

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

Re: Forestdale Heights, Inc.
Land Use Permit #4C0329-16-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal of a permit issued by the District #4 Environmental Commission to Forestdale Heights, Inc. authorizing the extraction of 150,000 cubic yards of sand per year from a 97-acre tract of land in the Saxon Hill Industrial Park in Essex. For the reasons explained below, the Board determines that the project complies with the requirements of 10 V.S.A. chapter 151 (Act 250).

I. **SUMMARY** OF -PROCEEDINGS

An appeal of Land Use Permit #4C0329 was filed with the Environmental Board on April 24, 1992 by the Town of Essex. On May 1, Forestdale Heights, Inc. (the Applicant) filed a cross-appeal which was later withdrawn. A prehearing conference was held on June 1, and a prehearing report and order was issued on June 12. On July 16, the Board issued a decision in which it concluded that the 1991 rather than the 1986 Chittenden County Regional Plan applies to this project. On August 5, the Applicant filed a motion to alter the Board's decision.

The Board convened a hearing on September 9, 1992, with the following parties participating:

Forestdale Heights, Inc. (the Applicant) by **Phillip C. Linton, Esq.**
Town of Essex (the Town) by Robert J. Perry, Esq.

Proposed findings of fact were filed by the Town on September 29 and proposed findings of fact and a memorandum of law were filed by the Applicant on October 1. On October 6 the Town filed a reply memorandum. The Board deliberated concerning this matter on Oct. 21, Nov. 4, Nov. 18, 1992 and January 5, 1993. On January 5 the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUES

1. Whether the project should be reviewed for conformance with the 1986 Regional Plan or **the** 1991 Regional Plan.
2. Whether the project complies with 10 V.S.A. § 8086(a)(8) (scenic beauty, aesthetics, historic sites, and natural areas), (9)(C) (forest and secondary agricultural soils), (9)(D) (earth resources), (9)(E) (extraction of earth resources), (9)(K) (public investments and **facilites**), and (10) (local and regional plans).

III. FINDINGS OF FACT

1. **The Applicant** is the owner of an approximately 750-acre tract of land in Essex. The tract is known as the Saxon Hill-Industrial Park (the Park). Forestdale purchased the property from the Village of Essex Junction in 1978. Forestdale then gave the Essex Junction school district a **90-acre** parcel on the east side of the park known as Saxon Hill. Saxon Hill is used for recreation and conservation purposes.
2. Ninety-three percent of the Park is forested. The forest consists of both naturally occurring native forests and plantation forests which were first planted in the 1920s. Approximately 241 acres, or one-third of the Park, consist of plantation forest, including scotch, red, and white pine trees, along with mixed hardwoods. The project area includes seven acres of plantation and 90 acres of native forest.
3. The Applicant proposes to extract sand from a 97-acre portion of the Park over a 10-year period. The extraction site is located at the southeast portion of the Park.
4. The project will consist of three components: the clearing of trees, the extraction of sand, and the reforestation and reclamation of the area.
5. The project will be accomplished over a 10-year period in phases. The Applicant proposes to divide the project area into five 20-acre cells and to clear the trees from each **20-acre** cell. Then, in five-acre sub-cells, the stumps will be removed, the topsoil stockpiled, and the sand extracted. Extraction will take place on no more than five acres at a time.

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increased the topsoil depth and nutrient level. The

each~~n~~ year

replac~~e~~d and

the new trees will be mowed to reduce competition. A complete reclamation plan is contained in Exhibit A13.

10. Slopes within the site will be graded to mirror the current topography and in no case will result in a slope greater than 4 on 1.
11. The Park contains over 12 miles of trails and roads. The project will involve the temporary closure of two trails or roads within the Park. During the project, temporary trail connectors will be established so that the trailways will not be interrupted. Relocation of trails will be designed so-that the project will not be visible from the trails. At the conclusion of the project, the trail and road system will be reestablished in its original location.
12. The Park is used extensively by members of the public for recreational purposes.
13. The site is generally flat and is thickly forested. It is a good location for a sand extraction operation. The sand is of high quality; the site is easily accessible and remote from residences and neighboring uses; and there are no water supplies within the area that would be affected by the operation. The site is isolated both visually and aurally; it involves, no scenic viewpoints, ridgeline areas, open fields, shorelines, or steep slopes.
14. Except for the sand excavation areas to the south, the entire 97-acre project site is surrounded by the forested lands of the Applicant. The project area is more than 500 feet from adjacent properties and public roads. The Applicant will maintain a forested buffer of at least 500 feet between the project and surrounding roads and properties. Buffer areas will also be retained between the project area and the trail connectors so that the project will not be visible from the trails. More than 2,000 feet of forested buffer exist between the project area and Saxon Hill. The project site will be visible from the two open sandpits to the south of the project.
15. The Park is not listed on the Vermont or Federal Register of Historic Places.
16. The Park is not listed by either the Vermont Agency of Natural Resources or the Vermont Natural Heritage

