

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

RE: White Sands Realty Company
c/o McKenzie, Borden,
Meaders & Ives
535 Fifth Avenue
New York, New York

Findings of Fact and
Conclusions of Law
Land Use Permit
#3W0360-EB

c/o A. Jay Kenlan, Esq.
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P.O. Box 785
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This is an 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. A notice of appeal was filed on March 9, 1981 by the Appellant. Notice of a public hearing and a pre-hearing conference was served on the parties and forwarded for publication in the Valley News on March 23, 1981. A pre-hearing conference was held on this appeal on April 1, 1981. Hearings were held on July 14 and 28, 1981 and September 15, 1981. The issues on appeal were determined at the pre-hearing conference.

The following parties participated in the hearings:

Applicant, White Sands Realty Company by A. Jay Kenlan, Esq. and Jim Watson, agent;
Appellees, Vermont Agency of Environmental Conservation, Department of Fish and Game by Dana Cole-Levesque, Esq.;
and
Town of Woodstock and Town of Woodstock Planning Commission by Deborah Sisco.

The hearings were recessed on September 15, 1981. On September 30, 1981, the Environmental Board (the "Board") reviewed the Proposed Findings of Fact and Conclusions of Law submitted by the parties, determined that the record was complete, and adjourned the hearings.

I. ISSUES IN THE APPEAL

A. Procedural Issues

On appeal, Appellant argued that:

1. The District Environmental Commission (the "Commission") violated the statutory requirement to issue a permit within 20 days of the last hearing date and

that consequently a permit for this project should be issued without conditions by the Board; and

2. That it is improper for the Commission to indicate the conditions that it would attach to a permit when a permit application is in fact denied.

As set forth in its Memorandum of Decision dated June 25, 1981, the Board found that the Commission acted within its discretion and complied with the statutory requirements for rendering decisions. The Board also decided that it was not improper for the Commission to indicate the conditions it would have attached to a permit, if issued, as it is intended to aid applicants-in planning projects.,

B. Substantive Issues

The substantive issues on appeal to be addressed by the Board concern:

Criterion 1 - the requirement for state approval of waste disposal on lots of greater than 10 acres;

proposed Commission condition on water conservation devices;

Criterion 4 - the necessity and utility of the proposed Commission erosion control devices;

Criterion 5 - the proposed Commission condition requiring road paving and a reserved parking area;

Criteria 7 and 9(J) - the proposed Commission requirements for fire pond and reservoirs;

Criterion 8 - significant imperilment of the deeryard located within the subdivision; and

Criterion 9(F) - the requirement for energy conservation devices.

II. FINDINGS OF FACT

1. The proposed project is a subdivision of a 246 acre tract of land into 20 lots ranging in size from 1.4 acres, more or less, to 41.8 acres, more or less, to be served by a road of approximately 5700 feet long. As proposed, the lots will be served by on-site water and septic systems.

Criterion 1(B) (waste disposal):

2. The Applicant submitted a Certificate of Compliance with respect to Vermont State Board of Health Regulations, Chapter 5, Sanitary Engineering, Subchapter 10, Part I, Subdivisions (hereinafter referred to as the "Certificate"). (Exhibit #10)

The Certificate relates to all lots of less than 10 acres. Under Board Rule **13** (C), the Certificate creates a rebuttable presumption that "sewage can be disposed of through installation of sewage collection, treatment and disposal systems without resulting in undue water pollution." Rule 13(C) (1). Nothing in the record rebuts this presumption, hence, the Applicant has demonstrated that sewage can be disposed of on the lots of less than 10 acres without resulting in undue water pollution.

3. The Town of Woodstock Zoning Permit, #T-630-80 (Exhibit #11) issued to the Applicant on July **23, 1980**, requires that:

"Prior to any development of lots 8 and 10 through 18, wastewater disposal systems shall be designed by a Vermont licensed professional engineer. Designs shall be certified by the engineer to comply with State of Vermont Subdivision Regulations as though the lots were under 10 acres in size. Prior to occupation or utilization of any such structures, a licensed professional engineer shall certify that the system has been installed in conformity with the design and the above state regulations."

