

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

RE: Richard and Deborah Provencher Findings of Fact,
P.O. Box 645 Conclusions of Law and Order
West Brookfield, MA 01585 Application #8B0389-EB
and
Jamie Provencher
44 Lund Road
Nashua, NH 03060
and
Vincent and Estelle Santelli
54 Fairlawn Avenue
Southbridge, MA 01550
and
Rudolph and Jeanne Provencher
45 Clark Street
Spencer, MA 01562

This decision pertains to an appeal filed with the Environmental Board on August 3, 1987, by Richard and Deborah Provencher, Jamie Provencher, Vincent and Estelle Santelli, and Rudolph and Jeanne Provencher from the July 24, 1987 decision of the District #8 Environmental Commission. In that decision, the District Commission denied a permit for a 5-lot subdivision on 540 acres in the Towns of Sandgate, Rupert, Dorset, and Manchester, Vermont.

A prehearing conference was held on August 19, 1987, and a Prehearing Conference Report and Order was issued on September 8. The Board convened a preliminary hearing on August 26 and a hearing on the merits on October 20, 1987. On January 12 and February 16, 1988, the Board convened as an Administrative Hearing Panel pursuant to Board Rule 41. The following parties participated in the hearings:

Applicants by James P. W. Goss, Esq.
Bennington County Regional Planning Commission
(Regional Commission) by Gregory Burke, Executive
Director
Raymond and Gracia Welsh
Eugene Kennedy
James McAward
Helen Sausville
Gerhard Klinitzke
State of Vermont Agency of Natural Resources (ANR) by
Frederic Emigh, Esq.

The hearing was recessed on February 16 pending the submission of proposed findings of fact and conclusions of law by the parties and preparation of a proposed decision by the hearing panel. On February 23, the Applicants, the Regional Commission, and Gerhard Klinitzke filed proposed findings. A proposed decision was sent to the parties on July 7, 1988, and the parties were provided an opportunity

to file written objections and to present oral argument before the full Board. On July 18 Parties Kennedy and McAward requested oral argument, and on July 22 Mr. Klinitzke requested oral argument. On August 11 the Applicants filed written comments. On August 18 the Board convened a public hearing in Mendon and heard oral argument from the parties. On October 19, following a review of the proposed decision, the evidence presented in the case, and the written objections, legal memoranda and oral arguments of the parties, the Board declared the record complete and adjourned the hearing. This matter 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

A. Party Status

The Applicants appealed the District Commission's decision with respect to Criteria 1(B), 4, 5, 7, 9(H), and 10. Requests for party status were made by a number of people who live in the area of the proposed subdivision. The Applicants objected to those party status requests on all criteria except Criterion 4. The Acting Chair made preliminary decisions subject to review by the full Board and granted party status to the following persons pursuant to Board Rule 14(B)(1): Raymond and Gracia Welsh under Criterion 4; Eugene Kennedy under Criterion 1(B); James McAward under Criterion 1(B); Helen Sausville under Criterion 1(B); and Gerhard Klinitzke under Criteria 1(B) and 4. The full Board has reviewed the Acting Chair's preliminary decisions and the Applicants' objections and concurs with the Acting Chair.

At the conclusion of the hearing on the merits, the Applicants again challenged Gerhard Klinitzke's participation as a Rule 14(B)(1) party on Criterion 1(B). The Applicants argue that Mr. Klinitzke does not own or use a water supply which might be affected by the development. The Board rejects this argument on the understanding that Mr. Klinitzke has the right to use such a water supply.

B. Substantive Issues

Criterion 1(B) - Waste disposal

Eugene Kennedy and James McAward are concerned that a spring on their property below the project site which serves as their water supply will be polluted by the project.

Helen Sausville is also concerned that the project will pollute the water supply on her property as well as the Kennedy/McAward spring, to which she has a deeded right. Mr. Klinitzke, who also has a deeded right to use the Kennedy/McAward spring, is similarly concerned about the possibility of pollution. The Regional Commission also believes that undue water pollution will result from the project's sewage disposal systems. The State's position is that the sewage disposal system designs are generally adequate but that final design details and construction should be carefully reviewed to ensure that no undue water pollution will occur.

Criterion 4 - Soil erosion

Raymond and Gracia Welsh, Gerhard Klinitzke, and the Regional Commission believe that the improvement of 5100 feet of Town Highway #13 will result in severe soil erosion.

Criterion 5 - Traffic

The Regional Commission is concerned that unsafe conditions will result from the steepness and narrowness of Town Highway #13.

