

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

RE: Edwin & Avis Smith by Findings of Fact and
Carl H. Lisman, Esq. Conclusions of Law
Lisman & Lisman and Order
P.O. Box 728 Application #6F0391-EB
Burlington, VT 05402

This decision pertains to an appeal filed on June 27, 1988 by Edwin and Avis Smith from the decision issued on May 25, 1988 by the District #6 Environmental Commission denying Land Use Permit Application #6F0391. The Applicants sought approval to subdivide an 8.48-acre parcel of a 448-acre tract of land into 14 residential lots and 1,400 feet of access road off Thorpe Avenue in St. Albans, Vermont.

A prehearing conference, convened on July 10, was attended by the Applicants, represented by Carl H. Lisman, Esq. The State of Vermont, Agency of Natural Resources, submitted a written notice of appearance through its attorney, Mark A. Sinclair, Esq. On August 3, a Prehearing Conference Report and Order was issued, in which the date for the hearing was scheduled for October 4. The hearing date was subsequently postponed several times due to various scheduling problems with the witnesses of both the Applicants and the State.

The Board convened a public hearing on January 25, 1989. Participating were the Applicants, by Carl H. Lisman, Esq.; the State, by Mark A. Sinclair, Esq.; and the Town of St. Albans Planning Commission, by Mike Ewell. After hearing the testimony of the parties and accepting the parties' stipulation into the record, the Board recessed the hearing pending the parties' filing of proposed findings of fact and conclusions of law and review of the record and deliberation by the Board. On February 6, the Applicants filed their Declaration of Covenants. On February 24, the State filed its proposed findings and a memorandum of law, and on February 28 the Applicants filed a memorandum. The Board conducted deliberative sessions on March 22, 1989 and April 19, 1989. On April 19, the Board declared the record complete and adjourned the hearing. This case is now ready for decision. The following findings of fact and conclusions of law are based exclusively upon the record developed at the hearing. To the extent the Board agreed with and found necessary any findings proposed by the parties, they have been incorporated herein; otherwise, said requests to find are hereby denied.

I. ISSUES IN THE APPEAL

The District Commission denied Land Use Permit Application #6F0391 under Criterion 8 because it found that the grid-like pattern proposed for the subdivision on the open

agricultural lands would create an undue adverse effect on the scenic and natural beauty of the area and that the Applicants had not taken reasonable steps to improve the harmony of the project with its surroundings. With respect to Criterion 9(B), the District Commission found that it could not make a positive finding because insufficient information had been provided by the Applicants. The District Commission also determined that a master plan for the development of the entire **448-acre** tract of land would be necessary to resolve the issues raised under Criteria 8 and 9(B).

In their Notice of Appeal, the Applicants contended that the District Commission's findings and conclusions as described above were in error. The State's position is that the District Commission was correct. The Applicants and the State subsequently sought to reach a settlement. Nevertheless, the parties filed prefiled testimony prior to the hearing. At the hearing, the parties submitted a stipulation in which the Applicants agree to provide substantial landscaping and other visual mitigation, to preserve 13.93 acres of land to be used only for agricultural purposes, and to submit to the District Commission, prior to any further subdivision of their land, a conceptual masterplan for the future development of the entire 448-acre property. For its part, the State withdraws its objection to this project.

The issues to be decided by the Board are whether the project as designed and modified by the Stipulation between the parties complies with Criteria 8 and **9(B)** of Act 250.

II. FINDINGS OF FACT

1. The Applicants own approximately 448 acres of land in the Town of St. **Albans**, which until recently they operated as a working farm. In March, 1988, the Applicants filed an application with the District Commission to subdivide a parcel of approximately 8.48 acres into 14 residential lots and to construct a **1,400-foot** road. The Applicants intend eventually to develop a substantial portion of this **448-acre** property.
2. The Applicants' lands are located on both sides of Interstate 89 in the vicinity of Exit 19. The subdivision would be located on the west side of Interstate 89, less than one-half mile from the Interstate. The project site is directly south of the Interstate Access

road into St. Albans City and is adjacent to Thorpe Avenue. The land between the site and the Interstate is primarily open farm land, except for the Collins-Perley Sports complex.

3. The 14-lot subdivision is laid out in two parallel rows of seven rectangular lots of equal size on both sides of a straight road. Adjacent to the site is an existing seven $\frac{1}{2}$ -acre lot subdivision developed by the Applicants which is laid out in a similar grid-like pattern.
4. The proposed subdivision site is part of an 18-acre section of land separated from the remainder of the Smith Farm by the Interstate access road and Route 104.
5. The proposed subdivision will be closer to the Interstate than other residential development in the area and will be one of the first residential developments viewed by motorists travelling north on the Interstate.
6. The subdivision site, which sits on the crest of a hill, is clearly visible from the Interstate. Other than a few commercial establishments and a large sports center in the Interstate viewshed, the foreground view from the Interstate is predominantly open space with most of the residential development located beyond the crest of a hill upon which the proposed subdivision will lie. The density of the residential development increases towards St. Albans City. The proposed subdivision will be located in a transition zone between fairly dense residential development and rural agricultural land.
7. Travellers on Interstate 89 experience a panoramic view to the west that includes rural farmlands, Lake Champlain, and the Adirondack Mountains in the distance. This stretch of Interstate 89 serves as the gateway to the St. Albans area and is an important scenic resource of the State. The open pasture land of the Smith farm contributes significantly to the scenic view.
8. No significant vegetation or topographical land forms exist between Interstate 89 and the project site to soften the view of the proposed subdivision from the Interstate. Without a significant and effective landscaping plan, the subdivision will be visible from the Interstate.