According to testimony before the Board, however, the Town of Woodstock has no personnel capable of making a technical review of the plans provided in accordance with the condition described above.

4. The Applicant argues on appeal that no state review of waste disposal on lots in excess of 10 acres should be required as a condition of any permit issued for this project as lots in excess of 10 acres are not generally subject to Act 250 review. The Board has previously determined, however, that once it obtains jurisdiction of a project due to the construction of a road, the project must be reviewed pursuant to all ten criteria as set forth in 10 V.S.A. §6086(a). See Richard Saltzman (D.R. #79, June 2, 1977).

5. The Certificate indicates that certain areas of the project in question require special design considerations for wastewater treatment. Consequently, the Board has decided to require review of the wastewater disposal systems and their locations designed for the lots in excess of 10 acres prior to any development on said lots.

Criterion 1(C) (water conservation):

6. Based upon the testimony offered, the Board finds that the project area appears to have ample water supplies. The Board also notes that the Applicant previously agreed to the water conservation provisions included in the Findings of Fact issued by the Commission. However, the Board considers that as the Applicant is not installing said systems, water conservation conditions are to be regarded as advisory only and strongly recommends that the Commission's conditions, or comparable provisions, be recommended to lot purchasers and the homeowner's association when formed. The Board, therefore, finds that the project is not contrary to the requirements of 10 V.S.A. §6086(a)(1)(C).
7. The Board further finds, therefore, if conditioned in the manner above, that the proposed subdivision will not result in undue water pollution under 10 V.S.A. §6086(a)(1).

Criterion 4 (soil erosion):

8. An Erosion Control Plan was submitted by the Applicant as depicted in Exhibit #16. Construction phase soil erosion controls consist of a maximum of two weeks exposure of raw earth, hay bales at the bottom of large fill, slopes, and hay bales used as velocity reducers and sediment traps. Soil is to be graded and mulched within two days of its excavation.
9. Permanent erosion controls consist of stone fill in road ditches where the gradient is in excess of 8 percent. Culverts are also to be placed in roadway ditches to prevent large accumulations of surface water (Exhibit #16).
10. No other party contested the adequacy of the Erosion Control Plan submitted by the Applicant.
11. According to testimony of the Applicant's expert, the road, if properly graded, will not erode abnormally.
12. The Board finds, therefore, that the proposed subdivision project will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result under 10 V.S.A. §6086(a)(4).

Criterion 5 (unsafe road condition):

13. The Applicant appeals Criterion 5 of 10 V.S.A. §6086(a) only to the extent that the Commission deemed that the project necessitated that the road be paved and that a parking area be provided near the intersection of U.S. Route 4 and the project road. The Applicant did not take issue with Findings of Fact 5(A), (B), (C) or (D).
14. Plans for the road construction were submitted by the Applicant as part of Exhibit #16. These plans included a 5700 foot road, more or less, a turnaround with a radius of 100 feet, and four turnouts at the downhill end of the steep sections of the project road. The road will be 24 feet wide with two foot shoulders on each side and an 18 inch gravel subbase.
15. According to the testimony of the Applicant's engineering expert, a well-maintained graveled surface road would be equally passable and safe as a paved road. The Applicant's expert testified further that such maintenance should include proper grading at least semi-annually.
16. The Applicant submitted a set of Road Covenants to establish certain covenants and conditions for the operation, maintenance and repair of the project road which is proposed to be a private road (Exhibit #15).

Exhibit #15, however, does not include a provision requiring proper grading of the project road at least semi-annually. Exhibit #15, therefore, should be revised to include such a requirement.
17. The Board finds, therefore, that if Exhibit #15 is amended as required in Finding 16, the proposed subdivision road need not be paved and the subdivision project will "not cause unreasonable congestion or unsafe conditions with respect to the use of the highways and other means of transportation existing or proposed." 10 V.S.A. §6086(a)(5).

