

4. i.

**Vermont Natural Resources Board
Land Use Panel
Guidance Document
June 28, 2006**

**Criterion 9(B) of Title 10: Protection of Primary Agricultural Soils.
Act 183 of the Vermont Legislature: Effective July 1, 2006.**

In recent years, major conflicts emerged in Act 250 when well designed projects proposed for areas planned for intensive growth by the municipalities were subject to denial since they had not been adequately clustered on the project tract in order to preserve a sufficient acreage of primary agricultural soils, a requirement of subcriterion 9(B)(iii) of Title 10. This requirement often resulted in isolated pockets of protected agricultural soils unlikely to be farmed in the future. Many agreed that the prior statutory language of Criterion 9(B) represented the antithesis of “smart growth” since it did not allow high density development to occur on primary agricultural soils in areas served by public investment and infrastructure. This led to the passage of Act 183 this year and the codification of “offsite mitigation” through the payment of fees.

Maximizing development densities in these areas, as allowed in Act 183, ultimately serves to take development pressure off primary agricultural soils in outlying rural areas. The Criterion 9(B) revisions approved in Act 183, effective July 1, 2006, promote more efficient land use and thus are in concert with “smart growth” land use principles and one of the statutory goals of Chapter 117 of Title 24 and Act 250's Capability and Development Plan which is to promote “compact urban and village centers surrounded by open countryside.”

Annotated statutory changes to Criterion 9(B):

10 V.S.A. § 6001 is amended to read:

§ 6001. Definitions.

* * *

(15) “Primary agricultural soils” means **soil map units with the best combination of physical and chemical characteristics that have a potential for growing food, feed, and forage crops, have sufficient moisture and drainage, plant nutrients or responsiveness to fertilizers,** few limitations for cultivation or limitations which may be easily overcome **and an average slope that** does not exceed 15 percent. **Present uses may be cropland, pasture, regenerating forests, forestland, or other agricultural or silvicultural uses. However, the soils must be** of a size **and location,**

relative to adjoining land uses, so that those soils will be capable, following removal of any identified limitations, of supporting or contributing to an economic or commercial agricultural operation. Unless contradicted by the qualifications stated in this subdivision, primary agricultural soils shall include important farmland soils map units with a rating of prime, statewide, or local importance as defined by the Natural Resources Conservation Service (N.R.C.S.) of the United States Department of Agriculture (U.S.D.A.).

Note: U.S.D.A. Important Farmland ratings identify soil map units that represent the best land for producing food, feed, fiber, forage, and oilseed crops in Vermont. Important Farmland inventories identify soil map units that consist of Prime Farmland, Unique Farmland, Additional Farmland of Statewide Importance, and Additional Farmland of Local Importance. This will provide greater predictability in the identification of primary agricultural soils which will continue be done by the Agency of Agriculture subject to final approval by the district commission. Applicants need to consult with the Agency of Agriculture early in the planning process to work on the identification of primary agricultural soils and explore opportunities for suitable mitigation for any loss in the potential of those soils.

The first step for a district commission is to determine whether a particular tract of land contains primary agricultural soils which are **“of a size and location, relative to adjoining land uses, so that those soils will be capable, following removal of any identified limitations, of supporting or contributing to an economic or commercial agricultural operation”**. The phrase **“relative to adjoining land uses”** is new. For further reference see USDA Report: Farmland Classification Systems for Vermont Soils - April 2003. Contact District Coordinator or local office of the NRCS/USDA.

If there are no primary agricultural soils on the project tract, the review ends. If the project tract does contain primary agricultural soils, then the district commission must determine if there will be any loss in the potential of such soils to support or contribute to an economic or commercial agricultural operation. If there is a reduction, then the commission must conduct a review under subdivisions (i) through (iv) of Criterion 9(B).

* * *

§ 6001. Definitions.

(30) “Designated growth center” means a growth center designated by the Vermont downtown development board under the provisions of 24 V.S.A. chapter 76A.

Note: The district commissions are not empowered to make their own determinations under this definition. Pursuant to the provisions of Chapter

76A of Title 24, an expanded Downtown Development Board has sole authority to formally designate growth centers. The type of primary agricultural soils mitigation will, in most situations, be determined by the location of the project.

10 V.S.A. § 6086(a)(9) is amended to read:

(9) Is in conformance with a duly adopted capability and development plan, and land use plan when adopted. However, the legislative findings of **subdivisions** 7(a)(1) through 7(a)(19) of this act shall not be used as criteria in the consideration of applications by a district commission.

* * *

(B) Primary agricultural soils. A permit will be granted for the development or subdivision of primary agricultural soils only when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will not **result in any reduction** in the agricultural potential of the primary agricultural soils; or:

Note: The “significant reduction” test has been eliminated and thus the district commissions are now required to review all projects that “result in **any** reduction in the agricultural potential of the primary agricultural soils” under the subcriteria of 9(B) as follows.