Program as a rare and irreplaceable natural area. There are no known occurrences of exemplary natural communities or endangered animals or plants at the site. There is very low probability that the site contains any threatened or endangered species.

17. The wetlands inventory map identifies no wetlands on the project site. Class **III wetlands** in the vicinity of the project will be avoided.
18. The hours of operation will be from 7 a.m. to 5 p.m. Mondays through Saturday. The only construction for the project will consist of a temporary tool shed.
19. The operation will not involve any blasting or use of **stone crushers**. Trucks will be covered to control dust, and water and calcium chloride will be applied on the site as needed for dust control. Public roads will be cleaned of sand daily. Stumps will be disposed of in **approved** stump disposal sites. The operation will be carried out in accordance with Forestdale's "Operating Plan" (Exhibit A12).
20. The Applicant has agreed to pay the Town an impact fee of **\$70,829.00** for repairs and maintenance of the roads.
21. The Parks and Recreation section of the 1991 Essex Town Plan contains the following, concerning the Saxon Hill forest:

This 743 acre forest offers the potential for carrying out all aspects of sound multi-use forest management. Resources in the forest include four reservoir areas, 12 miles of cross-country ski trails, numerous species of wild flowers and a proliferation of red, scotch and white pine trees. In 1977, the Forest was designated a Resource Preservation District-Industrial, and it was envisioned that limited industrial development in certain parts of the Forest would be compatible with its natural resources. ...

Protection of the trees is perhaps the primary means of preserving the amenities which the Forest offers. The trees enhance the **recreational** value of

the trails and significantly contribute to the aesthetics of the area. For these reasons, development within the forest should continue to consist of broad belts of trees and large contiguous blocks of forest. ...

22. In the Land Use and Development Section, the 1991 Town Plan includes the following discussion concerning Saxon Hill:

The Saxon Hill area has long been considered a resource to be preserved.

. . .

In 1977, a major portion of the area was designated a Resource Preservation-Industrial District. The specific objective of the "RPD-1" District is to "protect ... natural attributes for public enjoyment, and, when it is deemed economically and aesthetically feasible, to carry out industrial development in harmony with the natural surroundings." Limited, well-planned industrial and office uses are considered a compatible use within this area for several reasons. The forest itself provides a suitable buffer for neighboring residential developments. In addition, this area offers many of the characteristics which are desirable for such uses: level terrain, well-drained soils, proximity to transportation routes and availability of utilities. ...

Since 1977, a number of industries have chosen to locate in Saxon Hill Forest. ...

23. The Essex Town Plan contains a map of the existing zoning districts and a map of proposed land use. On both of these maps, the project site is in the Resource Preservation District - Industrial (RPD-1).
24. The Town Plan states four goals for the Saxon Hill area:

Goal 1: To promote a diversified and stable economy by encouraging compatible industrial development and assuring the successful operation of existing industries in the Saxon Hill Industrial Park.

Goal 2: To protect the natural attributes of the RPD-1 district for public enjoyment, and, when it is deemed economically and aesthetically feasible, to carry out economic development activities in harmony with the natural surroundings.

Goal 3: To assure the provision of adequate infrastructure to support the existing industries and the build-out of the industrial park.

Goal 4: To better manage the Saxon Hill area for its recreational and resource value.

Under Goal 4, eight objectives are enumerated.

Objective 5 states: "The forest management plan should be reevaluated with the County Forester to assure it is being implemented."

25. On the Chittenden County Regional Plan's Future Land Use Planning Map, the project site is located in the Forest/Mountain area. With regard to Forest/Mountain areas, the Regional Plan states:

Development here should be limited to forestry, agriculture, recreation and related uses. Limited low density residential development can take place where adequate sub-surface capacity to absorb waste, and a water source, are available.

26. The Town and Regional Plans are in conflict because the Regional Plan allows only forestry, agriculture, recreation, limited, low density residential and related uses in the area of the project, while the Town Plan allows industrial uses in this area.

