

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

RE: White Sands Realty Company Findings of Fact and
c/o McKenzie, Borden, Meaders Conclusions of Law
& Ives Land Use Permit Amendment
535 Fifth Avenue #3W0360-1-EB
New York, New York Motion to Reconsider

On March 9, 1981, White Sands Realty Company (the "Applicant") filed a notice of appeal from the Findings of Fact and Conclusions of Law issued February 13, 1981, by District #3 Environmental Commission denying an application for a project generally described as the subdivision of 246 acres into 20 lots and the construction of a 5700 foot access road located north of Route 4 near the Woodstock-Bridgewater Town line in the Town of Woodstock, Vermont. After notice and hearing, the Environmental Board (the "Board") issued Land Use Permit #3W0360-EB on October 19, 1981.

On October 29, 1981, the Agency of Environmental Conservation (the "Agency"), a party to this proceeding, filed a motion to reconsider the Board's Findings of Fact as they pertain to Criterion 8(A) of 10 V.S.A. §6086(a). On November 12, 1981, the Applicant filed a memorandum in opposition to the Agency's motion. On November 17, 1981, Assistant Attorney General John Chase filed a notice of appearance in this matter on behalf of the Fish and Game Department. On November 30, 1981, the Agency requested a hearing on its request for reconsideration and asked the Board to reconsider its decision with respect to Criteria 1(C) and 9(F) of 10 V.S.A. §6086(a). On December 2, 1981, the Applicant filed a motion opposing the appearance of the Fish and Game Department as a party to this proceeding.

At its December 8, 1981, hearing the Board considered the various matters and agreed to reconsider its Findings of Fact with respect to Criterion 8(a); denied the Agency's request to reconsider Criteria 1(C) and 9(F) and granted the motion opposing the appearance of the Fish and Game Department as an additional party to this proceeding.

The following parties participated in this reconsideration:

Applicant by A. Jay Kenlan, Esq; and,
Agency of Environmental Conservation by Dana Cole-Levesque,
Esq.

On February 10, 1982, the Board heard oral argument on the issues raised by the reconsideration of its Findings of Fact with respect to Criterion 8(a) and adjourned the hearing. This matter is now ready for decision.

PROCEDURAL ISSUES

1. On October 19, 1981, the Board issued Land Use Permit #3W0360-EB. On October 29, 1981, the Agency, a party to the proceeding, filed a motion to reconsider the Board's Findings of Fact as they pertain to Criterion 8(A) of 10 V.S.A.

§6086(a). Board Rule 15 provides that a "party may file within 15 days from the date of the decision such motions as are appropriate. As the October 29, 1981, motion was timely filed, the Board heard oral argument and considered the merits.

2. On November 30, 1981, the Agency requested that the Board reconsider its October 19, 1981, decision with respect to Criteria 1(C) and 9(F) of 10 V.S.A. **§6086(a)**. The Board denied this request as untimely in that the request was made more than one month after the decision was issued and not within the 15 days specified in Board Rule 15.

3. Finally, the Board refused to recognize the Fish and Game Department as a party, distinct from the Agency for purposes of this reconsideration. The Agency participated in all of the proceedings before the Board relative to this matter. It is true that 10 V.S.A. **§6084(b)** provides that "any state agency directly affected" shall receive notice of an Act 250 application and that 10 V.S.A. **§6086(c)** provides that "parties shall be those who receive notice." Although the Fish and Game Department may be affected by this matter, it has been represented by the Agency throughout the proceedings. In addition, the term "Agency" as defined in 3 V.S.A. **§801(b)(1)** means a board, commission, department or agency authorized by law to make rules or to determine contested cases. The Fish and Game Board is authorized to make rules, not the Fish and Game Department. See 10 V.S.A. **§4082**. Therefore, even if the Board had decided that an additional party was appropriate to represent the interests of the Fish and Game Department for purposes of the reconsideration, that party would have to be the Fish and Game Board.

The Board has now considered the substantive issues raised by the Agency's Motion to Reconsider Criterion 8(A) and is ready to revise its Findings of Fact with respect to said Criterion.

FINDINGS OF FACT

1. The land encompassed by the proposed subdivision consists of approximately 246 acres of land. A portion of the land is a deer wintering area. The critical portion of the deer wintering area; identified by the Vermont Fish and Game Department, lies on the westerly portion of the proposed project lands, including sections of Lots 9, 11, and 15 in areas of soft wood cover.

The Applicant **proposes**, to subdivide the 246 acres into 20 **lots** ranging in size from less than 2 acres to more than 40 acres. Eleven lots are greater than 10 acres in size, and three of these are in excess of 30 acres.

