

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Conservation Designs, Inc.,
and Ritchie Crockett Lawton

Land Use Permit
#5W1418-EB [#847]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This appeal concerns a 13-lot subdivision composed of 10 residential lots, a 15-acre common area, a 14-acre undeveloped lot, and an additional 51-acre lot to be retained by the Permittees, on a 90-acre tract of land located off Hastings Road in the Town of Waitsfield, Vermont (Project). As set forth below, the Board concludes that the Project complies with all Act 250 criteria on appeal.

I. PROCEDURAL SUMMARY

On January 13, 2004, the District 5 Environmental Commission (Commission) issued Land Use Permit #5W1418 (Permit) and accompanying Findings of Fact, Conclusions of Law, and Order (Decision) to Conservation Designs, Inc. and Ritchie Crockett Lawton (Permittees or CDI), authorizing the Project.

On March 9, 2004, the Commission issued a Memorandum of Decision denying a Motion to Alter (MOD).

On April 7, 2004, Katherine and Jan-Peter Werner, Martin and Lois DeHeer, Anthony Santor, Steve and Beth Peterson, John and Susan Dillon, Michael McGrath and Stephanie Cramer, Victoria Trihy, James Mall, Bonnie and Gabor Miskolczy, Dennis Derryberry and Jenifer Tuck (Appellants) and Peter Rummel filed an appeal with the Environmental Board (Board) from the Permit, Decision and MOD, alleging that the Commission erred in its conclusions with respect to party status and Criteria 1(A)(headwaters), 1(B)(waste disposal), 1(G)(wetlands), 3(water supply), 4(soil erosion and capacity to hold water), 5(traffic), 8(A)(wildlife habitat), and 10(town plan).

On May 4, 2004, Board Chair Patricia Moulton Powden convened a Prehearing Conference with the following participants:

Permittees, by Adam Lougee, Esq. with Alexander Lawton
Appellants Katherine Werner and Jan-Peter Werner, James Mall, Dennis Derryberry, Anthony Santor, and Martin and Lois DeHeer

Appellants Victoria Trihy, Stephen and Elizabeth Peterson, Bonnie and Gabor Miskolczy, John and Susan Dillon, and Jenifer Tuck, and Peter Rummel notified the Board in advance that they were unable to attend the prehearing conference.

On May 5, 2004, the Chair issued a Prehearing Conference Report and Order (PCRO), which, among other things, identified issues and set the matter for hearing.

The Board deliberated on preliminary issues on May 19, 2004, and again on June 2, 2004. On June 3, 2004, the Board issued a Memorandum of Decision on party status, which, among other things, ruled on various petitions for party status and dismissed three merits issues (Criteria 1A, 8A, and 10), narrowing the issues on appeal to Criteria 1(B), 1(G), 3, 4 and 5.

On July 28, 2004, Gerald R. Tarrant, Esq., of Tarrant, Marks and Gillies, entered an appearance on behalf of CDI.

On August 4, 2004, the Board conducted a site visit and convened a public hearing in this case. The hearing was reconvened on August 30, 2004. At the hearing, the parties were given an opportunity to file supplemental proposed findings and conclusions on or before October 8, 2004. The Board deliberated on October 27, 2004 and issued a Hearing Recess Order requesting additional information from the parties. There were no evidentiary objections and the parties waived hearing, so these supplemental prefiled exhibits have been admitted into the record. The Board also deliberated on December 22, 2004. Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned.

II. ISSUES

1. Whether the Project complies with Criterion 1(B).
2. Whether the Project complies with Criterion 1(G).
3. Whether the Project complies with Criterion 3.
4. Whether the Project complies with Criterion 4.
5. Whether the Project complies with Criterion 5.

See Memorandum of Decision on Party Status at 14 (Jun. 4, 2004)(narrowing issues on appeal).

III. FINDINGS OF FACT

To the extent that any proposed findings of fact are included herein, 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). Topic headings are only for organizational purposes. Facts stated and terms defined in the procedural summary are incorporated herein.

The Project

1. CDI proposes a 13-lot subdivision composed of 10 residential lots, a 15-acre common area, a 14-acre lot that will remain undeveloped and protected by conservation easements, and an additional 51-acre lot to be retained by the Permittees, on a 90-acre tract of land located off Hastings Road in the Town of Waitsfield, Vermont (Project).
2. The ten residential lots are clustered around an open meadow that will serve as part of the common area for the Project. These lots range between .3 and 1.1 acres in area. The lots will share access with current residents on Hastings Hill Road, and CDI will develop a new loop roadway to serve the lots.
3. The Project will be developed as a Common Interest Ownership Community, subject to a Declaration recorded at the time of its creation and governed by a homeowners' association of lot owners in accordance with its bylaws.

