

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

RE: J. Philip Gerbode by Findings of Fact,  
Richard A. Spokes, Esq. Conclusions of Law and  
Spokes, Foley & Peterson Order  
P.O. Box 986 Application  
Burlington, VT 05402 #6F0357R-EB

This decision pertains to an appeal filed with the Environmental Board by J. Philip Gerbode (the Applicant) on June 10, 1988 from the negative findings of the District #6 Environmental Commission with respect to 10 V.S.A. § 6086(a)(Y)(A) (impact of growth), Y(B) (primary agricultural soils), 9(K) (public investment), and 10 (town plan). The Applicant seeks approval under these criteria for the subdivision of a 150-acre tract of land into 16 commercial and industrial lots with internal roadways and municipal water and wastewater services located off Old Highgate Road in the Town of St. Albans, Vermont. The Board concludes that the project complies with Criteria Y(A), Y(B), Y(K), and 10.

I. BACKGROUND

The District Commission, at the Applicant's request, reviewed the application only with respect to 10 V.S.A. § 6086(a)(9) and (10), pursuant to 10 V.S.A. § 6086(b). The District Commission concluded that the application did not comply with Criteria 9(A), 9(B), Y(K), and 10. The parties requested a delay in the hearing to enable them to develop a mitigation agreement concerning Criterion Y(B). The Board held a hearing on June 1, 1989 specifically to consider the proposed mitigation agreement. After reviewing the parties' proposal, the Board directed them to modify the agreement to include more specific information on the terms and method of implementation of the agreement.

On June 22, 1990, the Applicant filed a revised mitigation agreement and various supporting documents. A second prehearing conference was held on July 13, at which the parties agreed that another hearing should be convened because some Board members who heard the previous testimony were no longer serving and there were several new Board members.

The Board convened a public hearing on October 24, 1990, with the following parties participating:

The Applicant by Richard A. Spokes, Esq.  
state of Vermont, Department of Agriculture by Mark A.  
Sinclair, Esq. and Amy Jestes

Franklin/Grand Isle Regional Planning and Development  
Commission (Regional Commission) by Joseph F. Cahill,  
Jr., Esq.

Following the hearing, the Applicant filed Proposed Findings of Fact, Conclusions of Law and Order. The Board conducted deliberative sessions on January 9 and March 6, 1991. On March 6, 1991, the Board reviewed the record and voted to adjourn the hearing. This matter is now ready for decision. To the extent any proposed findings and conclusions are incorporated below, they are granted; otherwise, they are denied.

## II. ISSUES IN THE APPEAL

1. Whether the Town of St. Albans will be able to accommodate the growth caused by the proposed subdivision, pursuant to Criterion 10.
2. Whether Criterion 9(B) is satisfied by implementation of the Mitigation Agreement.
3. Whether the proposed subdivision will materially jeopardize or interfere with the public's use or enjoyment of Interstate 89, pursuant to Criterion 9(K).
4. Whether the proposed subdivision is in conformance with the St. Albans Town Plan and the Regional Plan, pursuant to Criterion 10.

## III. FINDINGS OF FACT

### A. Overview of the Project

1. The proposed project consists of the subdivision of 16 lots for commercial and industrial purposes on a 150-acre tract of land in St. Albans Town. The project is known as the Technology Park.
2. The lots will be from two to 19 acres in size. Lots 3 through 7 and Lot 8 are intended for commercial uses and the rest of the lots will be used for light industrial and technology purposes.
3. The site is located adjacent to Interstate 89, a short distance from U.S. Route 7. It is bordered on the north by Interstate 89, on the east by Central Vermont Railway, on the south by the Eveready Battery Co., and on the west by Town Highway #4.

B. Criterion 9(A) (Impact of growth)

4. The Applicant assumes a 10-year build out period for the project, but there is no mandatory phase-in period.
5. The Technology Park will be connected to the City of St. Albans water supply and wastewater disposal systems. Water and sewer lines will be extended to the site; the Applicant will pay for extension of the lines. The City's wastewater treatment plant has sufficient capacity to accommodate this project, but the Applicant has not yet sought an allocation. The City issues allocations of capacity only to the extent that capacity exists. The City will assess a connection fee to hook up to both its water supply and sewage disposal systems, and a fee based on usage.
6. The Applicant provided no information on the impacts of traffic from this project and whether it will require the Town to incur any costs due to growth from the project.
7. The Applicant estimates that when built out, based upon the current St. Albans tax rate and 80% of the estimated fair market value of the property of \$16,500,000, the project will generate over \$280,000 in annual property tax revenue for the Town, and that the annual costs to the Town will be \$12,540.