2. The area in question is part of a larger existing deer winter range and was added to the maps of deer winter ranges in the spring of 1981. Exhibits #8 and #9, maps Of deer wintering ranges in the Towns of Woodstock and Bridgewater respectively, indicate a large number of deer wintering ranges in the general area of the proposed project. In earlier decisions, In re Peter Guille, Jr., Appeal #3W0383-EB dated March 18, 1980, and In re Quechee Lakes Corporation, Appeal #3W0364-EB and #3W0365-EB dated May 28, 1981, the Board found that "deer wintering areas ("deeryards") are critical habitat for the survival and well-being of white-tailed deer in Vermont." The Board continues to believe this to be true.
3. The number of deer supported by this winter range and the number of acres used by deer during the winter months were disputed by the parties. The Board finds, however, that the proposed use (single-family homes on relatively large lots) will not significantly reduce the number of deer using the winter range and the number of acres likely to be used as winter range after development, if the project is built as proposed and the Applicant maintains a habitat-management program on at least 50 acres as set forth in more detail below.
4. There was also conflicting testimony as to the economic value of the land as a deer wintering area versus its use as a residential subdivision. The Board recognizes that winter deer range has significant economic, environmental and recreational value to the public. However, the Board finds that if this subdivision were created with the habitat-management program set forth below, this is a reasonable means of lessening the destruction, diminution and imperilment of the habitat and species and the economic benefit to the public from the creation of the subdivision will outweigh any economic, environmental or recreational loss if the-habitat or species is actually reduced or diminished. 10 V.S.A. §6086(a)(8)(A)(i) and (ii).
5. No other land is owned or controlled by the Applicant "which would allow the development or subdivision to fulfill its intended purpose." 10 V.S.A. §6086(a)(8)(A)(iii).
6. Interference with the role of this winter range can be reduced to an acceptable level by development of a habitat-management program on at least 50 acres of the site for a period of from ten to twenty years. The Applicant indicates a willingness and the ability to undertake game and wildlife management programs to help offset any adverse impact of this particular development on the deer wintering area. 10 V.S.A. §6086(a)(8)(A)(ii). The Board,

therefore, will condition the permit as follows:

The permittee shall, with the assistance of a professional forester and/or game biologist, develop a habitat-management program for at least 50 acres, comprising the westernmost portions of Lots 9, 11, and 13, and that such habitat-management programs shall be instituted and maintained by the permittee, its successors and assigns, for a period of not less than ten years; provided, however, that if it is or can be established by "any party opposing" the permittee pursuant to 10 V.S.A. §6088, that at the end of the ten year period this area continues to be a "necessary wildlife habitat" pursuant to 10 V.S.A. §6086(a) (8) (A), such programs shall continue for an additional ten years or a total of twenty years.

The Board recognizes that any permit may be revoked for noncompliance with conditions in accordance with 10 V.S.A. §6090(b) and Board Rule 24.

7. The Board, therefore, finds insufficient evidence that, as conditioned above, this subdivision will "destroy or significantly imperil necessary wildlife habitat or any endangered species" as required by 10 V.S.A. §6086(a) (8) (A).

CONCLUSIONS OF LAW

1. The Board concludes that a "necessary wildlife habitat" as defined in 10 V.S.A. §6001(12) need not be decisive to the survival of the entire population of a species of wildlife but must be critical only to the survival of a portion of the population which is dependent upon the identified habitat. However, the Board must conclude that this particular subdivision, as presented to the Board and limited by the terms and conditions of the Board's Findings of Fact and the permit amendment issued herewith, meets the requirements of Criterion 8 under 10 V.S.A. §6086(a).
2. The Board previously found that the project meets the requirements of Criteria 1(B) and 1(C), 4, 5, 7, 9(F) and 9(J) under 10 V.S.A. §6086(a). The District Commission found that the project meets the requirements of the remaining criteria. Therefore, the Board concludes that if completed and maintained in conformance with all of the terms and conditions of Land Use Permit #3W0360-EB, as amended herein, the subdivision will conform to the criteria set forth in 10 V.S.A. §6086(a).

Jurisdiction over this permit shall be returned to
the District #3 Environmental Commission.

Dated at Montpelier, Vermont this 25th day of February, 1982.

ENVIRONMENTAL BOARD

BY Jan S. Eastman
Jan S. Eastman
Executive Officer

Board members participating
in this decision:
Leonard U. Wilson
Ferdinand Bongartz
Lawrence H. Bruce, Jr.
Melvin H. Carter
Roger N. Miller
Donald B. Sargent