Criterion 1(B), Criterion 4

4. The Project will be served by a community sewage disposal system for 7 of the 10 building lots, one onsite in-ground system on lot 2, and two mound sites located on the common area serving lots 6 and 10, respectively.
5. The locations of the disposal areas are depicted on CDI Exhibits 6A and 6C-6J.
6. Wastewater System and Potable Water Supply Permit #WW-5-2113 was issued by the ANR Department of Environmental Conservation on March 21, 2003, and incorporated the wastewater plans noted above. CDI Exhibits 6, 6A, 6C-6J and 47 constitute CDI's application to ANR and the permit and plans approved by ANR.
7. The well shield on Lot 1 is correctly shown on plan 2 of 9 of the oversized drawings. The lower part of the well shield is visible and the upper portion corresponds with the local drainage divide as shown on CDI Exhibit 6C. The well shield area continues along the drainage divide until it closes upon itself.
8. The location of the test pits is shown on CDI Exhibit 6B, but this exhibit is not a final drawing and does not show the well shield properly on Lot 2. CDI Exhibit 6C, the map approved by the Commission and ANR, shows the proper location of the well and septic system.
9. The well shield on Lot 2 does not go through the primary leachfield on Lot 2.
10. As shown on CDI Exhibit 6C, the well shield on Lot 8 touches the replacement field on Lot 7 and goes through the replacement field on Lot 8. CDI modified

its plans to move the well on Lot 8 approximately 15 feet to the west to address this issue.

11. Questions arose at the August 4, 2004 hearing regarding testing of the main disposal field on Lot 2. On August 6, 2004, CDI's engineer had three additional test pits dug on Lot 2 in the area of the primary in-ground wastewater system. This information confirms that the soils on Lot 2 are consistent with the soils previously reported, and that the soils are uniform throughout this section of the Project site. Additional test pits were not required.
12. CDI's groundwater table monitoring, much of which was conducted by Alexander Lawton, under training and supervision from CDI's consulting engineer, Gordon Reynolds, was conducted properly and in accordance with applicable rules. Mr. Reynolds is a professional engineer, who also reviewed Mr. Lawton's monitoring data and cross-checked it for verification. It is not unusual for a developer to conduct groundwater monitoring in this manner.
13. HRR independently collected groundwater monitoring data in the spring of 2002. The HRR data classified a particular well as "failing" if the water level rose above the "critical depth" for one day. The relevant ANR rules, however, allow for periods up to thirty days above the critical depth before failure.
14. HRR failed to follow several monitoring protocols set forth by ANR's wastewater rules.
15. CDI designed its wastewater system conservatively and eliminated marginal areas.
16. There is no evidence to suggest that CDI's design and data did not satisfy the applicable ANR rules.
17. The size of the watershed at the point of discharge furthest downstream from the Project is 3.512 square miles.
18. Given the 3:1 ratio used to determine if a stormwater discharge permit, or approval in the case of coverage under a General Permit, is required for operation of the Project, no such permit or approval is required unless the total amount of impervious area for the Project is 50,994 square feet or more.
19. The maximum total impervious area for the Project will be 50,990 square feet, assuming an 1,800 square-foot building envelope per home. The Project requires no stormwater discharge permit or approval for operation.

20. The site is relatively flat, with 0-8% slopes in the areas being developed. There are ridges and steep slopes in places, but the building envelopes are on relatively flat land with 0-8% slopes.
21. The overall design of the Project locates the infrastructure inside or adjacent to the roadways, and generally separated from neighboring properties.
22. Erosion control and stormwater controls include ditches on the uphill side of the new roadway, which will divert the water away from the Derryberry and Werner properties, eliminating the sheet flow that now occasionally occurs in storm conditions or during the spring melt. Culverts under the drives and roadway, including an outlet structure, will further slow and restrict the release of stormwater from the Project. The proposed infrastructure will support the Project and benefit neighboring properties.
23. Trudell Consulting Engineers conducted a stormwater study on the site comparing existing conditions with conditions upon completion of the Project based on a 10-year storm event. The study concluded that the Project will slow the rate of stormwater discharge.
24. The Project will also improve the existing stormwater infrastructure on Hastings Road, resulting in less erosion.
25. The Project will slow the rate of stormwater discharge, divert stormwater runoff away from neighboring properties and Hastings Road, and will not cause any increase in stormwater runoff onto Hastings Road or neighboring properties.
26. The Project is strictly a residential development, and no hazardous materials other than those fuels associated with heating houses and small quantities for household maintenance will be located on the property.
27. The lots are relatively small and will not have long driveways.
28. The loop road system designed to serve each lot, which will also serve as the utility loop, is internal to the lot layout.
29. Common utilities and roads will be constructed in a sequence designed to minimize disturbance. Ground disturbance beyond the building envelope on each lot will be minimized.
30. No stormwater discharge permit for construction, or approval in the case of coverage under a general permit, is required since the Project will disturb fewer than five acres of land.

