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

RE: Luce Hill Partnership
Application #5L1055-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision, dated July 7, 1992, pertains to an application for an 11-lot subdivision to be located in Stowe. As is explained below, the Environmental Board denies the application pursuant to 10 V.S.A. § 6086(a)(8)(A) (necessary wildlife habitat).

I. SUMMARY OF PROCEEDINGS

On September 25, 1990, the District #5 Environmental Commission issued Findings of Fact, Conclusions of Law, and Order #5L1055, denying an application for the creation of what is described as a 12-lot subdivision and the construction of related roadway off Barrows Road in the Town of Stowe, Vermont. The District Commission denied the application pursuant to 10 V.S.A. § 6086(a)(8)(A) (necessary wildlife habitat). The District Commission also found, pursuant to 10 V.S.A. § 6086(a)(9)(L) (rural growth areas), that the proposed project will not be located in a rural growth area because it will be located within an area of necessary wildlife habitat. See 10 V.S.A. §§ 6001(12) and (16), § 6086(a)(8)(A).

On October 24, 1990, the Applicant filed an appeal with the Environmental Board concerning Criteria 8(A) and 9(L). On November 30, 1990, former Board Chair Stephen Reynes convened a prehearing conference. On December 26, the Board issued a prehearing conference report and order.

During January and February, 1991, the Applicant and the Agency of Natural Resources (ANR) prefiled direct and rebuttal testimony and evidentiary objection. A hearing set for February 14 was cancelled because just prior to the hearing the Applicant objected to the participation of Board member Steve Wright, who decided not to participate.

On June 20, 1991, the Applicant filed a notice of deposition and request for production of documents pursuant to Board Rule 4 and Vermont Rule of Civil Procedure 30. On June 25, ANR filed a motion to quash. On June 28, the Applicant filed a memorandum in opposition to that motion. Prior to hearing, the parties were informed that the Chair granted ANR's motion to quash because the Board rules do not authorize depositions and the Vermont Rules of Civil Procedure regarding deposition do not apply to proceedings before the Board.

An administrative hearing panel of the Board convened a hearing on July 11, 1991, in Stowe, with the following parties participating:

The Applicant by David W. Conard, Esq.
ANR by Kurt Janson, Esq.

After taking a site visit and hearing testimony, the Board recessed the matter pending the filing of proposed findings of fact and conclusions of law, review of the record, deliberation, and decision.

On August 9, the parties filed proposed findings. On August 22, the Applicant filed a hearing transcript and a reply to ANR's proposed findings. On August 29, ANR filed a motion to strike the transcript and reply.

A proposed decision was sent to the parties on January 17, 1992, and the parties were provided an opportunity to file written objections, and to present oral argument before the full Board. On January 24, 1992, the Applicant requested oral argument. On February 6, ANR filed a response to the proposed decision. On March 18, the Applicants filed a response. The Board convened a public hearing in Stowe on March 25 with the Applicant and ANR participating. The Board deliberated concerning this matter on March 25 and July 7. On July 7, following a review of the proposed decision and the evidence and arguments presented in the case, 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

The main issue in this matter is whether the proposed project complies with Criterion 8(A). The Board's analysis consists of the following three questions:

1. Whether the project site contains "necessary wildlife habitat" as defined in 10 V.S.A. § 6001(12).

2. If so, whether the proposed project will destroy or significantly imperil such habitat.

3. If so, whether the proposed project fails to comply with any one of three subcriteria set out at 10 V.S.A. § 6086(a)(a)(A)(i)-(iii).

Two other issues are also raised:

4. Whether the proposed project complies with Criterion 9(L) (rural growth areas).

5. Whether to grant a post-hearing motion by ANR to strike the hearing transcript and the reply to ANR's proposed findings filed by the Applicant.

III. FINDINGS OF FACT

1. The Applicant proposes to create an 11-lot residential subdivision consisting of single family homes in Stowe, Vermont. The application originally was for 12 lots but was reconfigured during the course of proceedings before the District #5 Environmental Commission to eliminate Lot #5.