Criterion 7 - Municipal services

The Regional Commission believes that the project will create an unreasonable burden on the ability of the rescue squad, the fire department, and the school district to provide service to the project.

Criterion 9(H) - Scattered development

The Regional Commission believes that the project constitutes "scattered development" and that the additional costs of providing services are not outweighed by the benefits of the project.

Criterion 10 - Town and Regional Plans

The Regional Commission believes the project is not in conformance with either the Sandgate Town Plan or the Bennington County Regional Plan.

II. FINDINGS OF FACT

A. Description of the Project

1. The Applicants have proposed to create a 5-lot subdivision on 540 acres of land in the Towns of Sandgate, Manchester, Rupert, and Dorset. The lots, ranging from

26.6 acres to 340 acres, are located on the northeast side of Sandgate Town Highway #13, a Class IV Sandgate Town road. Town Highway #13 is the sole access to the property.

2. Lot #1 is 26.6 acres, with 25.0 acres located in Sandgate and 1.6 acres in Manchester. Lot #2 is 28.7 acres, with 17.5 acres located in Sandgate and 11.2 acres in Manchester. Lot #3 is 45.2 acres, 20.5 acres of which are located in Sandgate and 27.7 acres in Manchester. Lot #4 is 56.0 acres, with 20 acres located in Sandgate and 36.0 acres in Manchester. Lot #5 is 340 acres, with 70 acres located in Sandgate and the remaining acres are divided among Manchester, Dorset and Rupert.
3. The elevation of the project land ranges from approximately 1,000 feet to 2,600 feet. Grades on the land are predominantly over 20%. Lot #1, Lot #2, and Lot #3 are located below 1,800 feet in elevation. Approximately 15 of the 56 acres in Lot #4 are located below 1,800 feet. Approximately 18 acres of the 340-acre Lot #5 are located below 1,800 feet.
4. Town Highway #13 begins at Beartown Road, a Class III Sandgate Town highway. The Applicants have proposed upgrading Town Highway #13 to Class III standards for a distance of 5,100 feet from its intersection with Beartown Road.
5. Approximately a dozen residences are located along Beartown Road east of its intersection with Town Highway #13, some of which are occupied year-round. Adjoining landowners to the south of the project include Raymond and Gracia Welsh, Mr. and Mrs. Gerhard Klinitzke, Eugene Kennedy, James McAward, and Helen Sausville. Beartown Road becomes an unmaintained trail approximately one mile east of this intersection.
6. The property is located in the forested backland mountains at the northeastern corner of Sandgate, the southeastern corner of Rupert, the southwestern corner of Dorset, and the northwestern corner of Manchester. The only developed land in the area consists of the residences along Beartown Road and a seasonal camp at the end of Town Highway #13.
7. All portions of the property above 1,800 feet will be protected from development by covenants. All house sites will be below 1,800 feet and the portion of road to be improved is below 1,800 feet.

8. The lots will be sold subject to restrictive covenants which include the following restrictions:
 - a. The lots may not be subdivided.
 - b. The lots may only be used for single-family residential purposes.
 - c. All structures must be constructed and improvements must be made "along or in reasonable proximity to," or within 400 feet of, Town Highway #13.
 - d. A lot owners' association will be established that will be responsible for maintaining the road.
 9. Three high-yield springs are located in the area, one of which is on property owned by Mr. Kennedy and Mr. McAward. Mrs. Sausville and Mr. Klinitzke have deeded rights to the water from that spring. The Kennedy-McAward spring is located below the project site. The water in these springs is very pure and maintains a constant year-round temperature of approximately 47°.
- B. Criterion 1(B) - sewage disposal
10. The soils on the property are classified as Dummerston soils, which are defined as deep, well-drained, loamy soils. Dummerston soils are considered ideal for treatment of pollutants.
 11. A number of test pits were dug on the lots. No bedrock was encountered on Lots #1, 2, and 3. Ledge was encountered at 50" on Lot #4 and between 36" and 84" on Lot #5. Soil mottling, which indicates a seasonal high water table, was observed between 2 and 3 feet on Lots #2-5. Lot #1 is suitable for a conventional in-ground sewage disposal system. Mound type sewage disposal systems would be appropriate for Lots #2, 3, and 5. No area in the proximity of the proposed building site of Lot #4 would meet the applicable regulatory requirements for any type of waste disposal system.
 12. The Applicants have proposed an in-ground waste disposal system on Lot #1. The system would be located at the point where Town Highway #13 makes a sharp right-hand turn, in the area west of the old cemetery.
 13. Mound waste disposal systems have been designed for Lots #2, 3, 4, and 5. The disposal system for Lot #4 will be located on Lot #5.

