

**VERMONT ENVIRONMENTAL BOARD**  
**10 V.S.A. Ch. 151**

**Re:** *Allen Brook Investments, LLC  
and Raymond Beaudry*

Land Use Permit  
Application #4C1110-EB  
Docket #833  
(Issued 1/27/04)

**Findings of Fact, Conclusions of Law, and Order**

This is an appeal to the Environmental Board (Board) from Findings of Fact, Conclusions of Law, and Order (Decision), issued by the District 4 Environmental Commission (Commission) to Allen Brook Investments, LLC and Raymond Beaudry (collectively, ABI) denying Land Use Permit Application #4C1110 (Application) which seeks authorization to create 50 single family lots and one multi-family 10-unit "affordable housing" lot with infrastructure on a 54.15-acre tract in Williston, Vermont (Project). The Project is called "Brandywine."

**I. History**

On June 6, 2003, the Commission issued its Decision denying the Application.

On July 2, 2003, ABI filed an appeal with the Board from the Decision, alleging that the Commission erred in denying the Project based on a failure to satisfy the requirements of 10 V.S.A. §6086(a)(9)(B) (Criterion 9(B)).

On August 6, 2003, following a July 29, 2003 Prehearing Conference, Board Chair Patricia Moulton Powden issued a Prehearing Conference Report and Order.

On October 29, 2003, the Board held a site visit and hearing with the following participants: ABI by Richard Spokes, Esq. and the Vermont State Employees Credit Union (VSECU) by John Riley, Esq.

The Board deliberated on this matter following the hearing, and on November 12 and December 18, 2003, and January 21, 2004.

Following a review of the evidence and arguments presented, the Board declared the record complete and adjourned. This matter is now ready for final decision.

**II. Issues**

The issues in this matter are:

1. Whether the Project satisfies 10 V.S.A. §6086(a)(9)(B).
2. Whether the Project should be allowed to satisfy 10 V.S.A. §6086(a)(9)(B) through off-site mitigation.

### **III. Findings of Fact**

To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. See, *Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

#### **A. The Project**

1. ABI proposes to develop a planned residential development called "Brandywine" in the Town of Williston, Vermont.
2. ABI filed its Act 250 application for the Brandywine Project on November 6, 2002.
3. The Project site includes a large open meadow in its western and southern portions; it is bounded on its northern and eastern sides by Allen Brook, and there is a wetland along the western edge of the Project site.
4. The Project will not be built in the northern and eastern portions of the Project site's 54-acre parcel.
5. Williston will not allow ABI to build within the "conservation corridor" areas along Allen Brook, as identified in §IV(C)(7) of the Town of Williston's 2000 Comprehensive Plan (2000 Plan); the only place that ABI can build on the site, therefore, is in the open meadow area where Williston will allow construction to occur.
6. The Project, as proposed, uses almost all of the open meadow for house lots and roads infrastructure.
7. ABI decided to develop the Project as single family residences instead of condominiums or townhouses, as its studies show that there is a better market for single family residences in Williston.
8. It is possible to develop the Project site less intensely, but a decrease in the number of lots could have economic impacts on the Project.

***B. The area surrounding the Project***

9. The general area surrounding the site is characterized by residential and commercial uses.

10. The Project site is located just east of Route 2A and just south of Allen Brook, one of the two growth centers comprising a growth area envisioned by the 2000 Plan, and established through Williston's Zoning Ordinance, Subdivision Regulations and Sewer Allocation Ordinance. It is in the area designated as Medium Density Residential by both the 2000 Plan and the Zoning Ordinance, and its southern boundary is the boundary between the Medium Density Residential area and the Taft Corners Downtown area.

11. Two residential developments (Meadow Run and Forest Run) adjoin the Project site across Allen Brook to the north, a third residential development (Chelsea Commons) and a business park adjoin the site on its southern boundary, and there are various residences and commercial businesses along Route 2A to the west of the Project site.

12. The Project would be in the nature of "in-fill" between other residential and commercial uses.

***C. The Town of Williston's 2000 Plan***

13. A theme of Williston's 2000 Plan, which is particularly apparent from its Future Land Use Map, is that commercial, industrial and residential development should be concentrated in a portion of the Town, while the balance of the Town is retained as low-density residential and agriculture/open space.

***D. Primary agricultural soils on the Project site***

14. The 54.15-acre Project site contains 43.1 acres of primary agricultural soils, as defined by 10 V.S.A. §6001(15).

15. The Project will directly impact 26.7 acres of primary agricultural soils.

***E. Criterion 9(B) subcriteria***

16. ABI has no ownership of other land reasonably suited for this project.

17. Neither the subject parcel nor any adjoining parcels within a ¼-mile radius are currently in agricultural use; the Project will not interfere or jeopardize the adjoining lands or reduce their agricultural potential.

18. ABI made no effort to construct its development to avoid the Project site's primary agricultural soils, and, as designed, the Project does not represent an attempt to minimize impacts on such soils.

**F. *Mitigation Agreement***

19. ABI has submitted a Mitigation Agreement to satisfy Criterion 9(B).

20. ABI and Williston have entered into a mitigation agreement under which, in return for ABI's development of the primary agricultural soils on the Project site, ABI would pay to Williston a sum calculated by multiplying the 26.7 acres of primary agricultural soils on the project site to be developed by an amount which ABI and Williston have determined to be the per acre value of the development rights to the agricultural soils on the Johnson Farm in Williston, and then multiplying the resulting figure by two.

21. The funds in the ABI-Williston mitigation agreement would be used to purchase development rights and preserving the agricultural soils of the Ward Johnson Farm in Williston.

22. This mitigation agreement is contingent upon the Board's finding that Criterion 9(B) will be satisfied by on-site and off-site mitigation.

