

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

RE: Green Peak Estates, Inc. FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Michael Bickford, President Land Use Permit Application
P.O. Box 727 #8B0314-2-EB
Dorset, VT 05251

This decision pertains to an appeal filed with the Environmental Board ("Board") on November 25, 1985, by Green Peak Estates, Inc. ("GPE") from the November 1, 1985 decision of the District #8 Environmental Commission ("Commission") denying approval for Phases II and III of a residential subdivision proposed for Dorset, Vermont.

A Prehearing Conference was convened in this matter on January 16, 1986, by the Board's Vice Chairman/1/ and a Prehearing Order was issued on January 21. The public hearing in this case was convened on February 10, 1986/2/, with the following parties participating:

Applicant/Appellant GPE by A. Jay Kenlan, Esq. and Peter Hall, Esq.
The Town of Dorset and Dorset Planning Commission (hereafter, collectively "the Town") by Joseph O'Dea, Esq.
The Bennington County Regional Commission ("BCRC") by Harvey Carter, Esq. and Robert Weinberg, Esq.
Agency of Environmental Conservation ("AEC") by Gordon Gebauer, Esq.
The Bennington County Natural Resources Conservation District by Robert Graf
J.B. Elliot and the Green Peak Orchard Association by Reed Colgrove, Esq.
Joan and Pierre Ledoux
Scout Proft

In addition, the Nature Conservancy entered its appearance in writing on February 3, 1986. The hearing was recessed on February 10 and reconvened on March 3 and May 15, 1986. The hearing was recessed on the latter date pending the filing of proposed findings by the parties, a review of the record for completeness, deliberations by the Board and the convening of further hearings after the issuance of a written decision

/1/ Board Chairman Bradley and Member Bongartz did not participate in the consideration of this case due to conflicts of interest.

/2/ GPE and all other parties waived any objection to the convening of the public hearing in this matter beyond the 40 day limit identified in 10 V.S.A. § 6085(b).

pertaining to Criterion 10 (see discussion in Section I, below). Proposed Findings were filed by the Applicant and BCRC on June 3 and by the Town on June 5. The Board conducted deliberative sessions to consider this case on June 4, June 18 and June 25. On **July 16**, the Board determined the record complete with regard to Criterion 10 and closed the record with respect to that portion of these proceedings.

I. ORGANIZATION OF PROCEEDINGS

Pursuant to 10 V.S.A. § 6086(b), BCRC requested that the Board first consider Criterion 10 and issue its decision thereon before proceeding to a consideration of other issues. No party having objected to this approach, the Board conducted hearings focused solely on Criterion 10 and deferred consideration of issues raised under the following Criteria in the Applicant's notice of appeal: 1(A) and **(B)** - waste disposal, 1(C) - water conservation, 2 and 3 - water quantity and quality, and 5 - **transportation.**^{/3/}

Parties intending to participate in any aspect of this case were directed to enter their appearances. However, only those parties interested in and admitted under Criterion 10 participated in the hearings held by the Board to date.

We conclude below that a permit must be denied based upon a review of the Town and Regional Plans. If no appeal is taken from this decision as provided in 10 V.S.A. § 6089, this decision will constitute the Board's final action in this case. If an appeal is taken, the Board will entertain a motion to stay the remaining proceedings in this matter during such time as the appeal is pending, pursuant to EBR 42.

II. FINDINGS OF-FACT

1. On September 12, 1983, GPE filed Land Use Permit Application #8B0314 with the Commission seeking approval for a project described by GPE as follows:

This project is a land subdivision for residential, detached homes on a 400 acre site. This application is for the'

^{/3/}GPE also identified issues under Criteria 4 and 8(A) in its notice of appeal; however, those issues were **subse-**quently withdrawn.

first of several phases to improve the land with roads, utilities, septic fields, and minor landscaping.

Exhibit #18.

2. While Application #8B0314 included substantial design detail with regard to "Phase I," only general information was provided with regard to subsequent phases, including a "Conceptual Development Plan" dated March, 1983. Exhibit #17. On March 15, 1984, the Commission issued Land Use Permit #8B0314 which:

specifically authorizes the permittee to create nine lots and a 2100'± access road, install utilities and septic fields for said lots, westerly of Dorset Hill Road, Dorset, Vermont.