14. If the sewage disposal system for Lot #1 is located as proposed, all of the systems will be located on the opposite side of a ridge from the three springs.
15. The proposed septic system designs have been reviewed by the Regional Engineer for the Department of Environmental Conservation, the on-site specialist for the Vermont Association of Conservation Districts, and a hydrogeologist. If properly constructed and maintained, the septic systems would adequately treat the sewage and wastewater from one residence on each lot.
16. Final engineering plans that contain details such as the location of the wells to serve each housesite will not be completed until the lots are sold and house sites are chosen.
17. The proposed septic system locations are several hundred feet above the springs and between 800 and 2,850 feet from the springs in a horizontal direction.
18. Ninety percent of sewage treatment will take place within the first six inches of soils in the in-ground septic system on Lot #1 and in the soils of the mounds before even reaching the ground in those systems on Lots #2, 3, and 5.
19. The Kennedy-McAward spring produces 5,000 gallons of water per hour or 83 gallons per minute. The output of a single family sewage disposal system is approximately 450 gallons per day.
20. If the septic systems are properly installed and maintained, there would be no measurable change in water quality at the springs.

C. Criterion 4 - Soil erosion
Criterion 5 - Highway Safety

21. The Applicants propose to upgrade Town Highway #13 for approximately 5100 feet from its intersection with Beartown Road. Town Highway #13 is a Class IV Sandgate Town highway and is not maintained by the Town. The only access to the project site is from Town Highway #13.
22. Town Highway #13 beginning at the intersection of Beartown Road has an initial grade of 5%, rising to 15% for approximately 250 feet.
23. Town Highway #13 traverses a slope in excess of 20% for a distance of 1,000 feet beginning at Beartown Road. Town Highway #13 drops steeply to the Green River on

the easterly side. The Applicants will install guardrails for the first section of road for a distance of 700 feet.

24. The travelled portion of Town Highway #13 will be widened to 18 feet. It will be built to Town highway specifications and will be passable by standard-manufacture pleasure cars at all seasons of the year.
25. Improvement of the road will require grubbing stumps, removing and stockpiling topsoil, placing fill, grading, spreading, creating ditches, stabilizing the area, seeding and mulching the topsoil on embankments and side slopes, and installing culverts.
26. The road will be constructed as shown on Board Exhibit #31 and in accordance with the erosion control narrative attached to Board Exhibit #20, all as modified by the letter from Craig Heindel attached to Board Exhibit #60, and in accordance with the Vermont Handbook for Soil Erosion and Sediment Control on Construction Sites (Board Exhibit #61.)
27. Erosion may occur from construction activity while road improvements are being made and from normal runoff after the improvements are completed.
28. A number of roads in Sandgate have grades in excess of 12%; one area of Town Highway #17 has a 19% slope for a distance of 500 feet.
29. Sight distances from the intersection of Town Highway #13 and Beartown Road are 500 feet in a southerly direction and 200 feet in a northerly direction.
30. A stop sign will be installed at the intersection of Town Highway #13 and Beartown Road so that cars will have to stop before entering Beartown Road. The Applicants will also install a driveway warning sign to the north of the intersection on Beartown Road.

D. Criterion 7 - Municipal Services
Criterion 9(H) - Costs of scattered development

31. The Arlington Volunteer Fire Department could service the subdivision if the road were upgraded to Class III road specifications.
32. The Arlington Rescue Squad would provide services to the project if the road were upgraded. The additional houses and distance may present a burden because resources of the rescue squad are limited.

33. Town Highway #13 will be privately maintained by the five lot owners pursuant to road maintenance covenants incorporated into the deeds to the lots.
34. The school bus stops on Beartown Road two miles from its intersection with Town Highway #13. It does not go further on Beartown Road because the school board has decided it is "unsafe or impractical because of time considerations to provide bus transportation."

C. Criterion 10 - Local and Regional Plans

35. The Sandgate Town Plan contains the following objectives:
 - a. Limit residential development to areas . . . located along and near existing roads, thus avoiding unnecessary new road mileage of appreciable length and costly servicing.
 - b. Keep the rugged and poorly accessible mountain and forest areas free from development, reserved for forestry and recreational uses appropriate to their wilderness character.
36. The Town Plan states that there are adequate house sites in the accessible valley land that is reached from existing town highways to meet the housing needs of a growing population.
37. The policy of the Town Plan for land use in forest and mountain areas includes the following:

Residences should only be allowed in the forest and mountain areas if they are located on large lots. A lot should have at least 25 acres in the Forest 2 District, below 1800 feet in elevation, and with conditional approval by the Zoning Board of Adjustment.
38. The Bennington County Regional Plan identifies the area that encompasses the project site as Intermediate Uplands. Intermediate Uplands areas are rugged mountainous and forest land generally below 2,500 feet in elevation characterized by grades in excess of 20%, the absence of improved roads, and the absence of permanent structures for year-round use.