23. ABI has not entered into a mitigation agreement with the Agency of Agriculture, Food and Markets (AOA).

**G. *ABI's local permit application***

24. Allen Brook commenced the local permit process and received Conceptual Plan Approval from the Williston Planning Commission for 57 single-family residences at the Project site in 1995.

25. Prior to February 22, 2001, Brandywine received Subdivision and PRD Concept Approval, a Preliminary Phasing Allocation and Preliminary Subdivision and PRD Approval from the Town of Williston's Planning Commission.

26. Prior to February 22, 2001, Brandywine also received a sewer allocation from the Williston Selectboard.

27. Preliminary subdivision review is where the detailed technical review

takes place in the subdivision review process and is the most substantive stage of that process.

28. The application for final subdivision approval must conform to the preliminary approval.

29. If the application is substantially changed from the previously approved layout, the application may be remanded for a new preliminary plan review.

30. Prior to February 22, 2001, Allen Brook spent a total of \$310,020.00 on Brandywine which includes the purchase price of the land, permitting fees, engineering costs and professional fees.

31. Since February 22, 2001, Allen Brook has spent an additional \$128,300.00 on the project securing its Final Subdivision and PRD on August 28, 2001. It also has obtained a Storm Water Discharge Permit, Public Water System Permit and a Water Supply and Wastewater System Permit from the State of Vermont.

32. The Allen Brook partners have previously been involved with Mitigation Agreements which satisfied Criterion 9(B). They entered into a Mitigation Agreement with regard to Chelsea Commons and purchased the Mansfield Business Park land, which was subject to a Mitigation Agreement. Both developments adjoin the Brandywine Site.

#### **IV. Conclusions of Law**

The primary issue in this matter is whether ABI should be allowed to enter into a mitigation agreement for the preservation of off-site agricultural lands, even though the Project fails to comply with the clustering requirements of 10 V.S.A. §6086(a)(9)(B)(iii).

##### **A. Criterion 9(B)**

10 V.S.A. §6086(a)(9)(B) (Criterion 9(B)) reads:

Before issuing a permit for the development or subdivision of primary agricultural soils, the Board must find that the project “will not significantly reduce the agricultural potential of the primary agricultural soils,” or that

- (i) the applicant can realize a reasonable return on the fair market value of his land only by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential; and

(ii) there are no nonagricultural or secondary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose; and

(iii) the subdivision or development has been planned to minimize the reduction of agricultural potential by 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; and

(iv) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential.

10 V.S.A. §6086(a)(9)(B).

“Primary agricultural soils” are defined as:

Soils which have a potential for growing food and forage crops, are sufficiently well drained to allow sowing and harvesting with mechanized equipment, are well supplied with plant nutrients or highly responsive to the use of fertilizer, and have few limitations for cultivation or limitations which may be easily overcome. In order to qualify as primary agricultural soils, the average slope of the land containing such soils does not exceed 15 percent, and such land is of a size capable of supporting or contributing to an economic agricultural operation. If a tract of land includes other than primary agricultural soils, only the primary agricultural soils shall be affected by criteria relating specifically to such soils.

10 V.S.A. §6001(15).

Under the terms of the statute, therefore, an applicant can satisfy Criterion 9(B) by showing that (a) there are no primary agricultural soils on the project site, or (b) the

project will not reduce the potential of the primary agricultural soils, or (c) the project meets Criterion 9(B)(i) - (iv) (the subcriteria).<sup>1</sup>

**1. Satisfying Criterion 9(B) through off-site mitigation.**

Recognizing that there would be instances where satisfaction of the strict requirements of Criterion 9(B) was not feasible, the Board established, beginning with its decision in *Re: J. Philip Gerbode*, #6F0357R-EB, Findings of Fact, Conclusions of Law, and Order (Mar. 26, 1991), one other means by which a project could pass Criterion 9(B) muster: the Board and Commissions have allowed applicants in particular cases to use mitigation agreements to fully compensate for the negative effects under Criterion 9(B) of their projects and thereby satisfy the Criterion. By entering into a mitigation agreement with AOA and agreeing to pay monies into a fund to mitigate the loss of primary agricultural soils on a project site through the purchase of development rights on other primary agricultural soils, an applicant can, in effect, mitigate a project's way into compliance with the criterion.<sup>2</sup>

Prior to the Board's decision in *Southwestern Vermont Health Care Corporation*, #8B0537-EB, Findings of Fact, Conclusions of Law, and Order (Feb. 22, 2001), (SVHC), entering into such a mitigation agreement was often little more than a relatively simple negotiation with AOA over the correct amount that the applicant would be required to pay into the off-site mitigation program.

While the SVHC decision reaffirmed the legality of the off-site mitigation program, it also considerably restricted its availability. The Board wrote:

There can be little debate that the Legislature considers the protection of primary agricultural soils in Vermont to be a matter of great importance. Not only has the Legislature established the mandates of Criterion 9(B), it has stated that "Preservation of the agricultural and forestry productivity of the land, and the economic viability of agricultural units ... are matters of the public good. Uses which threaten or significantly inhibit these resources should be permitted only when the public interest is clearly benefited thereby." Act No. 85, §7(a)(2) (1973),

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<sup>1</sup> The burden of proving compliance with Criterion 9(B) is on ABI. 10 V.S.A. §6088(a).

<sup>2</sup> Primary agricultural soils mitigation agreements are creations born out of the Board's case precedent. There is no statute or regulation which establishes such agreements within the context of Criterion 9(B). The Board, has, however, found such agreements to be legitimate. See, *Southwestern Vermont Health Care Corporation*, #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 38 - 43 (Feb. 22, 2001).

see 10 V.S.A. §6042, *History*. These provisions constitute a clear signal to the Board that it must tread very carefully when approving any procedure – including Mitigation Agreements – which can have the effect of reducing the potential of Vermont’s primary agricultural soils.