2. The proposal includes the construction of an approximately 1,800 foot unpaved roadway and community leachfields. Water supply will be through individual on-site drilled wells.

3. The project site is approximately 37 acres in size. The terrain is a mixture of gently rolling hills, small plateau areas, and steep slopes.

4. The project site contains a mixture of open areas and wooded areas containing coniferous and deciduous tree species.

5 The project site contains well-distributed evidence of current and historical use by wintering deer. This evidence includes bark scarring and repeated browsing. The only portion of the site not used as a wintering area by deer is an approximately seven-acre portion located near Barrows Road.

6. Wintering areas are vital in the year-to-year survival of individual deer and in the propagation of the deer species.' The ability of deer to limit the drain on their energy reserves through the use of a wintering area is a critical factor in determining whether deer will survive the winter.

7. The wooded areas of the project site contain significant amounts of softwood cover. Softwood cover provides shelter which enables deer to minimize depletion of energy reserves during winter. The boughs of softwood trees collect snow which provides for lowered snow depths on the ground. The lowered snow depths enable the deer to move, feed, and escape predators with much less effort than they would experience outside of the cover. The cover also retains solar heat and radiates less heat at night and thus provides less extreme temperature conditions than would be experienced outside the cover.

8. Open areas within a deer wintering area, including those found on the project site, provide an accessible source of winter food and are one of the first places to provide green forage in the spring. The openings also permit deer to warm themselves in the sunshine.

9. For deer to survive the winter, they need areas of softwood cover and resources to sustain life such as accessible food. Vegetation suitable for deer browse is generally produced in areas receiving moderate winter to high amounts of sunlight.

10. The project site is part of an approximately 800-acre deer wintering area which has been identified on maps by the Vermont Department of Fish and Wildlife.

11. On November 29, 1988, Richard Carrick, one of the partners in Luce Hill Partnership, signed a purchase and sale contract to purchase the project tract. Mr. Carrick's contractual rights to the property were conveyed to Luce Hill Partnership on May 15, 1989.

12. Sometime prior to December 1988, the previous owner logged approximately six acres of the site. Following the execution of the contract discussed in Finding 11, above, approximately two additional acres of the site were logged. The majority of the logged areas were clear cut.

13. The logging operations were inconsistent with normal commercial logging practices. Instead, the logging operations were designed to clear future home sites. The potential lots and access road are easily distinguishable on the ground.

14. Prior to logging, the eight acres contained a significant amount of softwood cover. The eight acres were, and are, adjacent to the other areas of the site which contain softwood cover.

15. Following logging, after a period of several years, browse vegetation species will become evident. Deer have continued, during the winter, to use the eight acres of the project site which were-logged prior to the application process.

16. Human disturbance in the wintering area results in an increase in the consumption rate of the deer's energy reserves. Humans are perceived by deer to be predators no different from other predators. The presence of humans in the wintering area triggers a "fight or flight" response within the animal. This response uses energy which comes from body energy reserves which are not readily replaced during the winter. Human disturbance can also cause deer to flee into less desirable habitat during the winter. Human activity can reach a level at which the deer abandon the wintering area. These reactions by deer decrease the probability of survival through the winter. To minimize the consequences of interactions between people and,wintering deer, a buffer of at least 300 feet is necessary between house locations and wintering areas.

17. The Applicant proposes to create conservation zones for the deer on portions of Lots #2, 3, 4, 6, 9, 10, 11, and 12. Except for the conservation zone on a portion of Lot #12, all of these conservation zones are within 300 feet of a house location. In addition, most of the conservation zone on Lot #12 is within 300 feet of a house location. Therefore, in all probability, deer in these conservation *zones will* be disturbed by human activities at the lots in the subdivision.

18. To reach that portion of Lot #12 which is not within 300 feet of a house location, deer traveling from any other portion of the project site will have to pass through areas which are within 300 feet of a house location.