9. Continuation of the linear development pattern proposed by the Applicants over the remaining Smith Farm will result in the alteration of the unique scenic view from the Interstate.
10. The Applicants and the State have entered into a Stipulation in which the Applicants agree to take certain steps to mitigate the visual impact of the subdivision, including the following:
 - a) The Applicants will submit to the District #6 Environmental Commission and obtain approval for a conceptual masterplan before any further subdivision or development of the Smith Farm may take place. The masterplan, as spelled out more specifically in the Stipulation, will identify use areas by category, areas of preserved agricultural soils to be protected, buffer zones between agricultural and residential uses, the open spaces that will remain undeveloped, and the intensity of uses. In general, the masterplan will reflect a good faith attempt to create a favorable visual statement of the Applicants' land.
 - b) The Applicants will implement and continually maintain a landscaping plan identified as Exhibit C attached to the Stipulation and will replace any dead or diseased plantings as soon as seasonably possible.
 - c) Protective covenants will be included in the deeds of all lots sold in this subdivision that provide, among other things, a) a requirement that the lot owners maintain the landscaping, b) a requirement that all roofs be finished in dark, non-reflective colors, and c) a requirement that the colors of the building exteriors be consistent with the colors of the houses on neighboring streets.
11. The Applicants intend to use some landscaping materials transplanted from their property. Transplanted trees have higher rates of survival than nursery stock but do not provide screening as effectively as nursery trees because they are less bushy.
12. At least 200 acres of the Smith Farm qualify as primary agricultural soils. The site of the proposed subdivision contains primary agricultural soils: the soils have no limitations to cultivation which cannot be easily overcome, they are responsive to the use of

fertilizers, and are sufficiently well drained to allow sowing and harvesting with mechanized equipment. The average slope of the land is under 15 percent. The 8½-acre parcel is of a size capable of contributing to an economic agricultural operation. The project site represents approximately 4 percent of the Applicants' total tillable lands.

13. The Applicants have consented to Act 250 jurisdiction over their entire 448-acre property, which includes the land identified on Exhibit A attached to the Stipulation.
14. Pursuant to the Stipulation, the Applicants agree to preserve two parcels of primary agricultural soils totalling 13.93 acres. The parcels are located on both sides of the Interstate within the Smith Farm and are connected by an equipment underpass. The farmhouse, barn, and outbuildings are included on one of the parcels. The lands to be protected consist of primary agricultural soils, they have an equivalent potential for the production of food or forage crops as the agricultural soils on the subdivision site, they are currently used for agricultural purposes, they are in close proximity to both the active agricultural operation on the Smith Farm and the central portion of the farm and its associated farm buildings. These soils will be used only for agricultural purposes and will not be developed for the length of the land use permit issued for the proposed subdivision.

III. CONCLUSIONS OF LAW

Criterion 8 (Aesthetics and scenic beauty)

When evaluating projects for compliance with Criterion 8, the Environmental Board follows the protocol established in Re: Quechee Lakes Corporation, Land Use Permits #3W0411-A-EB and 3W0439-EB (November 4, 1985). The Board must first determine whether the proposed project has an "adverse" effect upon aesthetics and the scenic beauty of an area. In doing so, the Board considers whether the project is in harmony with its surroundings. This requires an analysis of a number of factors, including the nature of the project's surroundings, the compatibility of the project's design with its surroundings, the suitability of the colors and materials selected for the project, the perspective of the viewer, and the project's impact upon open space in the area.

This subdivision is proposed to be located in an area of great scenic beauty along Interstate 89. The Board has consistently emphasized the importance of protecting the scenic views along the Interstate corridor. See, e.g., Re: Heritage Group, Inc., Findings of Fact and Conclusions of Law #4C0730-EB (March 27, 1989); Ammex Warehouse Company, Inc., Land Use Permit #6F0248-EB (August 3, 1981). The character of the area is predominantly rural and agricultural with large open spaces and a sweeping panorama extending to Lake Champlain and the mountains in the distance. The existing residential development to the west and south of the project site is further and less visible from the Interstate than the proposed subdivision. The project will be in the middleground view from the Interstate. The density of the project and its grid-like design would contribute to a substantial loss of the open space that significantly contributes to the rural character and scenic beauty of the area surrounding the Interstate at the St. Albans exit.

The Board concludes, therefore, that the project is not in harmony with its surroundings and will create an adverse impact upon the aesthetics and scenic beauty of the area.

