

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

RE: Flanders Lumber Company Findings of Fact and
c/o John Powell, President Conclusions of Law
34 Park Street and Order
Essex Junction, VT 05452 Application #4C0695-EB-1

This decision pertains to an appeal filed with the Environmental Board on June 15, 1987, by the Vermont Department of Agriculture from the May 14, 1987 decision of the District #4 Environmental Commission and issuance of Land Use Permit #4C0695. That decision authorized the Permittee to construct a 109-unit planned residential development and related site improvements located on the east side of Route 2A in Williston, Vermont.

The issue raised on appeal is whether the project site contains primary agricultural soils as defined in 10 V.S.A. § 6001(15). On August 3 an administrative hearing panel of the Board convened a hearing on this issue. On August 21, the panel issued a proposed decision and on October 6, after the parties submitted written responses to the proposed decision and the Board heard oral argument, the Board issued its Findings of Fact, Conclusions of Law and Order. This decision is incorporated herein. The Board found that the site contains approximately 32.6 acres of primary agricultural soils and ordered a hearing to take evidence on Criterion 9(B), including the four subcriteria.

On December 2, 1987, an administrative hearing panel of the Board convened a public hearing in Williston, Vermont. The following parties participated in the hearing:

Flanders Lumber Co. (Applicant) by A. Jay Kenlan, Esq.
Vermont Department of Agriculture (Department) by Frederic Emigh, Esq. and Amy Jestes

The panel recessed the hearing pending the filing of proposed findings and memoranda by the parties and a review of the record and preparation of a proposed decision by the hearing panel. On January 11, 1988, the Applicant filed proposed Findings of Fact and Conclusions of Law and Order and on January 12 the Department filed Proposed Findings of Fact and Conclusions of Law. A proposed decision was sent to the parties on March 28 and the parties were provided an opportunity to file written objections and to present oral argument before the full Board. On April 8, the Board received Exceptions of the Town of Williston to Proposed Findings and Conclusions. Having received no request for oral argument, on April 13, 1988, following a review of the proposed decision, the evidence presented in the case, and the written objections, legal memoranda and oral arguments of the parties, the Board declared the record complete and adjourned the hearing. This

case is now ready for decision. The following findings of fact and conclusions of law are based exclusively upon the record developed at the hearing. To the extent the Board agreed with and found necessary any findings proposed by the parties, they have been incorporated herein; otherwise, said requests to find are hereby denied.

I. ISSUES IN THE APPEAL

The District Commission found that the project site does not contain primary agricultural soils and therefore it did not review the application for compliance with Criterion 9(B). In its October 6 decision, the Board concluded that the site does contain primary agricultural soils and that it would be appropriate for the Board to hear the remainder of the case on Criterion 9(B). The issue before the Board, therefore, is whether the project complies with Criterion 9(B).

The Applicant asserts that the soils on the project site have no agricultural potential because the project is located in an area of high density residential development and heavy traffic volume and because the primary agricultural soils on the site consist of small separate areas of various soil types, each of which requires different farming methods from the others and none of which is large enough to support or contribute to an economic agricultural operation. Since there is no agricultural potential, the Applicant argues, the development cannot "significantly reduce the agricultural potential of the primary agricultural soils," and thus the threshold consideration in Criterion 9(B) is satisfied. In the alternative, the Applicant's position is that it has satisfied subcriteria (i) through (iv) and should be granted a permit.

The Department believes that the agricultural potential of the primary agricultural soils is significantly reduced by the loss of a large portion of those soils. The Department further believes that the project design does not minimize the reduction of the agricultural potential and that clustering the units toward the eastern half of the site would preserve more of the primary agricultural soils. The Department believes that in its current configuration, the project does not comply with Criterion 9(B) (iii).

II. FINDINGS OF FACT

1. The Findings of Fact contained in Findings of Fact, Conclusions of Law and Order, Application #4C0695-EB, October 6, 1987, are hereby incorporated by reference.

2. As currently designed, the project would consist of two separate types of development: 52 "patio"-type homes in clusters of one to four units located in the western portion of the property, and 57 higher density "townhouse" units on the eastern part of the site. The townhouse units were intended to be "affordable housing."
3. The 48.3 acre site contains approximately 32.6 acres of primary agricultural soils. The project would cause the loss of approximately 17 acres of primary agricultural soils, or 52% of the total primary agricultural soils on the site. The agricultural potential of the primary agricultural soils on the site would therefore be significantly reduced.
4. John Powell is the president and owner of Flanders Lumber co. He has been in the building business since 1954 and is the president of the Homebuilders' Association.
5. The fair market value of the property, without permits, is \$441,000.
6. During the course of planning this project, Mr. Powell considered several different designs. The design which would yield the highest profit would consist of 74 half-acre single family lots. This design would also be relatively risk-free. Mr. Powell decided against this design and several others which he considered, either because they were not appropriate for this site or because the town would not approve them.
7. Before designing this project, Mr. Powell considered the housing needs in the area. He determined that there was a need for "mid-range" housing. The "patio"-style homes would sell in the range of \$105,000 each and the townhouses would sell for approximately \$89,000.
8. During District Commission hearings, the Applicant reduced the number of units by four to respond to concerns of the Department.
9. The return on the investment of the net present value of the infrastructure would be approximately 8%. If the number of units were reduced by 5, the Applicant would realize no profit.
10. A reasonable rate of return for an investment involving development of land is in excess of 8%.