19. The proposed project will directly destroy portions Of the wintering area on the project site through the construction of 11 houses and associated facilities

within the wintering area. In addition, activity on the site associated with construction and use of homes and associated land will significantly imperil the remainder of the wintering area on the site. In total, the proposed project will destroy or significantly imperil approximately 30 acres of deer wintering area.

20. Wildlife such as deer provide substantial, albeit mostly unquantifiable, public benefits, including scientific, recreational, and cultural benefits.

21. There is no evidence in the record of economic or other benefits to the public from the project.

22. The Applicant could minimize the impact of this project on the deer wintering area by reducing the number of homes to be constructed or by clustering home sites on the northeast portion of the project site. If the Applicant were to cluster, it could set aside a sufficient amount of wintering area on the project site in perpetuity.

23. To support the deer population, at least three acres of deer wintering habitat must be protected for every acre lost to development. Therefore, to adequately mitigate the impacts of this project, the Applicant could protect approximately 22 of the 30 acres of on-site wintering area. This would allow development of a total of 15 acres of the project site, including eight acres of the wintering area.

24. The record contains no evidence concerning whether the Applicant owns or controls a reasonable alternative site for the subdivision.

IV. CONCLUSIONS OF LAW

A. Criterion 8(A) (Necessary Wildlife Habitat)

10 V.S.A. § 6086(a)(8)(A) provides:

A permit will not be granted if it is demonstrated by any party opposing the applicant that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species, and

(i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or

(ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or

(iii) a reasonable acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

As stated above, the Board analyzes compliance with this criterion in three steps involving the presence or absence of *necessary* wildlife habitat, the destruction or imperilment of any such habitat, and compliance with the three subcriteria. The Board is only examining the presence of necessary wildlife habitat because there is no contention that any endangered species are present on-site.

1. Presence of Necessary Wildlife Habitat

10 V.S.A. § 6001(12) provides that necessary wildlife habitat means:

[C]oncentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period in its life including breeding and migratory periods.

The Supreme Court upheld the Environmental Board's application of this definition to deer wintering areas in In re Southview Associates, 153 Vt. 171, 175-178 (1989).

The Board concludes that the project site contains 30 acres of necessary wildlife habitat. The deer wintering area on the project site is a concentrated and identifiable habitat. It is an approximately 30-acre wintering area which is part of a larger 800-acre wintering area.

In the wooded areas of the site, the existence of a wintering area can be identified by the presence of significant amounts of softwood cover. Signs of wintering deer are observable and have been observed in the wooded areas of the project site.

The eight acres which were logged before the application was filed constitute identifiable wintering area because those acres provided a significant amount of softwood cover prior to logging. Since the logged acres are adjacent to presently existing softwood cover, deer using the existing cover would have used the cover formerly provided by the logged acres.

The Board believes that under the facts of this case it is appropriate to treat the site as it existed prior to logging. Specifically, the cutting which occurred was not consistent with typical forestry practices. Rather, it was consistent with clearing land in preparation for creating: a subdivision. As the Board has previously stated:

> Act 250 requires that a permit be obtained before commencing construction on a subdivision or development. 10 V.S.A. § 6081(a). If the Board were to review this application for compliance with the site as it existed after it was cleared and terraced, some developers would be encouraged to commence development without filing an application for an Act 250 permit, thereby reaping an economic advantage by getting a head start on construction. We are therefore reviewing this application for compliance with the criteria based upon the site as it existed before construction commenced.

Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings Of Fact, Conclusions of Law, and Order at 10 (Oct. 5, 1990).

The Board recognizes that some of the clearing was done by the owner who preceded the Applicant in title. However, if the Board were to allow this fact to influence it, the Board would be encouraging the destruction of natural resources and sale of the property to other people prior to the filing of applications. Moreover, all of the clearing was done in the same area, was consistent with plans for a subdivision, and continued following the date on which Richard Carrick signed a contract to purchase the property. Mr. Carrick is a partner in Luce Hill Partnership. Thus,

clearing occurred while the land was under the Applicant's control. In re Eastland, 151 Vt. 497, 500 (1989). Accordingly, the Board concludes that the Applicant continued the clearing for subdivision purposes which had been begun by the prior owner.