31. Measures taken to control erosion during construction will include silt fences and/or hay bale dikes strategically located to prevent runoff, and seeding and/or mulching upon completion of each stage of construction, all as further described in the revised Erosion Control Plan and the notes and details incorporated therein, attached as Sheet EC-1, Revision 4/3/03 of the Site Plans.
32. The Permittee will maintain the erosion control measures and stormwater control infrastructure throughout the life of the Project.

Criterion 1(G)

33. The 39-acre parcel being subdivided does not contain any Class I or Class II wetlands as defined by the Vermont Water Resources Board.
34. None of the neighboring properties contains Class I or Class II wetlands.
35. There is a small Class III wetland on the Miskolczy property, a significant distance from the Permittees property.
36. The drainage from the Project generally flows away from the Miskolczy property.
37. The erosion control plan for the Project directs the flow of stormwater away from the Miskolczy property.
38. The 39-acre parcel contains two small Class III wetlands depicted on CDI Exhibit 3C. One is a vernal pool located over a ridge from and generally southwest of Lot 6. The second is a small wetland located on lots 10 and 11.
39. Neither wetland will be disturbed by the Project. The building envelope on Lot 10 will be at least 10 feet away from the Class III wetland in that location.
40. Permittee will ensure that both wetlands are protected by deed covenants and remain in the condition in which they currently exist.
41. The Project will not affect any Class I or Class II wetland.

Criterion 3

42. Water will be supplied to each of the ten homes by a private or shared drilled well. The location of each well is referenced in Exhibit 6 and depicted on Exhibits 6A, and 6C – 6J.
43. No well interference will occur because of the capability of the bedrock aquifer, its rock type, fracture presence, the available recharge in the area of 300-400

gallons per minute per square mile, the low demand yield per well, and the available storage in the well bore.

44. Well locations, including the relocation of the well on Lot 8 fifteen feet to the west, are spaced sufficiently and will not impact each other or other wells in the area.
45. CDI drilled a well on Lot 1, and tested it in accordance with the Commission's request.
46. The well on Lot 1 was pumped at an average rate of 0.74 gallons per minute (gpm), which is more than the average day demand of 0.68 gpm for the four-bedroom residence it will serve.
47. A well producing less than one gallon per minute can provide sufficient water supply for a single-family residence.
48. The approximate water demand for the entire Project will be 8 gallons per minute.
49. There is some history in the area of neighboring wells running dry during droughts.
50. None of the 5 neighboring wells tested showed any unacceptable interference during the pump test.

Criterion 5

51. Access to the Project is provided by Hastings Road, a two-lane Class III Town Highway, which is a rural local road owned, controlled and maintained by the Town of Waitsfield, then by an existing 50-foot easement serving four other landowners in addition to the Project.
52. Hastings Road runs approximately three-tenths of a mile before ending. A gravel road presently exists from the end of Hastings Road onto and over a portion of the lot CDI proposes to develop.
53. CDI proposes to put in a new loop road at the end of Hastings Road to serve the Project. The loop road will be 14 feet wide to permit two-way traffic.
54. CDI will make improvements to Hastings Road, as depicted on CDI Exhibit 3D. These improvements were required by the Town, and many if not all of them were proposed by CDI.
55. These improvements will increase the capacity of Hastings Road to accommodate traffic.

56. The Project will generate approximately 96 vehicle trips per day based on 10 households.
57. Hastings Road intersects with the East Warren Road and has good sight distances in both directions. The Project will have negligible traffic impacts on the intersection of Hastings Road and the East Warren Road.
58. Road improvements include the removal of a ledge “hump” at Station 24, depicted on CDI Exhibit 3D at the very top of the road. Removal of the ledge and increasing the width of the roadway to 18 feet will reduce the grade and improve the line of sight.
59. The Selectboard required that road signage be placed on Hastings Road, including cautionary signs limiting the speed on the road in the area of the large turn in the road.
60. The Waitsfield Planning Commission’s approval for the Project retained a “pinch point” on the road at Station 13 of CDI Exhibit 3D, and also required that the existing tree canopy and several large trees be maintained.