3. The introduction to the Findings of Fact and Conclusions of Law accompanying Land Use Permit #8B0314 describes the Applicant's intention of developing a three phase project involving 400 acres. However, that document states, "This application requests approval of Phase I **only**." Exhibit #7. A review of the Commission's findings makes clear that no approval, tacit or otherwise, was intended with regard to any project element beyond Phase I. See, for example, Commission findings pertaining to Criteria 9(A) and 9(C), Exhibit #7. Further, during the Town's and Commission's review of Phase I, detailed plans and information were not provided for later phases and its approval was strictly limited to Phase I plans. See Exhibit #9.
4. On June 21, 1985 GPE filed Land Use Permit Application #8B0314-2 which included the following project description:

Residential subdivision for 37 detached homes on a 374± acre site. This application is for Phase II to improve the land with roads, utilities, septic, sewer, and minor landscaping Phase I was approved 3/15/84 for 9 lots. Phase III will follow for approval of 8 lots. Phase II is 20 lots.

The "Site Development Plan" submitted with Application #8B0314-2 is significantly different from the March, 1983 "Conceptual Development Plan" with regard to the location of roads, structures and lot lines, as well as in respect to the land included within the project area.

5. Access to Phases II and III would be provided over the private roadway constructed by GPE during Phase I. Entrance onto the property from Dorset Hill Road required GPE to make a severe cut through ledge. The access road runs in a generally east-west direction and now culminates in a circle.
6. A quite small portion of Phase II (parts of lots 10, 11, 12 and 13 and a 3.45 acre "common area") and approximately one-half of Phase III are open pasture land. The residual is mixed hardwood forest. In contrast, a portion of all nine Phase I lots is open pasture land.
7. The 20 Phase II lots on 120 acres and the nine Phase III lots on 40 acres all lie below the 2,000' elevation mark. GPE lands located northerly of Phase II and above the 2,000' mark will be reserved for forestry and recreational purposes. Should a permit be granted for this project in the future, we would require submission of a forestry and recreational plan for approval.
8. Phases I and II are characterized by steep slopes throughout the site, slopes which frequently exceed 20%. While the Applicant did not precisely quantify slope information, the followings summarizes the results of mapping provided by GPE (Exhibit #12):
 - a) Phase I. Of the nine approved lots, slopes appear to exceed 20% over more than one-half the area of at least five lots (1, 4, 5, 8, and 9). Further, only lot #6 is virtually free of slopes exceeding 20%; the remaining eight lots all have a significant portion exceeding that slope.
 - b) Phase II. Of the 20 proposed lots, slopes appear to exceed 20% over more than one-half the area of at least 11 lots (14 through 21, 23, 24 and 26). Further, only four lots (10, 11, 12, and 27) are virtually free of slopes exceeding 20%/4/; the remaining 16 lots all have a significant portion of their area which exceeds 20% in slope.
 - c) Phase III. Of the eight proposed lots, slopes appear to exceed 20% over more than one-half the area of only two lots (36 and 37), while four

/4/ Two of these four lots (11 and 12) have approximately half of their area allocated to leach fields.

lots (31 through 34) and a 10.28 acre "common area" are virtually free of slopes exceeding 20%.

9. Thus, with the exception of the southerly portion of Phase III, the entire project area is characterized by slopes which exceed 20%. Those areas scattered throughout the site which do not exceed 20% slopes fall within the 15 to 20% slope category and only a very small portion of the site consists of slopes of less than 15%. Exhibit #26.
10. Substantial cutting and filling would be required to install the access roadway proposed for Phases II and III as is evidenced by the blasting and excavation work which was required to install the 2,100' of Phase I road. While the Phases II and III road will be designed in order that grades do not exceed 10%, approximately 3,000' of the 6,240' of new road will traverse portions of the site which exceed 20% in slope.
11. The U.S. Department of Agriculture Soil Conservation Service mapping of the area reveals the following soils on the project site: Galway, Farmington, Georgia, Massena, Amenia and Nellis. All of these soil types are characterized by SCS as having moderate to severe limitations for improvements associated with residential subdivision, including leach fields, dwellings (with and without basements), roads, and lawns. Exhibits 27 and 28.
12. In substantial part because of slope and wetness limitations, GPE proposes waste disposal systems consisting of community leach fields located in isolated pockets of suitable soils. Soils characteristics are such that individual on-site systems cannot be installed on each lot in conformance with applicable Department of Water Resources waste disposal regulations.
13. Much of the Phase II lands consist of mature hardwood forest. This area, together with the GPE lands located above 2,000' have good potential for commercial forestry use.
14. The parties have stipulated and agreed that the "Plan of Development for Dorset, Vermont" as amended February 13, 1985 (Exhibit #1) is the duly adopted local plan applicable to the GPE project. The parties have also stipulated and agreed that "The Regional Plan, Bennington County, Vermont" adopted August 19, 1976 (Exhibit #4) is the duly adopted regional plan applicable to the project.