Criteria 7 and 9(J) (municipal and supporting government services):

18. The Applicant appeals Criteria 7 and 9(J) of 10 V.S.A. 56086(a) only to the extent that the Commission deemed that the project required the construction of fire ponds and reservoirs within 2000 feet of any proposed structure.
19. According to the testimony of the Applicant's engineer, if the road is properly maintained, it will provide reasonable access to the subdivision for emergency and service vehicles.

20. The proposed subdivision is located within the Town of Woodstock and approximately one mile from the Bridgewater Fire Station. Either the Town of Woodstock or Bridgewater will provide emergency services to the subdivision pursuant to mutual aid agreements.
21. Other testimony before the Board indicates that there is no current service water within the proposed subdivision available to meet a fire emergency. The Board is generally concerned about the immediate fire protections available within the development. However, instead of requiring the Applicant to provide fire ponds or reservoirs, within 2000 feet of any proposed structure, the Board strongly advises that the issue of fire protection be addressed by the Owner's Association created by Exhibit #15..
22. The Board finds, therefore, that the construction of fire ponds or reservoirs are unnecessary and the absence of such ponds will "not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services" in accordance with 10 V.S.A. §6086(a)(7) and that "necessary supporting governmental and public utility facilities and services are available...." according to 10 V.S.A. §6086(a)(9)(J).

Criterion 8 (necessary wildlife habitat):

23. The Appellant contends that the Commission's findings reviewed pursuant to 10 V.S.A. §6086(a)(8)(A) are in error with respect to the deeryard located in the project area.
24. 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 most 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 12, in areas of soft wood cover. Testimony on behalf of the Applicant indicates that 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).
25. Testimony by the Vermont Fish and Game Department indicates that this area is part of a larger existing deer winter range that was identified and added to the maps of deer winter ranges in the spring of 1981 (Exhibit #8). 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 this area. Testimony before the Board also indicates that deer utilize specific wintering ranges on a continually changing basis.

26. There was conflicting testimony as to the number of deer likely to inhabit this particular deer wintering area. This figure could extend anywhere from 10 to 100 deer.
27. There was also conflicting testimony as to the public economic benefit from the use of this area as a deer wintering area versus its use as a subdivision. The Board finds insufficient evidence to indicate that if this subdivision were created, it would destroy the entire deer wintering area and that the benefits under Criterion 8(A) (i) would outweigh the subdivision's encroachment on the deer wintering area.
28. Experts for the Applicant and for Appellants, by Vermont Fish and Game Department, testified that the disturbance of the existing deer wintering area on this project site was not critical to the survival of the species, whitetailed deer. The Applicant indicates a willingness to undertake game and wildlife management programs to help offset any adverse impact of this particular development on the deer wintering area. The Board, therefore, accepts the Applicant's proposal regarding a game and wildlife management program and will condition any permit as follows:

The permittee shall, with the assistance of a professional forester and/or game biologist, develop a habitat management program for the 50 acres, more or less, comprising the western most portions of Lots 9, 1.1 and 12 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 is, in fact, a "necessary wildlife habitat" pursuant to 10 V.S.A. 56086(a) (8) (A), such programs shall continue for an additional ten years or a total of twenty years.

29. The Board, therefore, finds sufficient evidence that this subdivision will not "destroy or significantly imperil necessary wildlife habitat or any endangered species," as required by 10 V.S.A. §6086(a) (8) (A).

Criterion 9(F) (energy conservation):

30. The Applicant proposes a 20 lot subdivision with a road of approximately 5700 feet, along a south-facing slope in the Town of Woodstock, Vermont and in close proximity to the Village of Bridgewater, Vermont. The

Applicant intends to build only the subdivision road; however, as discussed under Criteria 1(B) and 1(C) above, Board Rule 6 requires that subdivisions subject to the jurisdiction of 10 V.S.A. Chapter 151 comply with all criteria set forth in 10 V.S.A. §6086(a).