IV. CONCLUSIONS OF LAW

A. Applicant's Motion to Alter

On August 5, 1992, the Applicant filed a motion to

alter the Board's July 16 decision in which the Board determined that the 1991 Regional Plan applies to this appeal. The Applicant argues that the 1986 Regional Plan should apply because it filed its application with the District Commission on December 3, 14 days before the 1991 Regional Plan took effect. The Board determined that the filing date was December 18, because that is the date that the application was deemed complete.

The Applicant argues that the date the application is handed over to the district coordinator should be the governing date for the deciding when it was filed for vesting purposes. But an incomplete application does not receive vested rights. In re Raymond F. Ross, 151 Vt. 54 (1989).

Moreover, the Applicant has provided no new evidence to contradict the information set forth in the Board's July 16 decision.

Accordingly, the Board denies the Applicant's motion to alter.

B. Zoning Bylaws

The parties submitted extensive information concerning the Town of Willston's zoning ordinance and its applicability to this project. However, Act 250 requires the Board to determine whether a project conforms with the applicable town plan, not with zoning bylaws. 10 V.S.A. § 6086(a)(10); Re: Frank A. Molaano, Jr., #8B0468-EB, Findings of Fact, Conclusions of Law, and Order at 8-9 (Dec. 15, 1992). Accordingly, in determining whether this project conforms with Criterion 10, the Board did not consider the zoning ordinance or any related information, but only the Town Plan and Regional Plan and the maps contained in those plans.

C. Criterion 8 (aesthetics, historic sites, and rare and irreplaceable natural areas)

Criterion 8 requires the Board to find that the project "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas."

"Historic site" is defined at 10 V.S.A. § 6001(9) as

any site, structure, district or archeological

landmark which has been officially included in the National Register of Historic **Place4s** and/or the state register of historic places or which is

established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant.

The project site is not listed on the Vermont or National Register of Historic Places, and no evidence was submitted by the Vermont Advisory Council on Historic Preservation that the site is historic.

The project site also is not listed by either the Vermont Agency of Natural Resources or the Vermont Natural Heritage **Program** as a rare and irreplaceable natural area, and it is highly unlikely that the site contains any rare and irreplaceable natural areas. It is also not likely that there **is** any endangered or threatened animal or plant life at the project site.

With regard to scenic and natural beauty and aesthetics, the site contains no scenic resources traditionally associated with Criterion 8. The terrain is flat; there are no ridgelines, open space, shorelines, or steep slopes. **Except** for the southern part of the site which will be visible from **an** existing sand **excavation** area, the site will be surrounded by forest and will not be visible from any of the surrounding properties, roads, or trails. Moreover, the entire site will be planted with trees so that eventually it will be forest again.

Accordingly, the Board concludes that the project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural **areas**.¹

D. Criterion 9(C) (forest and secondary agricultural soils)

Criterion 9(C) requires the Board to find that the project will not significantly reduce the potential of the soils for commercial forestry. The Board concludes that, as proposed, the project will comply with Criterion 9(C). The soils will be stockpiled and reapplied to the site after the

'The issue of archeological resources was not raised in this appeal. This decision does not alter the findings and permit conditions of the District Commission regarding archeological resources'.

sand has been removed. These soils, which have been improved over the last 70 years by the buildup of leaves, needles, and other forest litter, have proven their ability to support a viable commercial forest. The trees that will be planted in each cell after the excavation is completed will be monitored to ensure their healthy growth, and any trees that die will be replanted. Given a successful reclamation and replanting program, the Board believes that the potential of the soils for commercial forestry will not be reduced.

E. Criterion 9(D) (earth resources)

Criterion 9(D) requires the Board to find that the project will not prevent or significantly interfere with the **subsequent extraction** or processing of earth resources.

Since this project involves the extraction of earth resources, this criterion has no applicability.

F. Criterion 9(E) (extraction of earth resources)

Criterion 9(E) requires the Board to find that the extraction of earth resources "will not have an unduly harmful impact upon the environment or surrounding land uses and development," and that "upon completion of the extrating . . . operation the site will be left by the applicant in a condition suited for an approved alternative use or development."