39. The policies for the Intermediate Uplands areas are:

Policy 1 Open air uses such as hiking, cross country skiing, snowmobile trails, horseback riding, and natural resource utilization such as logging, sugaring, etc. are the most appropriate activities for this planning area.

Policy 2 Permanent improvements such as roads and utilities that support sustained or year-round use should be discouraged. This recognizes the need to protect natural resources and to minimize the cost borne by communities in providing services to these backlands.

Policy 3 Intensive recreation activities such as group camp sites are encouraged in areas with existing and suitable access.

Policy 4 Uses appropriate to intermediate uplands as identified in policies 1 and 3, should be sensitive to severe soil limitations to avoid erosion.

40. The Regional Plan's transportation plan includes the following policies:

Policy 3 The transportation system should be designed to minimize impact in residential areas, avoid loss of parks and recreation areas, disruption of neighborhoods, loss of natural resources, unique sites and wildlife habitat.

Policy 4 Major transportation improvements and investments should be encouraged to benefit urban centers, village clusters, and rural residential lands with minimal or no investments for roads serving intermediate and upland areas.

Policy 9 All new road construction should be consistent with limitations imposed by topographical conditions, natural areas, and areas that have special resource value.

41. The Regional Plan discourages development in areas which may be watersheds and aquifer recharge areas. The policies for such areas include:

Policy 1 Discourage land development that would impair or endanger watersheds supplying public or private water supply systems or known aquifer recharge areas.

Policy 2 Encourage open air uses and conservation areas for lands within major watersheds. Presently almost all of the major watersheds identified fall into the conservation and resource area of the regional plan map, and most town plans classify these lands in forest and recreation.

42. The Regional Plan's plan for location of future development recognizes the need to "[p]rotect rural areas and their natural values by avoiding scattered development and incompatible uses."

III. CONCLUSIONS OF LAW

A. Criterion 1(B)

Pursuant to 10 V.S.A. § 6086(a)(1)(B), the Applicants have the burden of proving that the subdivision will meet applicable regulations of other agencies regarding the disposal of wastes and that it will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells. No other agencies' regulations apply to this project.

The project is located above three springs which serve as the water supply to several residents whose properties adjoin the project to the south. The Board is sensitive to the concerns of the residents who use the springs and of the need to protect aquifers from pollution. The Board, however, is persuaded by the evidence in this case that the springs will not be polluted from the subdivision's septic systems. The predominantly Dummerston soils on the sites are well suited for septic systems because of their good permeability and depth. The systems will all be located on the opposite side of a topographic ridge from the springs so that the treated effluent will run away from the area of the springs. The horizontal distance of between 800 feet and 2,850 feet and vertical distance of several hundred feet from the septic system locations to the springs provides further assurance that even if the effluent were to flow toward the springs, it would have ample opportunity for treatment in the intervening soils. Even if effluent somehow made its way to the springs directly, the very large volume of water at the springs would provide such a high degree of dilution that the effluent would not be measurable.

Because the proper construction of the septic systems is critical to ensure that no undue water pollution will result, the Board will require that before development of any lot may take place, final engineering plans with details such as the location of the house site and the well, the type of effluent pump, etc., must be submitted to and approved by the State's Regional Engineer in Pittsford. The Board will also require that no house may be occupied until the septic system construction has been inspected and an affidavit filed by the inspecting engineer attesting that the construction complies with the approved plans and permit conditions.

The Board concludes that the Applicants have met their burden of proof on Criterion 1(B) and that no undue water pollution will result from the project.

B. Criteria 4 and 5

The Board is concerned that the potential for undue soil erosion during and after construction of the road is high, due to the narrowness of the existing road and the steep slopes of the road itself and of the land it traverses. The Board is persuaded, however, that if the detailed, site-specific erosion control plans submitted by the Applicants are followed, and if the road is properly maintained, the road can be constructed and maintained so that undue soil erosion does not result. The Board will require that the Applicants strictly follow the erosion control plans submitted with Exhibits #20 and 31, as modified by Craig Heindel's suggestions in Exhibit #60, and the Vermont Handbook for Soil Erosion and Sediment Control on Construction Sites. The Board will incorporate into the permit conditions the provisions of the Homeowners' Road Maintenance Covenants to ensure that the road is continually maintained to prevent erosion. To ensure that the road is properly constructed and maintained, the Board will require a bond, escrow account, or letter of credit in the amount of \$25,000.