31. Testimony on behalf of the Applicant indicates the Applicant anticipates that homes to be constructed within the subdivision will apply modern energy conservation standards, known and available at the time of construction. The Board finds that the Applicant intends only to construct the road, not to construct the particular houses to be located on the lots in question. However, the Board strongly recommends that lot owners incorporate the best available technology for efficient use or recovery of energy including utilization of the south facing orientation of building sites when constructing dwellings and associated buildings in this subdivision.
32. The Board finds, therefore, that "the planning and design of the subdivision ... reflect(s) the principles of energy conservation and incorporate(s) the best available technology for efficient use of recovery of energy." 10 V.S.A. §6086 (a) (9) (F).
33. To the extent that any proposed Findings of Fact are inconsistent with the Board's Findings of Fact herein, the proposed Findings of Fact are denied.

CONCLUSIONS OF LAW

The Board concludes that the proposed subdivision, as presented to the Board and limited by the terms and conditions of these Findings of Fact and the permit issued herewith, meets the requirements of Criteria 1(B) and 1(C), 4,5,7,8,9(F) and 9(J) under 10 V.S.A. §6086(a). The Commission found that the project meets the requirements of the remaining criteria. The Board, therefore, grants a permit to the Applicant. Jurisdiction over this permit shall be returned to the District #3 Environmental Commission.

'Dated at Montpelier, Vermont this 19th day of October., 1981.

ENVIRONMENTAL BOARD

By Jan S. Eastman
Jan S. Eastman
Executive Officer

Members participating
in this decision:
Leonard U. Wilson
Ferdinand Bongartz
Lawrence H. Bruce, Jr.
Dwight E. Burnham, Sr.
Melvin H. Carter
Roger N. Miller



State of Vermont

LAND USE PERMIT

AMENDMENT

CASE No. 3W0360-1-EB
 APPLICANT White Sands Realty Company
 ADDRESS c/o McKenzie, Borden,
 Meaders & Ives
 535 Fifth Avenue
 New York, New York

LAWS/REGULATIONS INVOLVED

10 V.S.A. Chapter 151 (Act 250)
 Vermont State Board of Health
 Regulations, Chapter 5,
 Sanitary Engineering, Subchap-
 ter 10, Part I, Subdivisions

The Vermont Environmental Board hereby issues a Land Use Permit Amendment pursuant to the authority vested in it in 10 V.S.A., Chapter 151. This amendment applies to lands identified in Book 63, Page 395 of Woodstock Land Records, as the subject of a deed to White Sands Realty Company, the "permittee" as grantee. This permit specifically authorizes the permittee to subdivide 246 acres of land, more or less, into 20 lots and to construct an access road of approximately 5,700 feet located north of Route 4 near the Woodstock-Bridgewater Town line in the Town of Woodstock, Vermont.

The permittee, its successors and assigns, are obligated by this permit to complete and maintain the project only as approved by the District #3 Environmental Commission in accordance with the conditions of Land Use Permit #3W0360-EB, except as amended herein.

CONDITIONS

1. Condition #1 of Land Use Permit #3W0360-EB is amended to read as follows:

The project shall be completed as set forth in Findings of Fact and Conclusions of Law #3W0360, except as modified by the Findings of Fact and Conclusions of Law of the Environmental Board, #3W0360-EB and #3W0360-1-EB; in accordance with the plans and exhibits stamped "Approved" and on file with the District #3 Environmental Commission, and in accordance with the conditions of this permit, as amended. No changes shall be made in the project without the written approval of the District Environmental Commission.

2. Condition #10 of Land Use Permit #3W0360-EB is amended to read 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 that if it is or can be

n 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 wild-life 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.

All conditions of Land Use Permit #3W0360-EB remain in full force and effect, except as amended herein.

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