Based upon the plans proposed by the Applicant, the Board concludes that Criterion 9(E) has been **satisfied**. There will be a **forested** buffer of at least 500 feet on all sides of the project except for the existing **sandpit** to the south. Topsoil from the forest will be stockpiled for reapplication after extraction. No more than five acres will be open for extraction at any one time. After excavation is completed, each five-acre sub-cell will be graded to reflect the existing landscape, the stockpiled topsoil will be reapplied, grasses **will be** planted to stabilize the soils, and the area will be reforested as a plantation stand. Trucks leaving the site will be covered and calcium chloride or water will be applied to the roads in the project to minimize dust and sand in the air. Public roads will be cleaned of sand daily.

The Applicant will leave at least three feet of sand above the high seasonal water table, and, in most areas of the project site, a greater depth of sand will be left in

place. During the life of the project, the Applicant will monitor to track the level of the groundwater table to ensure that excavation goes no deeper than the seasonal high water table and that the finished grades will be at least three feet above the seasonal high water table

In light of the protections afforded to the natural resources and surrounding land uses, the Board concludes that the project complies with Criterion 9(E).

G. Criterion 9(K) (public investments and facilities)

Criterion 9(K) requires the Board to find that the project will not

unnecessarily or unreasonably endanger the public or quasi-public investment in [a public] facility . . . or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.

The Applicant has agreed to pay an impact fee to the Town to cover the cost of repairs to and maintenance of the town roads. The sufficiency of the amount of the impact fee is not in dispute.

The other public investment which could be affected by this project is the 90-acre tract called Saxon Hill owned by the Town of Essex Junction School District. This area, however, is separated from the project area by more than 2,000 feet of forest land. This visual and aural screen will protect against any potential adverse impact on the public investment.

The Board therefore concludes that the project complies with Criterion 9(K).

H. Criterion 10 (local and regional plans)

Criterion 10 requires the Board to find that the project conforms with the local and regional plans. For the reasons stated in its July 16, 1992 decision, the applicable plans are the 1991 Essex Town Plan and 1991 Chittenden County Regional Plan.

Title 24 V.S.A. § 4348(h), which provides further delineation concerning the applicability of town and regional plans in the Act 250 process, states:

(1) [T]he 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 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.

The Board believes that the Town Plan and the Regional Plan are in conflict. The goals articulated in the Town Plan for the Saxon Hill area, and particularly the Saxon Hill Industrial Park, clearly allow industrial development. In the Regional Plan, however, development in the Forest/Mountain area is limited to forestry, agriculture, recreation, and related uses, and limited low density residential development. The Board believes that the sand extraction operation is an industrial use, see Re: George & Dorothy Carwenter, #5W0976-EB, Findings of Fact, Conclusions of Law, and Order at 8-9 (Jan. 19, 1990), and is not forestry, agriculture, recreation, residential, or related uses, or low density residential development.

Since there is a conflict between the local and regional plans, we must next examine whether the project will have a substantial regional impact. We believe the project will not have a substantial regional impact. The Project site is located within the Saxon Hill Industrial Park, a privately-owned tract of land of approximately 750 acres. The sand extraction operation will not be visible from off-site, except from other sand pits to the south. There was no evidence submitted to the Board of any regional impact.

The Town argues that the project violates one of the objectives under Goal 4 in the Town Plan that states: "The Forest management plan should be reevaluated with the County Forester to assure it is being implemented." The Board notes, however, that the County Forester reviewed the management plan. The Town Plan does not require the County Forester actually to approve a management plan.

We are concerned, however, with the language in the Town Plan concerning protection of the trees in the Saxon Hill forest, and the statement that "development within the Forest should continue to consist of broad belts of trees and large contiguous blocks of forest. ..." While

eventually with the replanting of the trees the forest will regenerate, removing the trees in 20-acre blocks will result in the loss of large contiguous blocks of forest. The Board will therefore add a condition to the permit that requires the cutting of trees in 10-acre cells, rather than 20-acre cells as proposed. This will result in the retention of trees in larger blocks for longer time than if 20-acre blocks of trees were cut.

The Board concludes that if the project is operated in accordance with the plans and conditions, it will conform with the Essex Town Plan. Accordingly, the Board concludes that the project complies with Criterion 10.

ORDER

1. The Applicant's Motion to Alter dated August 5, 1992, is hereby denied.
2. Land Use Permit Amendment #4C0329-16-EB is hereby issued.
3. Jurisdiction is returned to the District #4 Environmental Commission.

Dated at Montpelier, Vermont this 8th day of January, 1993.

ENVIRONMENTAL BOARD



Elizabeth Courtney, Chair
Ferdinand Bongartz
Terry Ehrich
Lixi Fortna
Arthur Gibb
Samuel Lloyd
William Martinez
Steve Wright