IV. CONCLUSIONS OF LAW

This proposed residential subdivision in Waitsfield is opposed by a group of neighbors known as the Hastings Road Residents, or HRR, on Criteria 1(B)(waste disposal), 1(G)(wetlands), 3(water supply), 4(soil erosion/capacity to hold water) and 5 (traffic). As set forth below, the Board concludes that the Project complies with the criteria on appeal.

A. Criterion 1(B)(waste disposal).

Criterion 1(B) (Waste Disposal) provides that:

A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.

10 V.S.A. § 6086(a)(1)(B). As the applicant, CDI bears the burden of proving compliance with Criterion 1(B). *Id.* at § 6088(a). There is no indication that this Project involves injection of hazardous wastes into the ground, so the issue here concerns disposal of wastewater.

CDI has entered its ANR Potable Water Supply and Wastewater System Permit into the record to demonstrate compliance with Criterion 1(B). The Board must give “substantial deference” to technical determinations made by ANR in issuing this permit. 10 V.S.A. § 6086(d); EBR 19(F)(1). In order to rebut any technical determination made by ANR, the HRR must provide clear evidence that undue water pollution is likely to result. *Re: Pittsford Enterprises, LLP, and Joan Kelley, #1R0877-EB*, Findings of Fact, Conclusions of Law, and Order (Dec. 31, 2002); *see also* EBR 19(E)(1)(b)(ANR potable water supply and wastewater system permit entitles permittee to a rebuttable presumption that wastewater covered by the permit can be disposed of without undue water pollution). As set forth below, the HRR has failed to prove that the Project is likely to cause any undue water pollution.

The HRR claim that the groundwater table monitoring on which the ANR permit is based was not done, or was done improperly. The Board does not agree. The evidence in this case is clear that the required testing was conducted by Mr. Lawton under the training and supervision of Mr. Reynolds. Mr. Reynolds is a professional engineer, who also reviewed the data and cross-checked it for verification purposes. It is neither unusual nor improper for a developer to conduct much of his own testing in this manner.

Another concern voiced by the HRR is that the Project will cause stormwater runoff that will impact neighbors’ land and Hastings Road. The Board notes that no stormwater discharge permit is required in this case, so the standard of proof is a preponderance of the evidence. As set forth in the findings, the area already experiences a considerable amount of stormwater runoff at times, and the Project will actually direct water away from the Derryberry/Tuck land and the Werner land and drive, as well as away from the Miskolczy property and Hastings Road. In other words, the Project will reduce stormwater runoff toward these neighboring properties and Hastings Road.

CDI has met its burden of proving that the Project will not cause undue water pollution. The Project complies with Criterion 1(B).

B. Criterion 1(G)(wetlands).

A Project complies with Criterion 1(G) if it “will not violate the rules of the water resources board (WRB), as adopted under section 905(9) of this title, relating to significant wetlands.” 10 V.S.A. § 6086(a)(1)(G). As the applicant, CDI bears the burden of proving compliance with Criterion 1(G). *Id.* § 6088(a). The Vermont Wetland Rules are the applicable rules under Criterion 1(G).

The Wetland Rules regulate wetlands that have been designated as Class I or Class II wetlands. See Wetland Rules § 1.1 (purpose of Wetland Rules is to protect significant wetlands); *id.* § 2.24 (defining “significant wetland” as a Class I or

Class II wetland); *id.* § 6.1 (providing for protection of Class I and Class II wetlands and their buffer zones). Thus, Criterion 1(G) only protects those wetlands that have been designated Class I or Class II wetlands under the Wetland Rules. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, Memorandum of Decision at 4 n.1 (Jul. 10, 2003); *Re: Barre Granite Quarries, LLC*, #7C1079(Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 72 (Dec. 8, 2000); *Mark and Pauline Kisiel*, #5W1270-EB, Findings of Fact, Conclusions of Law, and Order (Aug. 7, 1998), *rev'd on other grounds, In re Kisiel*, 172 Vt. 124 (2000).

In this case, however, there is no indication that a Class I or Class II wetland will be affected by the Project. Therefore, the Project complies the Wetland Rules and with Criterion 1(G).