Based upon these stipulations and a review of the two documents, we find that Exhibits #1 and #3 are the duly adopted local and regional plans applicable to the GPE project and we further find that the provisions of the regional plan are not in conflict with the provisions of the local plan.

15. with the exception of a portion of Phase III, the GPE site constitutes "Intermediate Upland" as that term is used by the regional plan because:

- it lies outside the valley floor (valley areas fall within the area classified "Rural Residential" by the regional plan);
- it is characterized by slopes exceeding 20%;
- there are no improved roads into the Phase II and III lands;"
- there are no permanent structures on those lands.

See Exhibit #4, pages 33-34.

16. The 29 residences with associated sewers, disposal areas, and roads proposed by GPE do not conform with the regional plan's policies for Intermediate Upland areas: this intensive use is not an "open air use" as recommended by Policy 1; the project is replete with the sort of permanent improvements discouraged by Policy 2; the project is not an "intensive recreational activity: encouraged by Policy #3; and the permanent improvements proposed by GPE are not sensitive to the-moderate and severe limitations of the soils found on the site, contrary to Policy 4. See Exhibit #4, page 35.
17. The project does not conform to the regional plan's Site Planning and Location guidelines. See Exhibit 4, pages 38 - 40. This residential project is not located within an urban center, a village area or a rural residential area as recommended by the plan. The project is inconsistent with the plan's directive that residential development not occur on slopes greater than 20%.
18. Further, the access roadway as designed is not consistent with Transportation Policy 9, that all new road construction should be consistent with topographical limitations: nearly 50% of the new roadway will traverse areas with slopes exceeding 20%. The roadway design proposed by GPE also fails to conform with guidelines pertaining to local streets: the 600' length limitation on roads ending with cul-de-sacs is breached at three different locations.

19. With the exception of a portion of Phase III, the project also fails to conform with the following elements of the Dorset Town Plan:

- a. In view of the steep slopes, undulating topography, soil conditions, elevation, inaccessibility and forested nature of the site, the GPE lands constitute a "rugged and poorly accessible mountain and forest" area which the Town Plan recommends be preserved free from development. Exhibit #1, pages 3 and 8.
- b. The proposed driveway into Phases II and III does not conform with the recommendation that new highways be "chiefly in the nature of short access roads off present ones to reach new house sites." 6,240' of drive do not constitute a "short access road." Exhibit #1, page 5.
- c. The project is not located within a valley area where the plan recommends new housing to meet future population demands be located. Exhibit #1, page 6.

20. However, we find that a portion of Phase III does not have the same topographical limitations which play a prominent role in the remainder of the project's inconsistency with the town and regional plans. As Exhibits 8 and 26 document, that part of the site identified as Lots 31, 32, 33, and 34, the 10.23 acre "common land" parcel and the southerly portions of Lots 30, 35, 36, 37 and the 8.48 acre "common land parcel" are much more gentle in grade, are lower in elevation, and are substantially less forested than the residual of Phases II and III. Residential development of this portion of the site could be accomplished in a manner conforming with the town and regional plan.