11. Since 1964, the only agricultural use of the property has been the cutting of hay by farmers who paid approximately \$300 per year for such use.
12. The average density on the property is one unit per .44 acre.
13. The proposed project is located in the immediate vicinity of other intensive development along and near Route 2A.
14. The eastern portion of the property is lower than the rest of the site. The higher density use in that area would be less intrusive than if it were located on the western portion of the site which has a higher elevation.
15. The project would be served by existing municipal sewer and water facilities located along Route 2A.
16. The internal project roadways are designed in loops.
17. The project was designed to leave as much open space as possible while remaining economically viable.
18. The Applicant does not own or control any nonagricultural or secondary agricultural soils suitable for a residential development.
19. While the property has the potential to contribute to an economic agricultural operation, it is not currently a part of an agricultural operation. The few remaining farms in the area would not be significantly interfered with or jeopardized by this development. There are no forests on adjoining lands.
20. The Department stipulated that the Applicant has met its burden of proof on subcriteria (i), (ii), and (iv).

III. CONCLUSIONS OF LAW

The Board has previously concluded that this site contains approximately 32.6 acres of primary agricultural soils. Once such a determination has been made, the Applicant has the burden of demonstrating compliance with Criterion 9(B). The threshold consideration in Criterion 9(B) is whether the project will significantly reduce the agricultural potential of the primary agricultural soils. If the Board finds that the Project will not significantly reduce the agricultural potential of those soils, then a positive conclusion is reached regarding compliance with Criterion 9(B). If, on the other hand, the Board finds that the project will significantly

reduce the agricultural potential of the primary agricultural soils, the Applicant must demonstrate compliance with all four subcriteria of Criterion 9(B). /1/

The Board concludes that the proposed subdivision will significantly reduce the agricultural potential of the primary agricultural soils on the site. The Board believes that the proper consideration with respect to the threshold determination of Criterion 9(B) is whether the design and placement of the development on the site will reduce the agricultural potential of these soils to the extent that they will no longer be able to be used in agricultural production. The Board believes that the threshold consideration in Criterion 9(B) properly addresses the potential of the soils based upon the physical and chemical characteristics rather than upon a consideration of whether agricultural use of those soils is likely in light of current economics and surrounding land uses. Since approximately 52% of the primary agricultural soils would be replaced with housing sites, roads, and related improvements, the agricultural potential of those soils would be significantly reduced.

The Board believes that the factors delineated by the Applicant for consideration under the threshold consideration of whether the primary agricultural soils have agricultural potential, as described on page 2 of the Findings, is properly considered when reviewing compliance with the subcriteria of 9(B). These factors are of specific applicability in recognized non-rural areas and include location of the site, the past use of the site, the surrounding land uses, the likelihood of agricultural uses, the cost of such use and the distribution of the primary agricultural soils are all pertinent issues to be considered when analyzing compliance with the subcriteria.

The Board concludes that the Applicant has satisfied its burden of proof on the four subcriteria. Subcriterion (ii) is satisfied because the Applicant owns or controls no other nonagricultural or secondary agricultural soils which are reasonably suited to the purpose. The Applicant has demonstrated compliance with subcriterion (iv) by demonstrating that no farming operations are conducted on adjoining lands which would be significantly interfered with or jeopardized by this subdivision.

/1/ This interpretation of the proper sequence for review under Criterion 9(B) has been upheld by the Court in In re Spear St. Associates, 145 Vt.496 (1985).

With respect to subcriterion (i), the Applicant provided sufficient evidence that it can realize a reasonable return on the fair market value of its land only by developing it into a residential subdivision that covers a substantial portion of the primary agricultural soils. Agricultural use of the property is not economically feasible at this time, and reducing the number of units to preserve more of the primary agricultural soils would result in no return on the fair market value.

Subcriterion (iii) requires that the project be "planned to minimize the reduction of agricultural potential by providing for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage" The Board believes that in designing the subdivision, the Applicant attempted to leave undisturbed as much of the primary agricultural soils as possible while still obtaining some profit. The design that consisted of dividing the entire property into 74 half-acre lots would not have satisfied subcriterion (iii). The design as finally proposed, however, was carefully planned to minimize the reduction of the agricultural potential of the primary agricultural soils to the extent feasible within the limits imposed by the topography of the site, the allowable density, and economics. The population density of the project of one unit per .44 acre is reasonable in light of the higher density of other residential developments in the area and the appropriate use of this site. Rather than spreading the units throughout the site and across the western portion that contains the majority of the primary agricultural soils, the units are located in clusters toward the eastern portion of the site. The Board concludes that the Applicant has demonstrated compliance with subcriterion (iii) as well.

IV. ISSUANCE OF LAND USE PERMIT

In accordance with these findings of fact and conclusions of law, the Board will issue amended Land Use Permit #4C0695-EB. The Board hereby incorporates by reference those findings of fact and conclusions of law reached by the District Commission which were not appealed and which are not affected by this decision. The permit now issued approves the project subject to the conditions imposed by the District Commission on Land Use Permit #4C0695 as well as those imposed by this permit amendment.

Based upon the foregoing findings of fact and conclusions of law, the Board concludes that the project described in Land Use Permit Application #4C0695, if completed and maintained in

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accordance with all the terms and conditions of that application, the exhibits presented to the District Commission and the **Board** by the Applicant, and the conditions set forth in Land Use Permit **#4C0695** and Land Use Permit **#4C0695-EB**, will not cause or result in a detriment to the public health, safety or general welfare under the criteria set forth in 10 V.S.A. § 6086(a).

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V. ORDER

Land Use Permit #4C0695-EB is hereby issued in accordance with the findings of fact and conclusions of law herein. Jurisdiction over this matter is returned to the District #4 Environmental Commission.

Dated at Montpelier, Vermont this 18th day of April, 1988.

ENVIRONMENTAL BOARD



Leonard U. Wilson, Chairman

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Donald B. Sargent

Arthur Gibb

Ferdinand Bongartz

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FF 4C0695-EB