c. Criterion 9(B) (primary agricultural soils)

8. The Technology Park will be located on a former dairy farm. The site contains approximately 150 acres of primary agricultural soils.
9. The land is currently used for crop production. It supported a dairy farm until 1986, when the owners of the farm participated in the whole-herd buyout program.
10. The site of the proposed Technology Park presents several obstacles to its future use as a dairy farm or for its contribution to an economic agricultural operation. Although another farm is located adjacent to this site, the two properties are separated by the Central Vermont Railway's tracks. Because of the lack of access across the tracks, farm equipment would have to be moved a long distance on Route 7, a road with heavy traffic. Therefore, it would be very difficult for the two properties to be worked as one farm unit. Interstate 89 also physically separates the project site from the farmland to the north, virtually precluding the possibility of working these lands as one unit.

11. The proposed project would require that a substantial portion of the site be devoted to nonagricultural purposes. Preserving a small portion for agricultural purposes at this location would not result in the preservation of a parcel of land capable of contributing to an economic agricultural operation because of the difficult access to the site for farm vehicles.
12. Adjoining this site to the west and south are commercial and industrial uses such as the Eveready Battery plant, a shopping center, and fast food restaurants.
13. Most of the 39 farms in St. Albans Town are located in the St. Albans Bay and northeastern areas of town, all quite a distance from this property.
14. The Applicant has offered to pay a fee to the Vermont Housing Conservation Board (VHCB) for the permanent preservation of agricultural soils in St. Albans Town. He has entered into a Mitigation Agreement with the State of Vermont Department of Agriculture which sets out the specific terms of and standards for payment of the fees to the VHCB. (Board Exhibit #9) These include a commitment to pay the VHCB an amount equal to twice the per acre average of Farm Credit Service appraisals of productive tillage in the Town of St. Albans as determined within 60 days of any mitigation payment date, so that two acres of primary agricultural soils should be preserved for each of the 150 acres developed by the Technology Park project. The payment will be made each time an application is submitted for an amendment to the land use permit for development of the lots. A Memorandum of Understanding between the Applicant and the VHCB provides that the VHCB will acquire the fee simple interest or the development rights of lands designated for agricultural use under the VHCB's Interim Guidelines for the Acquisition of Development Rights in Agricultural Land established pursuant to 6 V.S.A. § 32. (Board Exhibit #10)
15. The Department of Agriculture is authorized to implement an Agricultural Land Development Rights Acquisition Program, pursuant to 6 V.S.A. Chapter 2. The Mitigation Agreement is designed to comply with this Program. Pursuant to its authority under 6 V.S.A. § 32(a), the Department has developed a procedure for identifying and recommending to the VHCB appropriate agricultural rights for acquisition. The VHCB has developed criteria to be used in reviewing the Department's recommendations for

acquisition. Three closings have taken place under the Acquisitions Program, and a fourth closing is pending. Approximately eight other potential acquisitions are being pursued.

16. Certain advantages would result from the payment of the entire fee to the VHCB in a lump sum rather than payments as each lot is sold over an undetermined time period. Payment of a lump sum would make it more likely that the VHCB would be able to purchase a large parcel; payment in smaller amounts over a longer period of time would probably result in the purchase of several smaller, noncontiguous pieces of agricultural lands. The Department of Agriculture encourages the preservation of contiguous farm units.
  17. The Selectmen of the Town of St. Albans endorsed the Mitigation Agreement by way of a Resolution dated October 22, 1990.
  18. If a permit is issued for this project, the Mitigation Agreement and the Memorandum of Understanding will be incorporated into the permit.
- D. Criterion 9(K) (Public Investments)
19. The site lies adjacent to Interstate 89 and is visible to motorists.
  20. The Applicant has not arrived at a final design for the project. No landscaping plan has been developed.
- E. Criterion 10 (Local and Regional Plans)
21. The Town of St. Albans' Plan became effective on October 20, 1987. Under the provisions of the Plan, the majority of this site is located in a commercial/industrial land use planning district.
  22. The Town Plan includes Land Use Planning Districts. Goals and policies for each district are identified in the Plan. This project is located in an area designated as commercial/industrial. Specific provisions in the Plan concerning the commercial and industrial districts include the following:
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(a) C. SPECIFIC LAND USE DISTRICTS

3. Industrial

These districts encompass the existing industries, as well as adjacent areas for expansion and new industries, to provide increased tax base and employment opportunities. These areas contain the native site characteristics desired by industries, including rail and major highway facilities and the potential for reasonably-economic servicing with water and sewer. Because of these unique characteristics, these sites should be protected from loss to residential and other less-valuable uses. . . .