If the Board concludes that a project will have an adverse aesthetic impact, it must determine whether the adverse effect is "undue." An adverse impact is undue if the Board reaches a positive conclusion with regard to any one of the following:

- 1) Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area? Such standards may, for example, be set forth in the local or regional plan, or be adopted in the creation of an historic design district; or be incorporated into a municipal or State scenic road designation. If the Board or Commissions find that such standards do exist, and that the project as designed would violate those standards, the adverse impact would be undue.
- 2) Does the project offend the sensibilities of the average person? The Legislature has directed the Commissions and this Board, composed of lay people from many different communities within Vermont, to determine what is acceptable in terms of new developments' impact on aesthetics and scenic and natural beauty. If our sensibilities are, collectively, offended by a project, its impact under

Criterion 8 is undue. It is not enough that we might prefer to see a different design or style of building, or that we might prefer a different type of land use, but that the project, when viewed as a whole, is offensive or shocking, because it is out of character with its surroundings, or significantly diminishes the scenic qualities of the area.

- 3) Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings? Such steps may include selection of less obtrusive colors and building materials, implementation of a landscaping plan, selection of a less obtrusive building site within the project area, or reduction of the mass or density of a project. If there are reasonable alternatives available to the Applicant that would mitigate the adverse impact of the project, failure to take advantage of those alternatives may, in some circumstances, render undue an otherwise acceptable aesthetic impact.

No evidence of a community standard applicable to this project was offered by any party. Therefore, the first question is not relevant to this consideration.

The second and third questions can be addressed together. The Board concludes that the project is not shocking or offensive because of the mitigation provided by the extensive landscaping plan and the Protective Covenants. If properly implemented and maintained, the plantings will provide a softening effect to the harsh monotony of the lot lay-out and will partially screen the houses from the Interstate. The Board will allow the Applicants to use field-dug trees because of their potential superior survival rate. The Board notes that success of the landscaping plan is critical to the Board's finding that the project complies with Criterion 8.

The requirements in the Protective Covenants that the roofs be finished in dark, non-reflective colors and that the exterior colors of all structures be consistent with houses in the area will further mitigate the adverse visual impact of the subdivision.

The Board concludes that the proposed subdivision will not have an undue adverse effect upon the aesthetics and scenic beauty of the area if the landscaping plan is

implemented and maintained and the lot purchasers follow the mandates of the Protective Covenants. The Board will therefore condition the permit to require the continual maintenance of the landscaping and will incorporate the Protective Covenants into the conditions of the permit.

Criterion 9(B) (Primary agricultural soils)

If a project site contains primary agricultural soils, pursuant to 10 V.S.A. § 6086(a) (9)(B) the Applicants must demonstrate that the agricultural potential of the primary agricultural soils will not be significantly reduced. There is no dispute that the soils on the site of the proposed subdivision meet the definition of primary agricultural soils contained at 10 V.S.A. § 6001(15). The question the Board must resolve, therefore, is whether the subdivision will significantly reduce the agricultural potential of the primary agricultural soils.

The Board believes that if the 8.48-acre piece of land upon which the subdivision would be built were the entire property considered in this application, there would be no question that the agricultural potential of the soils would be destroyed. By subdividing the parcel into 14 lots and a road, all practical agricultural use of the site would be lost.

However, the Applicants have agreed that their entire 448-acre property will be included in the Board's jurisdiction both for this subdivision and for any future development of the farm. Before any further development or subdivision of the Smith Farm may take place, the Applicants will submit a master plan to the District #6 Environmental Commission. Among other things, the master plan will identify the location and size of areas of all the primary agricultural soils on the property and the location and size of the areas containing primary agricultural soils that will be protected for the life of any land use permit issued. In addition, the Applicants have agreed to specifically protect 13.93 acres of primary agricultural soils located on this farm. These soils are currently used for agricultural purposes, are located in close proximity to the central portion of the farm, and have an equivalent potential for producing food and forage crops to the soils on the subdivision site.

The Board believes that the loss of the 8.48 acres of primary agricultural soils, or approximately 4 percent of the primary agricultural soils on the property, is not a significant reduction in the agricultural potential of the

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primary soils on the Smith Farm, particularly in light of the Applicants' agreement to specifically protect from development another 13.93 acres of primary agricultural soils located on the property.

The Applicants wish to submit a master plan for the property after they have created this 14-lot subdivision, but before any further development of the property takes place. The Board believes that submission of the master plan before this site is subdivided would provide the Board with better information about the protection of the primary agricultural soils for evaluating whether the agricultural potential of the soils on the site will be significantly reduced. However, the submission of the entire property to jurisdiction and the immediate protection of the 13.93 acres allows the Board to find that the subdivision will not significantly reduce the agricultural potential of the primary agricultural soils.

IV. ORDER

Land Use Permit #6F0391-EB is hereby issued in accordance with the Findings of Fact and Conclusions of Law herein and Findings of Fact and Conclusions of Law #6F0391. Jurisdiction over this matter is returned to the District #4 Environmental Commission.

Dated at Montpelier, Vermont this 11th day of May, 1989.

ENVIRONMENTAL BOARD



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FF 6F0391-EB (APL20)