Thus, *Mitigation Agreements should be used only as a last resort - - only when an applicant has seriously attempted, but failed, to meet the subcriteria*. The Board understands that there will be circumstances in which, even with the best of efforts, a project will fail the subcriteria. But if efforts to reduce the impacts of a project are not even attempted, then Mitigation Agreements will be seen as no more than a cost of doing business. Therefore, the Board holds that, before a Mitigation Agreement will be accepted by the Board, an applicant must also design its project to meet the subcriteria (ii) and (iii) of Criterion 9(B) to the extent reasonably feasible.

Further, as noted above, [AOA] will not enter into mitigation agreements unless [AOA] can find that the project meets subcriterion (iv) of Criterion 9(B). The Board believes that this requirement imposed by [AOA] is reasonable and therefore incorporates it as its own; thus, before the Board will consider accepting any Mitigation Agreement entered into between an applicant and [AOA], the applicant’s project must meet subcriterion (iv).

*SVHC, supra*, at 43 - 44 (emphasis added).

Thus, *SVHC* established, as a threshold requirement, that an applicant must meet subcriteria (ii), (iii) and (iv) before a mitigation agreement will be accepted by the Board or the Commission as a means by which to meet Criterion 9(B).

***B. Application of Criterion 9(B) and SVHC to the present appeal***

***1. The existence of primary agricultural soils at the Project Site.***

As noted, Criterion 9(B) only applies if there are primary agricultural soils on the project site. In this case, there is no dispute that the Project site contains primary agricultural soils.

***2. Reduction in agricultural potential of primary agricultural soils.***

Once the Board has determined that the site contains primary agricultural soils, it must determine whether the Project would significantly reduce the agricultural

potential of the soils. "The Board interprets the word 'potential' to require a consideration of whether the design and location of the subdivision on the property will preclude agricultural use of the primary agricultural soils and not whether agricultural use of those soils is likely in light of current economics and surrounding land uses."

*Re: Raymond Duff, #5W0921-2R-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 13 (June 14, 1991).*

There is no dispute that the Project, as proposed, would "significantly reduce the agricultural potential" of 26.7 acres of primary agricultural soils on the Project site. 10 V.S.A. §6086(a)(9)(B).

### **3. *Satisfying Criterion 9(B) through the subcriteria.***

If a project will impact primary agricultural soils, an applicant can fully satisfy Criterion 9(B) by meeting each of its subcriteria. Here, the only evidence that the Board has is that the Project satisfies subcriteria (ii) and (iv) of Criterion 9(B).

Significantly, ABI has stated that it does not intend to meet subcriterion (iii), the so-called "clustering" subcriterion.

### **4. *Satisfying Criterion 9(B) through a mitigation agreement.***

Because the Project does not meet the subcriteria required by SVHC – because ABI does not intend to meet subcriterion (iii) – the Commission held that ABI could not enter into a mitigation agreement and therefore denied ABI's permit application for the Brandywine Project. And, if SVHC is read to provide no exceptions, the application must be denied.

#### **a. *Does SVHC apply to the present case?***

ABI argues that this matter should not be governed by the Board's SVHC decision, as it began the local process before the Board's SVHC decision, relying on the *Gerbone* standards then in effect.

In *Solomon et. al. v. Atlantis Development, Inc., et. al.*, 145 Vt. 70 (1984)., the Vermont Supreme Court addressed, as a matter of first impression, the issue of the retroactive application of judicial decisions in the civil context. As a matter of course, a new decision issued by the Vermont Supreme Court will be applied retroactively to cases pending in the courts at the time a new Supreme Court decision is issued. There are exceptions to this rule, however; under certain circumstances, a new Court decision will only be applied prospectively. Adopting the reasoning of the United States Supreme Court in the case of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the *Solomon* Court wrote:

In *Chevron Oil*, the [United States] Supreme Court stated that a decision must meet several criteria in order to be applied prospectively. First, it must "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed.... If this criterion is met, the Court will then inquire whether retroactive application would be inequitable: "[w]here a decision of this Court could provide substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of non-retroactivity."

*Solomon*, at 74 (internal citations omitted).

The holding of the *Solomon* decision, therefore, is that decisions should be given retroactive effect unless the *Chevron Oil* elements are present. See, *Vermont Accident Insurance Company, et al., v. Howland*, 160 Vt. 611, 612 (1993) (mem.) ("In civil cases, we will apply a ruling prospectively only if (1) we overrule past precedent or decide 'an issue of first impression whose resolution was not clearly foreshadowed,' and (2) retroactive application would be inequitable.")

ABI notes that the SVHC standard meets the first *Solomon / Chevron Oil* test, citing the Board's decision in *The Van Sicklen Limited Partnership*, #4C1013R-EB Findings of Fact, Conclusions of Law, and Order at 49-50 (March 8, 2002), which held that SVHC establishes as a "new principle of law" that mitigation agreements will only be accepted if an application meets subcriteria (ii), (iii) and (iv) of Criterion 9(B). ABI also contends that the second element of *Chevron Oil* - fairness - is likewise satisfied, noting ABI's prior experience with mitigation agreements in two projects adjoining the Brandywine site, its reliance on the less restrictive *Gerbode* standard, its expenditure of funds, and its commencement of the local permit process in 1995.

The difficulty with ABI's argument is that *Solomon* addresses the question of whether new law should be applied to cases which are pending when the new decision is issued. Here, the Board's February 2001 SVHC decision was issued 20 months before ABI's November 2002 Act 250 application was filed.