The wintering area on the site is decisive to the survival of deer during the winter. The wooded areas provide shelter for the deer which prevents depletion of energy reserves needed to survive the winter and protection from temperature and predators. Such shelter also was provided by the formerly wooded eight acres logged before the application was filed.

The Applicant argues that, under the Southview decision, the Board cannot conclude that necessary wildlife habitat exists on the site unless there will be a net loss in the deer population if the habitat is removed. The Applicant also contends that the Board is reading the word "necessary" out of the phrase "necessary wildlife habitat" and is concluding that all wildlife habitat is protected. The Applicant further contends that this deeryard cannot be necessary wildlife habitat because it is not the same as the Southview deeryard.

The Board rejects these arguments. This site is part of an 800-acre deer wintering area. The Applicant's argument regarding net loss of deer is based on the idea that deer who are prevented from using the site will winter in the rest of the wintering area. Such an argument would allow the area to be nibbled away until none of it is left. The Court expressly rejected an analogous argument in Southview, saying that if the argument prevailed:

> All other developers would escape a Criterion 8 challenge because, no matter how devastating to particular habitats, their projects would not decimate the entire deer herd in Vermont so long as one deeryard remained.

Southview, 153 Vt. at 175. Similarly, under the Applicant's argument, so long as a portion of the 800-acre deeryard remains, development of the balance of the yard would escape Act.250 protection.

The Southview decision does not require that there be a net loss of deer if a habitat is destroyed or that a deeryard must be exactly like the one discussed in that

case. The decision requires only that a deeryard be of sufficient quality that it is "necessary." Id. at 176. The Court stated:

> A concentrated, identifiable deeryard is "necessary wildlife habitat" if it is decisive to the survival of the white-tailed deer that use it during the winter -- that is, if the deer reauire that sort of habitat to survive the winter. Of course, many of the individual animals might serve in another deeryard elsewhere in the state if the project were built; that fact does not render the area to be developed unnecessary to their survival in the sense contemplated by the Act.

Id. at 177, n. 3 (emphasis added). The Board has concluded above that the project site contains the type of habitat, which is required for deer to survive the winter. Thus, the Board's decision meets the interpretation of "necessary wildlife habitat" set forth in Southview.

Moreover, the Board's conclusion does not support the Applicant's argument that now all wildlife habitat will be deemed "necessary." This decision, like Southview, concludes that deer wintering areas are necessary wildlife habitat. Nothing about the conclusion suggests that all other areas used by deer are such habitat,

2. Effect on Habitat

The Board concludes that the proposed project will destroy or significantly imperil most, if not all, of the necessary wildlife habitat located on the site. Except for a portion of Lot #12, all of the on-site wintering area will either be built upon or will be within 300 feet of proposed house locations. The habitat in the built areas will be destroyed and the habitat that is within 300 feet of the house locations will be significantly imperiled because deer using these areas will be disturbed by human activities associated with the built areas. See Re: Folev and Barnett, #5L1018-1-EB/5L0426-6-EB, Findings of Fact, Conclusions of Law and Order at 6 (July 19, 1991).

Further, with respect to that portion of Lot #12 which is not within 300 feet of a house location, the only access for deer which the Applicant has provided will be through areas which are'within 300 feet of house locations. Human

disturbance will discourage deer from using that access and therefore the habitat value of the remaining portion of Lot #12 will be significantly imperiled.

The Applicant challenges the Board's finding that a 300-foot buffer is necessary. See Finding 13, above. The Applicant argues that the 300-foot buffer is arbitrary. The Board disagrees. The testimony of witness John Buck shows that the figure was based on a scientific study with a national focus and then adjusted downward to meet the sense of Vermont state wildlife experts that the national figure was too high for Vermont. Thus, the statement in Finding 13 that a buffer of "at least" 300 feet is necessary is supported by the evidence.