Sight distances at the intersection of Town Highway #13 with Beartown Road are adequate. The Applicant will install a stop sign at the intersection and a driveway warning sign on Beartown Road north of the intersection. Guardrails will be installed along the portion of Town Highway #13 that has a steep drop-off at one side. The 18-foot width of the road will be adequate for vehicles passing in opposite directions. The maximum 15% grade of the road when improved will be less steep than portions of other roads in Sandgate.

The Board believes that if the road is properly constructed as proposed by the Applicants, neither undue erosion nor unsafe road conditions will result and that the Applicants have therefore met their burden with respect to Criteria 4 and 5.

C. Criteria 7 and 9(H)

Criterion 7 requires that the Applicants demonstrate that their project will not place an unreasonable burden on the ability of the local government to provide municipal or governmental services. Under Criterion 9(H), if a subdivision is not physically contiguous to an existing settlement, the Applicant must demonstrate that "the additional costs of public services and facilities caused directly or indirectly by the proposed development or subdivision do not outweigh the tax revenue and other public benefits of the development or subdivision such as increased employment opportunities or the provision of needed and balanced housing accessible to existing or planned employment centers."

The Board concludes that the Applicants have demonstrated compliance with Criterion 7, provided that Town Highway #13 is improved to Class III town road specifications and the Town is not required to maintain it. The Arlington Fire Department would be able to provide service to the subdivision and the school bus would not have to travel any additional miles because it could pick up and deliver children at the same location on Beartown Road. Town Highway #13 will be maintained by the lot owners and the Town will not be required to provide road maintenance. The subdivision may place a burden on the ability of the rescue squad to provide services, but the evidence did not indicate that the burden would be undue.

The Board concludes that although the project is not physically contiguous to an existing settlement, the project complies with Criterion 9(H) because it will not place an undue burden on the ability of the Town to provide services, as discussed above.

D. Criterion 10

The Board concludes that the subdivision conforms to the Sandgate Town Plan, provided that the Applicants improve the road to Class III Town standards and the Town is not required to maintain the road. The Town Plan encourages new residential development to be located along existing roads in order to avoid the costs of constructing and maintaining new roads. Since the lot owners will be required by their deed covenants and permit conditions to accept all responsibility for road maintenance, the policies in the Town Plan will not be violated by the construction of this road. The Town Plan provides that forest and mountain areas should be used for forestry use rather than development, but it does allow residential development of lots larger than 25 acres below 1800 feet in elevation. The lots in the

proposed subdivision range from 26.6 acres to 340 acres. Three of the lots are located entirely below 1800 feet. Fewer than 25 acres in Lots #4 and 5 are located below 1800 feet. No house sites will be located above 1800 feet, however, and the deed covenants and permit conditions will prohibit any development or construction above 1800 feet.

The Board concludes that the project does not conform to the Bennington County Regional Plan. As part of the Intermediate Uplands area, this property may only be used for recreational and natural resource activities, and permanent improvements such as roads or utilities are discouraged. Development in areas which may be watersheds and aquifer recharge areas is also discouraged. The Regional Plan also provides that the transportation system should be designed to avoid loss of natural resources, and minimal or no investment should be made in roads serving Intermediate Upland areas.

The Town Plan would allow this subdivision, but the project would violate the Regional Plan. When a conflict exists between a town and regional plan, 24 V.S.A. § 4348(h) provides that the regional plan applies to the extent that it is not in conflict with the local plan, in which case the regional plan will apply if there are substantial regional impacts from the project. The Board believes that the impacts from this subdivision do not have substantial regional impacts. Therefore, the Town Plan applies to this subdivision and the Regional Plan does not.

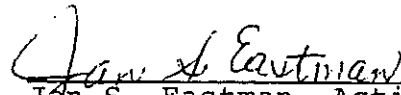
Since the Board has concluded that the project conforms to the Town Plan, the Applicants have satisfied Criterion 10.

IV. ORDER

Land Use Permit #8B0389-EB is hereby issued in accordance with the Findings of Fact and Conclusions of Law herein and Findings of Fact and Conclusions of Law #8B0389 issued by the District Commission on July 24, 1987. Jurisdiction over this matter is returned to the District #8 Environmental Commission.

Dated at Montpelier, Vermont this 19th day of October, 1988.

ENVIRONMENTAL BOARD



Jan S. Eastman, Acting Chair
Lawrence H. Bruce, Jr.
Elizabeth Courtney
Arthur Gibb
Samuel Lloyd