Regarding the application of new case precedent to pending cases, there is no specific case law which establishes when an Act 250 case "commences." Vermont Supreme Court precedent on vested rights, however, provides significant guidance. As a general rule, the law in effect at the time of the filing of a complete Act 250 application is the law that controls that application. *In Re Ross*, 151 Vt. 54 (1989). And see, *Smith v. Winhall*, 140 Vt. 178 (1981) (applicant is entitled to have a project reviewed in accordance with the laws and regulations in effect at the time that application is submitted); *Re: Frank A. Molgano, Jr.*, 163 Vt. 25 (1994). But see, *John*

*A. Russell Corporation and Crushed Rock, Inc.*, #1R0489-6-EB (Remand), Findings of Fact, Conclusions of Law, and Order (Jan. 17, 2002) (pending ordinance doctrine applied to Town Plan under process of adoption), *rev'd on other grounds*, \_\_\_ Vt. \_\_\_, 2003 VT 93 (Oct. 15, 2003).

It is the date of an Act 250 application, therefore, that is the beginning of the Act 250 process. The question, then, is whether there is any other reason to consider ABI's case to be "pending" as of the time the SVHC decision was rendered.

In its recent decision in *Re: Burlington Broadcasters, Inc. et al.*, #4C1004R-EB, Memorandum of Decision (Nov. 26, 2003), the Board addressed the question of whether the law in effect at the time of the commencement of the local permitting process, or the law in effect at the time of the Act 250 application, should apply. The Board held that, for purposes of its analysis of Criterion 10 (Town Plan), the local zoning regulations in effect at the time the applicant commenced the local zoning process would govern. *Id.*, at 7 - 10. This decision was based on Vermont Supreme Court decisions specific to Criterion 10 analysis, which emphasize the need for consistency in the employment of local zoning regulations in the local and Act 250 processes. See *In re Molgano*, 163 Vt. 25, 32 (1994): "Since the purpose of that section is to ensure consistency with local planning and zoning, the logical interpretation is to measure conformance at the time of the local processes."

When asked the same question with respect to which "community standard" should govern in determining compliance under Criterion 8 (aesthetics), however, the Board departed from its Criterion 10 analysis. It wrote, "The *Molgano* Court specifically stated that the reason an applicant's rights should vest at the time the local process begins is that the purpose of Criterion 10 'is to ensure consistency with local planning and zoning.' *Molgano*, at 32." The same consistency imperatives, the Board held, do not apply to the application of a clear, written community standard under Criterion 8, because while

commencement of the local zoning process is particularly significant under Criterion 10, and it has no comparable significance under Criterion 8. Clear, written community aesthetic standards are not necessarily limited to zoning ordinances or town or regional plans.

*Re: Burlington Broadcasters, Inc. et al.*, *supra*, at 10 -11, citing, *Re: Northshore Development, Inc.*, #4C0626-5-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Dec. 29, 1988).

The issue before the Board in the present matter concerns Criterion 9(B). The need for consistency between the local and Act 250 process present in *Molgano* with respect to Criterion 10 is not present here. Thus, the Board's reasoning in *Burlington*

*Broadcasters* with respect to Criterion 8 is applicable here, and there are no grounds for applying the law as to Criterion 9(B) as it existed at the time that ABI applied for its local zoning permits. SVHC therefore governs this matter.

**b. Should SVHC be applied flexibly to allow ABI to enter into a mitigation agreement without first satisfying the clustering requirements of subcriterion (iii)?**

Turning to the merits of this case, the question is whether the circumstances of ABI's Project - its proposed location and the planning goals of Williston's 2000 Plan - argue in favor of flexibility in the Board's application of subcriterion (iii), such that the subcriterion's clustering requirement may be relaxed in furtherance of other purposes or goals. The question thus presented to the Board is whether the phrase "*to the extent reasonably feasible*," which modifies SVHC's requirement that an applicant meet the "clustering" provisions of subcriterion (iii), may provide ABI with the relief it seeks. *SVHC, supra*, at 44.

There is an inherent conflict in this case, a conflict between the Board's mandate in SVHC, which requires compliance with subcriterion (iii) as a prerequisite for the acceptance of a mitigation agreement under Criterion 9(B), and the goals of Act 200 as embodied by Williston's 2000 Plan.

On the one hand, the Board is charged, under Criterion 9(B), with the preservation of Vermont's primary agricultural soils. Williston also recognizes the value of continued preservation of its agricultural lands, and its 2000 Plan makes no distinction between agricultural lands which lie outside its growth areas and agricultural lands which lie within those areas.

On the other hand, Williston's 2000 Plan furthers the goal of concentrating residential (and other) development in certain core parts of its Town in order to benefit the open space and agricultural uses in the Town's outlying areas.

This conflict was recognized in the SVHC decision's discussion of the validity of the off-site mitigation program under Criterion 9(B). As the Board stated, while "Criterion 9(B) reflects a legislative policy that "[p]reservation of the agricultural ... productivity of the land and the economic viability of agricultural units are matter of public good," the goals of Act 200, 24 V.S.A. §§4300 et seq., "dictate that the Board should not apply Criterion 9(B) rigidly and narrowly to require on-site protection of agricultural lands and to refuse to allow off-site mitigation."

Such an interpretation would limit the opportunities of both the Board or [AOA] to develop "strategies to protect long-term viability of agricultural ...

lands." For example, some agricultural lands are located in areas that are experiencing rapid transition to nonagricultural uses and that are no longer suited to agricultural production because of inaccessibility and conflicts with designated growth centers. A narrow interpretation of Criterion 9(B), allowing only on-site mitigation for a project, may, in the long run, fail to carry out Act 200's and Act 250's goals by attempting to preserve farmland which will ultimately be overwhelmed and fragmented by development at the expense of protecting large parcels of land which are more amenable to preservation.

The Mitigation Program offers a source of revenues to protect and maintain viable agricultural lands. It provides both [AOA] and the Board a reasonable means of achieving the Legislature's goal to preserve viable agricultural lands through an informed planning process.

*SVHC, supra*, at 42 - 43.