3. Subcriteria of Criterion 8(A)

As quoted above, the three subcriteria of Criterion 8(A) involve evaluation of whether: (1) the loss to the public from the destruction or imperilment of a habitat is not outweighed by the benefit to the public from the development or subdivision, (2) feasible and reasonable means of preventing the destruction or imperilment of habitat have not been applied, and (3) reasonable acceptable alternative sites exist. If a decision is reached that any one of these three circumstances is true, a permit may not be granted.

There is little evidence in the record concerning the proposed project's compliance with the subcriteria. Each party has argued that the other party bears the burden of proof on the subcriteria and that the other party has not met its burden.

The Board declines to decide who bears the burden of proof under the subcriteria because the Board concludes, with respect to subcriterion (ii), that "all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat" have not been applied. See 10 V.S.A. § 6086(a)(8)(A)(ii). Specifically, ANR has demonstrated that setting aside 22 acres of the on-site habitat in perpetuity would lessen the destruction and imperilment of the deer wintering area. It has also demonstrated that this set-aside is feasible and reasonable because 15 acres of the project site would still be left over for development as a subdivision, including the potential cluster development of housing units.

Further, without deciding which party bears the burden of proof on the subcriteria, the Board concludes that the Applicant has not met its burden of production with respect to subcriterion (i) (weighing of loss and benefits) or subcriterion (iii) (alternative sites).

The burden of proof is considered to include both the burden of production and the burden of persuasion. As the Board has previously stated:

> In Act 250 proceedings, the burden of production means the burden of producing sufficient evidence on which to make positive findings under the criteria, as the Board has previously determined that the burden of production is always on the Applicant. See Re: Pratt's Prooane, Findings of Fact and Conclusions of Law #3R0486-EB at 4-6 (Jan. 27, 1987) .... The Board believes that the term "burden of proof" as used in Act 250 means the "burden of persuasion," that is the burden of persuading the Board that certain facts are true.

Re: Killington, Ltd. and International Paper Realty Cor ., #1R0584-EB-1, Findings of Fact and Conclusions of Law and Order (Revised) at 21 (Sep. 21, 1990).

Thus, it is the Applicant's burden to provide sufficient evidence on the three subcriteria so that the Board may make findings supporting issuance of a permit pursuant to Criterion 8(A). If the Applicant had produced sufficient evidence on subcriteria (i) or (iii), the Applicant could argue that the burden was shifted to ANR to persuade the Board, by a preponderance of evidence, that the Applicant's position is not correct. Cf. In re Quechee Lakes Corp., 154 Vt. 543, 553 (1990) (burden of proof refers primarily to the risk of non-persuasion). However, the Applicant has not provided any evidence on these two subcriteria. Therefore, the Board concludes that the Applicant has not met its burden of production and therefore must deny the application pursuant to subcriteria (i) and (iii).

B. Criterion 9(L) (Rural Growth Areas)

The Applicant included Criterion 9(L) in its appeal because the District Commission's approval under that criterion was contingent on its finding that the proposed

project will be located in an area of necessary wildlife habitat and therefore not in a rural growth area.

10 V.S.A. § 6001(16) defines rural growth area to include lands which, in relevant part, are not necessary wildlife habitat. Since the Board has concluded that the project site contains necessary wildlife habitat, the Board concludes that the project site is not a rural growth area.

C. Post-hearing Motion by ANR

ANR filed a motion objecting to the Applicant's filing of a reply to ANR's proposed findings and of a transcript of the hearing.

The Board denies the motion with respect to the reply. The Board grants the motion with respect to the transcript because the transcript does not carry any indication of who prepared it or certification that it is accurate. If this decision is appealed, the usual practice will have to be followed of having a transcript prepared by a court stenographer.

V. ORDER

1. Application #5L1055-EB is denied because it does not comply with 10 V.S.A. § 6086(a)(8)(A) (necessary wildlife habitat).

2. The application complies with 10 V.S.A. § 6086(a)(9)(L) (rural growth areas).

3. ANR's motion to strike is granted in part and denied in part as discussed above.

Dated at Montpelier, Vermont this 7th day of July, 1992.

ENVIRONMENTAL BOARD

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