C. Criterion 3(water supply).

Before issuing a permit, the Board must find that the Project “[w]ill not cause an unreasonable burden on an existing water supply, if one is to be utilized.” 10 V.S.A. § 6086(a)(3). Criterion 3 addresses the “impacts on the ability to meet the demand of neighboring wells or water sources if those other wells or water sources share the same basic source of water such as an aquifer or common spring.” *Re: Barre Granite Quarries, LLC*, #7C1079(Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 73 (Dec. 8, 2000)(citing *Re: MBL Associates*, #4C0948-EB Findings of Fact, Conclusions of Law, and Order (Altered) at 28 (May 2, 1995)). The burden is on the applicant, CDI, to prove compliance with Criterion 3. *Id.* § 6088(a).

The Potable Water Supply and Wastewater System Permit submitted as CDI Exhibit 6 creates a rebuttable presumption that “a sufficient supply of potable water is available.” EBR 19(E)(3)(a). As with Criterion 1(B), this shifts the burden to the HRR to prove that a sufficient supply is not available. Also, any technical determinations ANR made in issuing the permit are entitled to substantial deference. 10 V.S.A. § 6086(d); EBR 19(F)(1). The HRR failed to carry the heavy evidentiary burden of proving noncompliance with Criterion 3 by clear evidence, as discussed below.

The HRR argue that there is a relatively low water supply in this area already, that adding 10 homes will cause undue source interference, and that the pump test on one well is insufficient to show that the water supply will be adequate. Regardless of the sufficiency of the pump test required by the Commission in this matter, ANR concluded that an adequate water supply existed in issuing the ANR permit, and there is no clear evidence that ANR’s technical determinations concerning adequacy of water supply are erroneous. The entire Project will have a water demand of only 8 gallons per minute (gpm), and the HRR provided no convincing evidence that this will cause undue interference.

The Board concludes that the Project complies with Criterion 3.

E. Criterion 4(soil erosion and capacity to hold water).

Under Criterion 4, a proposed development cannot, "cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result." 10 V.S.A. § 6086(a)(4). CDI bears the burden of proving compliance with Criterion 4. *Id.* § 6088(a).

CDI will use devices such as silt fences or hale bay dikes to control erosion during construction, and will seed and/or mulch disturbed ground upon each stage of construction. CDI's revised erosion control plan also calls for continued responsibility for maintenance of erosion controls throughout the life of the Project. As noted above, the Project will actually improve existing stormwater runoff conditions by diverting away from neighboring properties and Hastings Road. The Project's stormwater infrastructure will also slow the rate of stormwater discharge, thus lessening erosion. These measures will prevent any unreasonable soil erosion. In addition, the Project is designed to minimize impervious area and will not unreasonably reduce the capacity of the land to hold water.

Accordingly, the Project complies with Criterion 4.

F. Criterion 5(traffic).

Criterion 5 requires that the Board determine whether a proposed development will "cause unreasonable congestion or unsafe conditions with respect to the use of highways . . ." 10 V.S.A. § 6086(a)(5). As the opponents, the HRR bear the burden of proof on Criterion 5, *id.* § 6088(b), but the applicant must provide sufficient information for the Board to make affirmative findings. *Re: Barre Granite Quarries, LLC, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 50 (Dec. 8, 2000).* A permit may not be denied solely on the basis of Criterion 5, but the Board may attach reasonable conditions and requirements to the permit to alleviate the burden created. 10 V.S.A. § 6087(b); *see also, Re: Nile and Julie Dupstadt and John and Debra Alden, #4C1013-EB, Findings of Fact, Conclusions of Law, and Order (Apr. 30, 1999).* Apart from the improvements that CDI has proposed, and the Town of Waitsfield has required, no permit conditions have been requested. As discussed below, the Board concludes that no additional permit condition is required because the Project complies with Criterion 5.

The Project is at the end of Hastings Road, a Class III town road that currently serves approximately 10 households. The HRR claim that Hastings Road is already dangerous and that doubling the number of vehicle trips will make this situation worse. Although the Project will double the traffic on Hastings Road, there is no indication that there is a safety issue now that will be exacerbated by the

Project and no indication that the Project will cause unreasonable congestion. In fact, the improvements CDI will make to the road, which include widening the road in places and reducing the grade in others, will improve traffic safety on Hastings Road.

With the proposed improvements to Hastings Road, the Project complies with Criterion 5.

V. ORDER

1. The Project complies with Criteria 1(B), 1(G), 3, 4 and 5.
2. Land Use Permit #5W1418-EB is issued herewith.

DATED at Montpelier, Vermont this 22nd day of December, 2004.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
Donald Marsh
W. William Martinez
Patricia Nowak*
Richard C. Pembroke, Sr.

* Board member Patricia Nowak was unable to attend the reconvened hearing on August 30, 2004, but listened to the audio record and joins in the Board's decision and permit.