In this matter, the Board continues to believe that *SVHC* represents a considered balance between the goals of Criterion 9(B) and those of Act 200. We are mandated by Criterion 9(B) to preserve Vermont's primary agricultural soils; we have also recognized, however, that such preservation can occur without an absolute prohibition against the development of primary agricultural soils on a project site. Off-site mitigation of primary agricultural soils can often advance both the goals of Criterion 9(B) and those of Act 200, but such a mitigation program must proceed carefully and with measured steps. After much consideration and analysis, the Board adopted such steps, which we enunciated in establishing the standards and requirements in our 2001 *SVHC* decision. One such requirement is that "an applicant must also design its project to meet ... [subcriterion] (iii) of Criterion 9(B) to the extent reasonably feasible." *SVHC, supra*, at 44.

We see no reason, based upon the facts of the instant case, to alter or amend the mitigation agreement requirements established in *SVHC*, particularly since ABI concedes that it has made no effort to resolve the potential conflicts between Act 200 and Criterion 9(B) and design its Project to preserve primary agricultural soils on its Project site. Thus, we are consequently reluctant to abandon our earlier holding and relax *SVHC* to allow the Project to proceed as designed.

The Project must therefore be denied for its failure to meet Criterion 9(B).

### **C.     *The Mitigation Agreement***

Because we decide today that ABI does not meet the standards established by *SVHC* and, therefore, may not enter into a mitigation agreement in order to satisfy

Criterion 9(B), the question of whether such mitigation agreement can be made with the Town of Williston or must be made with the State AOA is no longer before us. However, since this matter may be brought before the Commission pursuant to the procedures set forth in EBR 31(B), we will provide guidance on this question in the interest of administrative efficiency.

Even if the Board held that ABI could enter into a mitigation agreement to meet Criterion 9(B), the Board would not approve the mitigation agreement presented in this case. The proposed agreement is one between ABI and Williston; it is not between ABI and AOA, which is the agency referenced in SVHC.

The Board believes that it is appropriate to approve only those mitigation agreements to which AOA is a party. AOA has greater experience in negotiating such agreements; in addition, AOA may determine that (a) a different figure for the cost of conservation easements is necessary than the one determined by Williston and ABI; (b) a different multiplier (more than two) must be used because of the quality of the soils that will be lost to the Project, other factors noted in the SVHC decision, including "location, accessibility, tract size, quality of soils, and existing farm infrastructure." *SVHC, supra*, at 45.<sup>3</sup>

Further, pursuant to a Memorandum of Understanding, mitigation funds received by AOA are provided to the Vermont Housing and Conservation Board (VHCB), a public instrumentality of the State of Vermont, created in 1987 to "encourage and assist in creating affordable housing and in preserving the state's agricultural land, historic properties, important natural areas and recreational lands." 10 V.S.A. §301. See, *SVHC, supra*, Findings of Fact 138 - 150. VHCB has experience in drafting protective language into its conservation easements, and VHCB may determine that the mitigation funds are better spent on sites other than the Johnson Farm.

Williston is to be commended for its establishment of its Environmental Reserve Fund, and the Board believes that this Fund should provide the source for monies for projects which have been identified by the Town for protection.<sup>4</sup> The funds in the instant case, however, were generated under the auspices of a state law, Act 250, and

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<sup>3</sup> Further, as the SVHC decision notes, AOA, as a matter of policy, will not enter into a mitigation agreement unless a project will satisfy subcriterion (iv) of Criterion 9(B) by not significantly interfering with or jeopardizing agriculture or forestry on adjoining lands or reducing their agricultural or forestry potential. *SVHC, supra*, Finding of Fact 128, and at 44. While it may be true that the Project will not harm a neighboring farm, AOA may wish to make its own determination as to this subcriterion.

<sup>4</sup> The Board also notes that Williston has a mechanism for the assessment of impact fees, which it has considered applying toward the preservation of open spaces within the Town.

the Board concludes that it is most appropriate to use them in accordance with the decisions of state agencies with expertise in these matters, AOA and VHCB.

The Board, therefore, would not accept the mitigation agreement proposed by ABI and Williston in this matter and instead would refer ABI to AOA for negotiations in this regard.

**V. Order**

1. The Project does not satisfy 10 V.S.A. §6086(a)(9)(B).
2. Land Use Permit Application #4C1110-EB is denied.
3. Jurisdiction is returned to the District 4 Environmental Commission.

Dated at Montpelier, Vermont this 27<sup>th</sup> day of January 2004.

ENVIRONMENTAL BOARD

/s/ Patricia Moulton Powden

\* Patricia Moulton Powden, Chair  
\*\* Samuel Lloyd  
\* \*\* Donald Marsh  
\* \*\* W. William Martinez  
Alice Olenick  
Richard C. Pembroke, Sr.  
A. Gregory Rainville  
Jean Richardson  
\* \*\* Christopher D. Roy

\* Board Members Martinez, Marsh, Moulton Powden and Roy, dissenting:

We dissent from the Board's decision to deny ABI the opportunity to enter into a mitigation agreement.

*Additional Findings of Fact*

In addition to the Findings of Fact found by the majority decision, the evidence also supports the following Findings relative to this conclusion:

1. Section II(A), *Objectives*, of Williston's 2000 Plan, includes, in pertinent part, the following statements:

2. *Approach to Planning*

The planning process should derive from a vision for Williston's future. That vision is characterized by a balance between the Town's development objectives and the Town's conservation objectives.

3. *Conservation*

The elements of the Town's character and heritage must be preserved if Williston is to maintain its unique identity. The Town must protect the quality of its natural environment. It will support existing agricultural uses and will protect its agricultural potential through the conservation of the open space that defines its scenic beauty.

4. *Responsible Growth*

The Town's conservation objective can best be achieved through an affirmative effort in support of balanced and responsible growth and development.