(b) GOALS AND POLICY IN BOTH COMMERCIAL AND INDUSTRIAL DISTRICTS:

. . . .

**POLICY:** To encourage appropriate **industries** in suitable locations which will utilize the skills of the local labor force.

**POLICY:** To promote the clustering of related and compatible commercial uses and to discourage strip commercial development along highways.

. . . .

Commercial uses are encouraged in specified districts. Any commercial or industrial development proposed for St. Albans should be in keeping with the rural character of the Town. It is desirable for this type of development to locate in a single, central location rather than lining the edges of the main thoroughfares. . . . Industrial development should be of small to medium scale so as not to create traffic congestion, pollution or other inappropriate aspects.

23. The Town Plan contains the following general objectives pertinent to this project:

1. A FIRST OBJECTIVE OF THIS PLAN IS TO PROVIDE FOR CONTROLLED AND ORDERLY GROWTH OF THE TOWN, AT A RATE SLOW ENOUGH THAT ST. ALBANS' DOMINANT "SMALL TOWN" AGRICULTURAL RURAL CHARACTER IS MAINTAINED.

. . .

The Town of St. Albans captures that unique combination of physical and cultural aspects of Vermont. This makes the Town an attractive "Small Town," "Rural" environment both for residential settlement and for commercial and industrial development.

. . .

2. IT IS THE SECOND, FUNDAMENTAL OBJECTIVE OF ST. ALBANS TOWN TO PROTECT THE RURAL NATURE OF THE TCWN.

Every effort should be given to the maintenance and furtherance of agricultural enterprises in St. Albans. Agricultural land will be protected.

24. The "Franklin-Grand Isle Land Use, Policy, Implementation, and Procedure Manual" is the regional plan applicable to this project.
25. According to the regional land use maps, approximately 83 percent of the site is located within the St. Albans urban service area, and the other 17 percent, located along the northern boundary, is designated for agricultural use. The land use plan recognizes that if it becomes economically infeasible to farm the land, other uses may be permitted.
26. A Land Evaluation and Site Assessment (LESA) was conducted in order to evaluate the agricultural significance of this site and its suitability for preservation efforts. The LESA evaluation concluded that farming on the site may no longer be economically viable or worth preserving due to its proximity to built-up

areas, municipal services, the Interstate 89 interchange, the railroad, and industrial and commercial uses to the south and west.

27. The Regional Commission is concerned that the project site is located on a possible gravel aquifer recharge area. The Regional Commission has a policy that development on groundwater recharge areas should be discouraged or carefully controlled. The Regional Commission therefore recommends that all operations and any on-site storage of materials be within properly enclosed and maintained structures; that no on-site dumping of solid, liquid, or hazardous wastes should occur; and that groundwater quality should be monitored or tested periodically for possible contamination.

IV. CONCLUSIONS OF LAW

A. Criterion 9(A)

Insufficient evidence was submitted for the Board to decide whether conditions are needed to prevent undue burdens upon the town and region to accommodate the growth caused by this development. When the Applicant files a complete application with the District Commission, he should include all information necessary for the commission to make this determination.

B. Criterion 9(B)

If a project contains primary agricultural soils, Act 250 requires applicants to demonstrate that the agricultural potential of the soils will not be significantly reduced or, if they will, that (1) no other uses are possible which would not significantly reduce the agricultural potential of the soils but which would still yield a reasonable return on fair market value; (2) the applicant owns or controls no other land consisting of nonagricultural or secondary agricultural soils which would be suitable for this project; (3) the project has been designed to minimize the loss of the primary agricultural soils; and (4) the continuation of agriculture on adjoining lands will not be jeopardized. 10 V.S.A. § 6096(a)(9)(B).

There is no dispute that this site contains approximately 150 acres of primary agricultural soils, as defined at 10 V.S.A. § 6001(15). The question the Board must address is whether the agricultural potential of the soils will be

significantly reduced if the Applicant agrees to pay a fee that will result in the permanent preservation of two acres of land for every one developed.

