that this position fails to satisfy **the**

requirements of Act 250. We would include conditions regarding energy conservation in any permit that may be granted for this project.

Criterion 9(G) : We find that adequate surety is provided to the Town with respect to the interior roads proposed to be built as part of this project, if those roads are built in conformance with Town Highway Standards.

1. The Town **does** not have any capital program or plan governing new road construction. The applicants have, however, agreed to construct interior roads in conformance with the Town's standards for highway construction. We find that this **agreement** provides adequate surety to protect the Town in the **event** that the Town is required to **assume responsibility** for these roads and thus satisfies the requirements of Criterion 9(G). We would condition any permit that may be granted for this project to require construction of all interior roads, including the "pent road", to Town standards and reconstruction of the small bridge on the "pent road" to the applicable bridge standards employed by the State Agency of Transportation.

CONCLUSIONS OF LAW - Procedural Issues

1. This Board does not **accept** the argument advanced by the Agency of Environmental Conservation that those who have purchased land within **the** project must be joined as **co-applicants** in the present application. It is true that Board Rule G(A) requires applications to "**list** the name or names of all persons who have a substantial interest in the tract of involved land by reason of ownership or control." The Rule does not, however, require previous purchasers of subdivided land to **be** joined as co-applicants to a **proposal**, especially when they oppose the application, as they have in this case. The Rule was intended to bring **before the** Commission or Board those persons who are directly involved in the proposed development to such an extent that their participation as co-applicants is reasonable and necessary to ensure thorough review of the application and to protect **the** flexibility of the **Commission** or Board in approving and/or modifying the project. We do not believe that the existing purchasers of parcels in this development fall within this category. We note in this regard that if it were critical to our approval of this proposal to accomplish some alteration in the existing lot lines or existing development on these inholdings, we would not be powerless to do so. A developer who has created an environmental problem by selling parcels from a development without a permit might well be required to address that problem by some means, perhaps including **negotiations** with the purchasers, **as** a condition of approval of the overall development.

2. For the reasons **stated** above, the motion of the Agency of Environmental Conservation to join William Halikias as a co-applicant is denied. Mr. Halikias' request for party status as an adjoining property owner is granted. Mr. Halikias' property adjoins, and is indeed surrounded by, the property involved in this application. Although he did not participate in the proceedings before the District Commission, he was not the owner of the parcel at the time of those proceedings. In any event, he is entitled to party status in our de novo review of this matter by requesting a hearing and complying with the Board's procedural Rules.
3. The applicants have presented a motion to exclude our consideration of Criteria 2 and 3 on the ground that they are not properly before the Board because the Guilford Planning Commission withdrew its appeal on Criterion 2. This motion is denied. Because of the practical relationship between Criteria 2 and 3, and because the District Commission's findings on these issues were consolidated, we conclude that Criteria 2 and 3 were interrelated and jointly raised by the appeal of the Guilford Planning Commission. The Planning Commission's subsequent attempt to withdraw these issues from our consideration after the appeal period had run must be denied. The other parties to these proceedings, particularly the adjoining landowners who were unrepresented by counsel, reasonably concluded that they did not need to appeal the District Commission's findings on these criteria, as they were already opened up on appeal. Once the appeal period had run, it was of course impossible for those parties to file their own appeals on the water supply criteria, even though this issue was of substantial concern to them. Our procedures are intended to protect the rights of all parties and to promote a fair review of the merits of an appeal within the criteria of Act 250. These objectives would be ill served if we were to bar the participation of the adjoining landowners on Criteria 2 and 3.
4. The Environmental Board must consider development and subdivision applications under Act 250 on their merit as defined by the criteria of 10 V.S.A. 96086(a). In most circumstances, it is irrelevant to the review process whether an applicant has violated the requirements of the Act with respect to a pending application or any previous development. We recognize that in certain circumstances an applicant's prior performance may be relevant to the question of whether a subsequent development proposal does in fact satisfy the criteria of the Act. However, the legal question of whether that prior performance was in violation of the Act or of a previous permit is generally an issue for consideration in enforcement proceedings alone. We have consequently not considered whether the applicants' previous road construction and land sales within the Green I-II.11 Farms project were conducted in violation of the Act. This

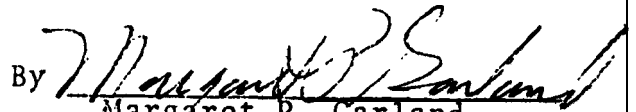
question should be addressed, if at all, in appropriate enforcement proceedings under the terms of the Act and the Board's Memorandum of Understanding with the Agency of Environmental Conservation.

CONCLUSIONS OF LAW - Substantive Criteria

Based on the foregoing Findings of Fact, it is the conclusion of the Environmental Board that the development of this project, as presently designed and described in this appeal, would be detrimental to the public health, safety and general welfare. This conclusion is required by our Findings with respect to Criteria 1(C), 1(E), 4, 5, 7, 3(A) and 9(F). We have found that this project, if redesigned or conditioned by appropriate terms of a Land Use Permit, could satisfy the requirements of Criteria 1(B), 1(C), 3(A), 9(F) and 9(G). We believe that the applicants might be able to satisfy the requirements of Criteria 1(E) and 4 by the provision of more thorough planning and engineering data to the Board. The applicants would not, however, be able to satisfy the requirements of Criteria 5 and 7 by the submission of more information alone. We conclude that substantive changes in the design of the project are necessary to satisfy those criteria. In particular, we wish to make clear our intention to place conditions on any permit for this project that would ensure the safe and uncongested use of the town roads serving the proposal development. This Board has already given the applicants ample opportunity to prepare their application and their case on appeal. Nevertheless, we invite the applicants to submit such motions as are appropriate pursuant to Board Rule 15(E) if they wish to go forward with their application at the present time.

Dated at Montpelier, Vermont this 13th day of March, 1930.

ENVIRONMENTAL BOARD

By 
Margaret P. Garland
Chairman

Members voting to
issue this decision:
Margaret P. Garland
Ferdinand Bongartz
Roger N. Miller
Melvin H. Carter
Michael A. Kimack
Daniel C. Lyons
Leonard U. Wilson