2. Section II(B), *Policies*, of the 2000 Plan, includes the following statements:

1. *Resource Conservation*

The Town will conserve fragile areas, such as flood prone lands, aquifers, wetlands, lands containing ecologically sensitive plant life, and critical wildlife habitat, from conversion and encroachment by development.

*Earth resources, such as selected prime agricultural soils, sand and gravel deposits, will be conserved for future use.* Open and natural areas and cultural resources including open space, woodlands, slopes and ridges, scenic vistas, recreation lands and trail corridors will also be conserved. The Town will continue to formally recognize these conservation areas as they are discovered and made known through inclusion on the Williston Open Space Map. *The Town will designate growth centers that will minimize adverse impacts on the resources, and that will accommodate development so that the more heavily resource*

*endowed parts of Town are relieved from development pressure.*  
Subdivision and development that does occur in proximity to these resources will be of a type and scale, and will be sited so that use and enjoyment of the resource remains possible.

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### *3. Development Distribution*

*The Town will support development in growth centers to cause a pattern of compact settlement, surrounded by open land. Land uses will be separated where necessary to avoid conflict. Compatible land uses will be encouraged to settle in a mixed pattern. Density of land use will be significantly higher in the centers than in the countryside, with consideration for the capacity of support systems such as sewage disposal and roads.*

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### *10. Agriculture*

The Town recognizes and values the role that farming and farmers have played in its history and in the creation of the open land and historic structures that make Williston beautiful. The Town further recognizes the importance of an agricultural sector to its character and social fabric. The Town appreciates the economic burdens confronting the farmer and the pressures inherent in the pattern of growth in Chittenden County. The Town will continue to provide tax reductions for farm operators and to develop conservation easement acquisition programs that encourage the continuation of farming. *The Town will continue to work to protect the future potential of agriculture. It will discourage incompatible development and work to ensure that subdivision and land development minimize the fragmentation or conversion of agricultural land.* Town facilities will be located and capacity allocated in a manner that avoids agricultural land consumption and induced development in agricultural districts.

(Emphasis added.)

3. The 2000 Plan defines two growth areas: the historic Village Center (and surrounding residential area), and the emerging commercial center around the Taft Corners (Routes 2 and 2A) intersection. This commercial center is surrounded by a mix of transition areas, industrial areas and residential areas.

4. The growth areas make up approximately 25% of Williston's total land area. Under the 2000 Plan, virtually all non-residential development and 85% of residential development must occur within the designated growth areas. The remainder of Williston, outside the growth areas, is designated as Agriculture/Rural Residential.

5. Section IV, *Land Use*, of the 2000 Plan, includes the following statements:

C. *Future Land Use*

In keeping with the Goals of the Vermont Planning Act, this Comprehensive Plan will set out a pattern for future land use that accommodates growth in a compact manner. In general, this plan proposes that commercial development be concentrated in the commercial area around the Taft Corners intersection, that industrial development be concentrated along the western side of the Town, and *that residential development be concentrated in the area north of Interstate 89, generally west of North Williston Road, south of Mountain View Road, and extending north along Route 2A to the Winooski River. The remainder of the Town is seen as rural and shall be designated for limited development, agriculture and forestry uses, and open space.* The Future Land Use Plan is depicted in Map 2. This general pattern will be encouraged by appropriate land use controls, provision of needed public facilities and infrastructure, and other incentives. In all areas, development will be balanced by preservation of areas identified in the Open Space Plan and other significant open and natural areas. The desired rate and character of development in specific areas of Town are described in the following sections.

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3. *Medium Density Residential Area*

Outside of Taft Corners and the Village, the remaining land available for residential development within the Town's sewer district is designated for medium density residential development. *This area has been the location for the majority of the Town's residential development in past years.* While this area need not be given the same encouragement and zoning incentives as land in the Taft Corners commercial center, the availability of municipal services justifies continued residential development.

*Moderate density residential development should be carefully sited and clustered in a manner that will allow preservation of significant open space parcels. The use of Planned Residential Developments (PRDs) should be encouraged, and allowable densities must be based on the amount of developable land. Any development proposal should be compatible with the Town's Open Space Plan (Maps 4, 5, 6, and 7). Where clustering or siting strategies on an individual parcel are not sufficient to accommodate protection of a desired open space resource, either transfer or purchase of development rights or acquisition of the property should be considered.*

(Emphasis added.)

6. The 2000 Plan represents a land use policy designed to contain sprawl and concentrate growth in specific areas of Williston.

7. The Plan's growth area concept is implemented through Williston's Zoning Ordinance, Subdivision Regulations and Sewer Allocation Ordinance.

8. Williston's Commercial Districts, the Industrial Districts, the Mixed Use District, the Village Center District and the Medium Density Residential District comprise the growth area under the Zoning Ordinance and the Sewer Service Area under the Sewer Allocation Ordinance. The remainder of Williston is zoned Agricultural/Rural Residential.

9. The Project is consistent with the growth area planning goals set forth in the 2000 Plan.

10. While preservation of the Project site's agricultural soils would further Williston's agricultural protection goals, it would not further any of Williston's growth area planning objectives.

11. Williston will derive the following benefits from the Project: elements of an interconnected street system; ten units of affordable housing; a path easement along the entire northern portion of the site; open space along the entire northern portion of the site which will protect the Allen Brook conservation corridor; path and sidewalk connections to developments on nearby properties; and the alignment of the Project's access road with the existing street (O'Brien Court) on the west side of Route 2A.

12. If the Brandywine site were preserved for agricultural use, these benefits would be lost.

13. Williston believes that the size and location of the site makes it extremely

unlikely to be actively used for agriculture. This is due to the limited size of the parcel, the limited number of acres containing good agricultural soils, the difficulties associated with transporting farm equipment and products to and from the site, and the likely objections to agricultural uses by occupants of neighboring properties.