III. CONCLUSIONS OF LAW

A. Estoppel/Vested Rights

In support of its position that Phases II and III should be approved, GPE raised an argument in the nature of estoppel or "vested rights." In essence the Applicant argued that the Town, BCRC and the Commission all approved Phase I and that approval was not appealed. At the time of these approvals, the Town, BCRC and the Commission were all aware that GPE proposed a multi-phased project. GPE further argues that the topographical characteristics of Phases II and III are similar

to those of Phase I. The Applicant concludes that the Town, BCRC and the Commission are now all estopped from concluding that Phases II and III do not comply with the local and regional plan and GPE has a vested right to an affirmative finding under Criterion 10.

We are unable to agree for several reasons. First, GPE's argument is not supported by the record. We have found that the Town's and the Commission's prior approval was strictly limited to Phase I and Permit #8B0314 and its accompanying findings do not provide either direct or tacit approval of the overall GPE development plan. Second, GPE could have sought either "masterplan approval" of a conceptual nature for the entire project in 1983 or it could have used EBR 21 to secure review under Criterion 10 for the entire project. As we discussed at length in Re: Bruce J. Levinsky, Declaratory Ruling #157 issued August 8, 1984, the masterpermit process which has been used in reference to industrial parks-is also available for other forms of commercial development. Had GPE sought approval for its overall multi-phased development plan, it could have submitted the entire proposal for "conceptual" review by the Commission, subject to a detailed review at a subsequent time when final design and engineering had been completed. Alternatively, using Rule 21, GPE could have sought Criterion 10 review of all three phases. Had GPE pursued either route it could now argue that Criterion 10 approval has, to some extent, become a vested right. Since the Applicant failed to pursue either approach, neither the Commission nor the parties is estopped from raising Criterion 10 issues with regard to Phases II and III. To hold otherwise would result in a denial of due process and the "fair hearing" guaranteed by Vermont's Administrative Procedure Act: we cannot now foreclose parties from contesting issues which the Applicant and the Commission did not fairly notify participants would be at issue in the Application #8B0314 proceedings. See 3 V.S.A. § 809 and Vermont Real Estate Commission v. Martin, 132 Vt. 309 (1974).

Finally, there have been significant alterations to GPE's overall development plan since the preparation of the March, 1983 "Conceptual Development Plan": the number and configuration of lots, the location of roads, the lands included within the project area, and the location of structures have all changed. Therefore, even if the hurdles discussed above could be surmounted, the 1983 plan is not the plan currently before this Board.

B. Conformance With the Regional and Town Plans

We have found that the provisions of the regional plan are not in conflict with the provisions of the Dorset Town Plan. Therefore, we are required by 10 V.S.A. § 6086(a)(10)

and 24 V.S.A. § 4348(h) to deny a permit in this case unless Phases II and III conform with both the local and regional plans.

We conclude that the project (with the exception of a portion of Phase III discussed below) does not conform with the Regional Plan. The site fulfills the Plan's definition of "Intermediate Upland" but the project conflicts with all four policies enunciated for Intermediate Uplands. The project also deviates from the regional plan's site planning and location guidelines in that it is not located within an urban, village or rural residential area; it does not comply with the directive that residential development not occur on slopes exceeding 20%; and the design of the access roadway deviates from the plan's guidelines concerning length and adaptation to topography.

We further conclude (with the exception discussed below) that Phases II and III do not conform with the Dorset Town Plan: the site constitutes a rugged and poorly accessible mountain or forest area which should be kept free from development; the access driveway is not a "short access road off present ones to reach new house sites"; and the project is not within a valley area where the plan directs that new housing needs be met.

However, we have found that, with the exception of the northern portion of lots 30, 35, 36, 37 and the 8.48 acre "common area," Phase III consists of more gently rolling open land which includes some open pasture land. This portion of the site is measurably and visually distinct in its topography when compared to the remainder of Phases II and III. While the present lot configuration and road access plan do not conform with the local and regional plan limitations discussed above, a revised plan making better use of the more gentle topography of Phase III could conform with the two plans.

IV. Order

Based upon the above Findings of Fact and Conclusions of Law, we conclude that Phases II and III as proposed by Green Peak Estates, Inc. do not conform with either the Plan of Development for Dorset, Vermont or the Regional Plan for Bennington County, Vermont.

Dated at Killington, Vermont this 22nd day of July, 1986.

VERMONT ENVIRONMENTAL BOARD


Lawrence H. Bruce, Jr.
Vice Chairman