In previous cases concerning primary agricultural soils, the Board has considered the specific characteristics of the site in determining whether the agricultural potential of the soils will be significantly reduced. See, e.g., Re: Edwin and Avis Smith, #6F0391-EB, Findings of Fact and Conclusions of Law (May 11, 1989); Re: Flanders Lumber Company, #4C0695-EB-1, Findings of Fact and Conclusions of Law #4C0595-EB-1 (Apr. 18, 1988); Re: Spear Street Associates, #4C0489-1-EB, Findings of Fact and Conclusions of Law (May 15, 1982).

As currently proposed, this project will use a major portion of the primary agricultural soils on the site. Substantial evidence was presented to demonstrate that, because of a number of factors, this land is not likely to be used for agricultural production in the future. It is in an area designated as commercial/industrial by the Town; it is close to the railroad, an Interstate interchange, and commercial and industrial development, and it is physically isolated from other farm units.

In this case, the Board concludes that the proposed Technology Park will not significantly reduce the agricultural potential of the soils because, in combination with the soils that will be preserved in accordance with the Mitigation Agreement, only 1/3 of the total amount of agricultural soils will be developed, while 2/3 of the agricultural potential will be permanently preserved.

The Environmental Board has broad authority to tailor permit conditions to reduce the environmental impacts of proposed projects. See, e.g., In re Hawk Mountain Corp., 149 Vt. 179, 184 and 185 ("the legislature intended to confer upon the Board powers of a supervisory body in environmental matters"). 10 V.S.A. § 6086(c) grants the district commissions and the Board the authority, under the police power, to impose conditions necessary to alleviate adverse impacts with respect to the ten criteria. As long as a condition constitutes a proper exercise of the police power, and has an appropriate relationship to the criterion involved, it is within the authority of the Board to impose. See In re Alpen Associates, 147 Vt. 647 (1986); Re: J.P. Carrara & Sons, Inc., #1R0589-EB, Land Use Permit (Feb. 17, 1988); Re: Clarence and Norma Hurteau, #6F0369-EB, Memorandum of Decision, (Mar. 25, 1988).

Based upon the characteristics of this site and the provisions of the Mitigation Agreement negotiated between the parties, the Board believes that the payment of a fee to the VHCB for the purposes enumerated will result in the preservation of a significant amount of primary agricultural soils.

The Board is concerned, however, about the method by which the payments are proposed to be made to the VHCB. Any value of the land for agricultural use will significantly diminish as the infrastructure is constructed and the lots are developed. However, the full amount of funds will not be available to the VHCB for preserving an agricultural unit until the last lot is developed. The Board believes the preferable method would be payment of the total amount prior to any construction on the site. In this situation, the Board will allow the payment to be made as lots are sold, until 50 percent of the lots are sold. At that time, before any further development of lots may occur, the Applicant shall pay the fee on all the remaining lots in an amount equal to twice the per acre average of Farm Credit Service appraisals of productive tillage in the Town of St. Albans as determined within 60 days of the date an application is filed for development of the next lot. The Mitigation Agreement and Memorandum of Understanding with the VHCB should be amended to reflect this procedure.

c. Criterion 9(K) (public investments)

10 V.S.A. § 6086(a)(9)(K) requires an applicant to demonstrate that

[a project located] adjacent to governmental and public utility facilities, services, and lands, including . . . highways ... will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.

The Interstate highway system is considered a public facility for purposes of Criterion 9(K); a project adjacent to the Interstate must be reviewed for the impact of the project on the public's visual enjoyment of the Interstate corridor. Re: Heritage Group, Inc. and H. Warren Lyon, Findings of Fact and Conclusions of Law #4C0730-EB at 4-5 (Mar. 27, 1989).

The Applicant has not prepared a final design for the project or a landscaping plan. Without such information, the Board cannot evaluate the visual impact of the project on the Interstate corridor. Presumably when the Applicant files a complete application with the District Commission, the design for the Technology Park will be finalized and a landscaping plan developed so that the District Commission can evaluate the visual impact of the project on the Interstate corridor. In accordance with 10 V.S.A. § 6086(b),<sup>1/</sup> in a proceeding that is limited to review of Criteria 9 and 10, the Board or district commission may decline to reach a conclusion on a criterion until the application has been reviewed for conformance with all the criteria and specific information necessary for a decision has been provided. Accordingly, the Board declines to reach a conclusion on Criterion 9(K).