14. Williston's support for the Project is based on its belief that the Project site is not suitable for agricultural uses; it is not based primarily on its desire to concentrate growth within a central core growth area. However, not developing the Project site as anticipated in the 2000 Plan may well be counterproductive in that it may increase development pressures on other, more significant agricultural parcels outside of Williston's designated growth area, resulting in unwanted sprawl.

15. Agricultural mitigation moneys received from this Project would be contributed to preserving viable and currently farmed agricultural land along U.S. Route 2 just outside the growth center (thereby creating an outside barrier against growth as you travel east from Williston village). Thus, the ultimate benefits to primary agricultural soils exceeds any loss of primary agricultural soils at the Project site.

16. Section XII(E), *Impact Fees*, of the 2000 Plan, includes the following statement:

Additional impact fees may be developed, as needed, to fund other needed improvements identified in the Capital Budget and Program. In particular, the Town should consider impact fees to fund needed facilities for fire and police protection, and for open space preservation. This would require amending the Town's Impact Fee Ordinance.

#### *Conclusions of Law*

We believe that attaining a balance between the goals of Criterion 9(B) and those of Act 200 is best served by allowing ABI to develop the Project site without the full imposition of subcriterion (iii) as mandated by SVHC. The Board can reach this conclusion based on the specific circumstances of this case.

First, the Williston 2000 Plan, read together with Williston's Zoning Ordinance, Subdivision Regulations and Sewer Allocation Ordinance, promotes the Legislative goals enacted in Act 200:

(c) In addition, this chapter shall be used to further the following specific goals:

(1) To plan development so as to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside.

(A) Intensive residential development should be encouraged primarily in areas related to community centers

....

(B) Economic growth should be encouraged in locally designated growth areas, or employed to revitalize existing village and urban centers, or both.

24 V.S.A. §4302(c)(1)(A).

The General Assembly adopted the language of Criterion 9(B) as part of Act 250, which took effect on April 4, 1970. Vermont is a very different place in 2004 than it was in 1970, as evident in towns like Williston. Over time, the legislature has responded to land use issues that have arisen as the nature of development in Vermont has evolved. Accordingly, the General Assembly later enacted Act 200, which took effect on July 1, 1989. The goals of Act 200, such as "[t]o plan development so as to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside," 24 V.S.A. §4302(c)(1), were enacted nearly two decades after establishment of the original criteria of Act 250, including Criterion 9(B). Presented with two important land use laws bearing on development of the project site at issue here, we must keep in mind the following rules of statutory interpretation:

If the provisions seem in conflict, interpretations that harmonize and give effect to both are favored. Specific statutes control over a general statute, and if two statutes deal with the same subject matter, the more recent legislative enactment will control.

*Lomberg v. Crowley*, 138 Vt. 420, 423 (1980) (citations omitted).

Reading the language of Criterion 9(B) in conjunction with the more recent legislative pronouncements of Act 200 in favor of growth centers and against sprawl, and in the context of prior practice regarding soil mitigation agreements, it is reasonable to allow such an agreement in these specific circumstances without the need for clustering to avoid prime agricultural soils.

Second, the Project is proposed for development within an area which Williston has formally designated for growth. Williston has engaged in the very planning and conservation efforts encouraged under Act 200. Having done what it was statutorily encouraged to do, the Board should not subvert Williston's planning efforts at the end of the process; we cannot purport to support concepts of local control and then ignore

them in this decision.<sup>5</sup>

Third, the Board has found that the Project is actually within an area of Williston that is suitable for higher density residential growth.

Fourth, the Board has found that the Project represents "in-fill," is surrounded by other, heavily-developed residential and commercial projects. In SVHC the Board recognized that primary agricultural soils on such lands could be subject to intensive development, when mitigation agreements derived from such development would be used to protect other, more agriculturally viable lands:

Criterion 9(B) reflects a legislative policy that "[p]reservation of the agricultural ... productivity of the land and the economic viability of agricultural units are matter of public good. Uses which threaten to significantly inhibit these resources should be permitted only when the public interest is clearly benefited thereby." 10 V.S.A. §6042, *Capability and Development Plan*. Criterion 9(B)(iii)'s language encourages *on-site* agricultural mitigation techniques as a means to achieve the legislative intent. However, in some circumstances, the use of *off-site* mitigation to protect specifically targeted agricultural lands can be equally consistent with the legislative intent to protect "economically viable agricultural units."

The Legislature could not have foreseen the issues presented by every proposed project which will have impacts on primary agricultural soils. A narrow reading of criterion 9(B), resulting in the on-site preservation of a portion of agricultural soils on a project site, may not sufficiently preserve the economic viability of the agricultural soils involved. Instead, the public's interest may be better served by a decision which approves the development of a project site in exchange for other economically viable agricultural lands of comparable quality. The Board's endorsement of the Mitigation Program effects legislative purpose while not exceeding the discretionary authority given to the Board by §6086(c) to adopt remedies as justified by particular circumstances.

The Legislature's enactment of Act 200, 24 V.S.A. §§4300 et seq., has recently been used by the Board to provide guidance in the

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<sup>5</sup> We are particularly concerned that ABI has developed the Project in strict conformance with guidance from Williston, in that ABI has (a) protected the riparian buffer for Allen Brook; (b) saved portions of the Project site for common land; and (c) preserved the wetlands on the site.

interpretation of Act 250. See *Barre Granite Quarries, LLC*, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 93 (Dec. 8, 2000). Act 200 includes among its many goals:

(9) To encourage and strengthen agricultural and forest industries.

(A) Strategies to protect long-term viability of agricultural and forest lands should be encouraged....

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(E) Public investment should be planned so as to minimize development pressure on agricultural and forest land.

24 V.S.A. §4302(c)(9).

The goals of Act 200 dictate that the Board should not apply Criterion 9(B) rigidly and narrowly to require on-site protection of agricultural lands and to refuse to allow off-site mitigation. Such an interpretation would limit the opportunities of both the Board or [AOA] to develop "strategies to protect long-term viability of agricultural ... lands." For example, some agricultural lands are located in areas that are experiencing rapid transition to nonagricultural uses and that are no longer suited to agricultural production because of inaccessibility and conflicts with designated growth centers. A narrow interpretation of Criterion 9(B), allowing only on-site mitigation for a project, may, in the long run, fail to carry out Act 200's and Act 250's goals by attempting to preserve farmland which will ultimately be overwhelmed and fragmented by development at the expense of protecting large parcels of land which are more amenable to preservation.

The Mitigation Program offers a source of revenues to protect and maintain viable agricultural lands. It provides both [AOA] and the Board a reasonable means of achieving the Legislature's goal to preserve viable agricultural lands through an informed planning process.

*SVHC, supra*, at 42 - 43.

We note that *SVHC* itself expressly distinguishes between preserving agricultural soils in open meadows and those which lie in more urban areas. Thus, our position in this case does not represent an exception to *SVHC*, but it is, rather, a complement to *SVHC*, in that it addresses the urbanized side of the situation as opposed to the more rural context present in *SVHC*.

Thus, in municipally planned *and existing* growth centers, where the parcel is essentially in-fill of developed property that is not viable agricultural property in the long run, given the growth center uses and development surrounding it, the strict clustering requirements of subcriterion (iii) need not be applied.

The above findings are crucial to our dissent in this case. We would not intend to merely rubber stamp a town's decision to designate an area as a "growth area" and thereby grant relief to projects from the clustering requirements of subcriterion (iii). Rather, a decision not to require clustering should be made only when the Board's independent assessment indicates that a project is actually within a Town's core growth area and that exempting a project from subcriterion (iii)'s provision furthers Act 200's goals.

Our position in this case should not be read to grant *carte blanche* development of primary agricultural soils for residential or other purposes. Only where the central core planning factors noted above are present and outweigh all other considerations would we find that the loss or diminution of primary agricultural soils on a project site in order to protect other valuable lands to be warranted.

Lastly, we believe that the existing language of Criterion 9(B), the lack of legislative acknowledgement of soil mitigation agreements, and the anti-sprawl provisions of Act 200 point out the urgent need for the General Assembly to reconcile these various provisions in the statute so that municipalities and citizens have a clear idea of what is, and is not, permitted going forward.<sup>6</sup>

\*\* Board Members Lloyd, Martinez, Marsh, and Roy, dissenting:

We dissent from that portion of the Board's decision that would not allow ABI to enter into a mitigation agreement with the Town of Williston.

In addition to the majority's Findings of Fact, the evidence also supports the following Findings relative to this issue:

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<sup>6</sup> ABI proceeded through the local process pursuant to the same practice which had existed when it developed prior Williston projects -- it was allowed to enter into mitigation agreements without first having to meet SVHC's requirements. Given the Board's conclusion that, for Criterion 9(B) purposes, the relevant vesting date is the Act 250 application date (and not the date that the local process commences), a practical implication of this conclusion is that District Coordinators and others need to be more circumspect when recommending to applicants that they delay filing their Act 250 applications until after the local zoning process is completed.

*Additional Findings of Fact*

1. The Johnson Farm (Farm) is located just east of Williston Village, west of Oak Hill Road, along Interstate 89 and Vermont Route 2. The Farm contains approximately 210 acres, with approximately 157 acres south of I-89 and the remainder being north of I-89.

2. The Town is working with the Farms' owners and the Vermont Land Trust to find a way of protecting some or all of the Farm's land area.

3. The Farm is located outside the Town's growth area, and is designated as Prime Open Space in the Town Comprehensive Plan.

4. A portion of the Farm (40 acres of the Farm's primary agricultural soils) is located in the Medium Density Residential Area, as designated by Williston's Future Land Use map; this is the same Area as the location of the Project.

5. The Town used the Land Evaluation Site Assessment (LESA) method to determine the value of the Farm as part of a working farm unit and whether it merited inclusion on the Prime Open Space list.

6. The Farm has 61.5 acres of primary agricultural soils.

7. Of the Farm's 61.5 acres of primary agricultural soils, 26.1 acres have an Agricultural Rating of 4, compared to only 12.0 acres of the Brandywine site. Class 4 soils are the best of the statewide soils, and occur on slopes of less than 8%. Under the Mitigation Agreement more than twice the amount of Class 4 soils will be preserved on the Farm as will be impacted by the Brandywine development.

8. Williston has established an Environmental Reserve Fund, funded by annual allocations over the past ten years, to conserve lands which have been identified in its Plan as open space parcels. See 2000 Plan, §IX(A)(7):

Use of the Town's Environmental Reserve Fund: The Town has established an Environmental Reserve Fund (ERF), the primary goal of which is to preserve open space, park lands, and natural resource lands by acquiring such lands or interests in such lands. The Town seeks to leverage ERF expenditures by seeking other conservation funding sources as noted above. As described in Section VII of this Plan, this use of the ERF should be based on a prioritized list of potential lands developed jointly by the Planning Commission and the Conservation Commission. The following guidelines are offered to assist in making use

of the ERF most efficient. Contributions to the ERF must be voted each year at Town Meeting.

*Conclusions of Law*

Williston has made a concerted effort, through its funding of its Environmental Reserve Fund, to conserve open space lands identified in its Town Plan. One such parcel is the Johnson Farm, and Williston would commit any monies which it would receive through a mitigation agreement with ABI to the preservation of that farm. We applaud Williston's efforts in this regard and believe that, where a town has established and funded a program to preserve its lands, considerations of local control should be given preference over the global approach to farmland preservation espoused by the majority in its demand that Criterion 9(B) mitigation agreements be limited to those negotiated by the Vermont AOA.