D. Criterion 10

1. The Town Plan

The Town Plan contains goals and policies that allow the conclusion that the project conforms with the Plan. Although the Plan encourages the preservation of agricultural lands, it also contains policies and goals that support commercial and industrial development in suitable locations. The inclusion of the project site in the commercial/industrial land use planning district indicates the intent that this land be used for industrial or commercial purposes rather than for agricultural purposes. Furthermore, the Mitigation Agreement provides that all payments made to the VHC B shall be used "for the sole purpose of acquiring agricultural land development rights in the Town of St. Albans." Accordingly, the project conforms with the Town Plan because it both allows for commercial and industrial development at this site, and will allow the preservation of agricultural lands at another location in St. Albans Town.

2. The Regional Plan

The Regional Plan calls for the protection of agricultural lands as well as the promotion of appropriate commercial and industrial development. The implementation of the terms of the Mitigation Agreement will allow for the development of some commercial and industrial development and the preservation

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<sup>1</sup>10 V.S.A. § 6086(b) was amended in 1990 to delete preliminary review on Criterion 9.

the preservation of agricultural lands and the continuation of economic agricultural operations in areas designated by the Regional Plan for such purposes.

IV. Proposed Conditions

Should a land use permit be issued in this matter, the following conditions regarding Criteria 9(B) and 10 shall be included in the permit:

1. Prior to the commencement of any construction of buildings on any lot, the Permittee or his successor in interest, and any lot purchaser or tenant, shall file an amendment application as co-applicants. Amendment applications shall be reviewed for conformance with the conditions of this permit and the Findings of Fact.
2. The Applicant shall in all respects comply with the Mitigation Agreement dated February 2, 1990, as amended to reflect the change in procedure for making payments to the VHC B, and the District #6 Environmental Commission shall retain jurisdiction until Land Use Permit amendments have been issued for development of all of the lots in the Vermont Technology Park. The Commission may require periodic certifications from the Applicant to be assured that the terms of the permit and the Mitigation Agreement are being adhered to.
3. Each time an application is submitted for an amendment to the land use permit for development of the lots, the Applicant shall pay the VHC B an amount equal to twice the per acre average of Farm Credit Service appraisals of productive farm tillage in the Town of St. Albans as determined within 60 days of any mitigation payment date. When 50 percent of the lots are sold, the Permittee shall pay to the VHC B an amount equal to twice the per acre average of Farm Credit Service appraisals of productive tillage in the Town of St. Albans as determined within 60 days of the date an application is filed for development of the next lot. The Mitigation Agreement and the Memorandum of Understanding with the VHC B shall be amended to reflect this method of payment.
4. Prior to seeking any Land Use Permit amendment for construction of buildings on any lot, the Applicant shall obtain and file with the District #6 Environmental Commission a Water Supply and Wastewater Disposal Permit, a certification from the City Manager of the City of St. Albans that the Applicant has received a wastewater

allocation for the project, and a certification from the Department of Environmental Conservation approving the connection setting forth the uncommitted reserve capacity of the sewage treatment plant and verifying that the plant is in conformance with the Wastewater Treatment Facilities Connection Policy.

5. The Applicant's application for approval under Criteria 1 through 8 shall include a Declaration of Covenants, Conditions and Restrictions for the Vermont Technology Park setting forth the following:

- a) minimum landscaping requirements for each lot;
  - b) building envelopes for each lot and designation of open areas within the Park;
  - c) building design standards addressing minimum height, roof mounted mechanical equipment and roofing and siding colors;
  - d) exterior lighting standards;
  - e) signage standards;
  - f) location of parking lots on each lot to include screening from the Interstate;
  - g) location of garbage dumpsters, propane tanks and other storage tanks, to include screening from the Interstate.
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V. ORDER

Application #6F0357R-EB meets Criteria 9(B) and 10 of 10 V.S.A. § 6086(a). Criteria 9(A) and 9(K) shall be considered by the District Commission in conjunction with its review of the remaining criteria. Jurisdiction over this matter is returned to the District #6 Environmental Commission.

Dated at Montpelier, Vermont this <sup>26<sup>th</sup></sup> day of March, 1991.

ENVIRONMENTAL BOARD

*Stephen Reynes*

Stephen Reynes, Acting Chair  
Ferdinand Bongartz  
Elizabeth Courtney  
Rebecca J. Day  
Arthur Gibb  
Charles F. Storrow

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