(i) **the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential;** and

Note: The “reasonable return on the fair market value of the land” evaluation is no longer required for any project reducing the potential of primary agricultural soils. Thus there will be no need for testimony from competing economic experts on the feasibility of growing alternative crops, etc. The first subcriterion is simply a restatement of former subcriterion (iv).

(ii) **except in the case of an application for a project located in a designated growth center,** there are no **lands other than primary** agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose **of the development or subdivision;** and

Note: Subcriterion (ii) is still operative for all projects on primary agricultural soils located outside of designated growth centers. Subcriteria (ii) and (iii) are not applicable to projects located on primary agricultural soils inside designated growth centers.

(iii) **except in the case of an application for a project located in a designated growth center,** the subdivision or development has been planned to minimize the reduction of agricultural potential **of the primary agricultural soils through innovative land use design resulting in compact development patterns, so that the remaining primary agricultural soils on the project tract are capable of supporting or contributing to an economic or commercial agricultural operation;** and

Note: The so called “clustering” provision in subcriterion (iii) remains with more focused language for all projects on tracts containing primary agricultural soils located outside of “designated growth centers.” The purpose of the mandatory clustering requirement is to protect a percentage of primary agricultural soils on project tracts located in outlying areas while promoting compact development patterns in designated growth centers served by necessary infrastructure such as roads, water and sewer, surrounded by open countryside – one of the goals of Chapter 117: Vermont’s Municipal and Regional Planning and Development Law. That percentage will be determined by the ratios established in Section 6093 of Title 10 as described below. The district commissions do have some flexibility to determine the type of mitigation, in “appropriate circumstances,” as authorized in Section 6093(a)(3). They do not have the authority to alter the mitigation ratios which are dependent on a number of factors including the location of the project and the quality of the soils.

(iv) **suitable mitigation will be provided for any reduction in the agricultural potential of the primary agricultural soils caused by the development or subdivision, in accordance with section 6093 of this title and rules adopted by the land use panel.**

Note: All projects reducing the potential of primary agricultural soils on a project tract are required to provide “suitable mitigation,” either “onsite or offsite,” which is dependent on the location of the project pursuant to Section 6093 below. It is important to understand that, for projects located outside of designated growth centers, the provisions of subcriteria 9(B)(iii) and 9(B)(iv) are identical (see § 6093(a)(2) which implements subcriterion 9(B)(iv):

.....the subdivision or development has been planned to minimize the reduction of agricultural potential of the primary agricultural soils through innovative land use design resulting in compact development patterns, so that the remaining primary agricultural soils on the project tract are capable of supporting or contributing to an economic or commercial agricultural operation.....

It is important to keep this in mind when a district commission is considering whether to exercise its authority to provide “mitigation flexibility” as authorized in § 6093(a)(3)(B).

10 V.S.A. § 6093 is added to read:

§ 6093. Mitigation of primary agricultural soils

(a) Mitigation for loss of primary agricultural soils. Suitable mitigation for the conversion of primary agricultural soils necessary to satisfy subdivision 6086(a)(9)(B)(iv) of this title shall depend on where the project tract is located.

(1) Project located in growth center. If the project tract is located in a designated growth center, an applicant who complies with subdivision 6086(a)(9)(B)(iv) of this title shall deposit an offsite mitigation fee into the Vermont housing and conservation trust fund established under section 312 of this title for the purpose of preserving primary agricultural soils of equal or greater value with the highest priority given to preserving prime agricultural soils as defined by the U.S. Department of Agriculture. Any required offsite mitigation fee shall be derived by:

(A) determining the number of acres of primary agricultural soils affected by the proposed development or subdivision;

(B) multiplying the number of affected acres of primary agricultural soils by a factor resulting in a ratio established as follows:

(i) for development or subdivision within a designated growth center, the ratio shall be 1:1;

(ii) for residential construction that has a density of at least eight units of housing per acre, of which at least eight units per acre or at least 40 percent of the units, on average, in the entire development or subdivision, whichever is greater, meets the definition of affordable housing established in this chapter, no mitigation shall be required. However, all affordable housing units shall be subject to housing subsidy covenants, as defined in 27 V.S.A. § 610, that preserve their affordability for a period of 99 years or longer. For purposes of this section, housing that is rented shall be considered affordable housing when its inhabitants have a gross annual household income that does not exceed 60 percent of the county median income or 60 percent of the standard metropolitan statistical area income if the municipality is located in such an area.

(C) multiplying the resulting product by a “price-per-acre” value, which shall be based on the amount that the secretary of agriculture, food and markets has determined to be the recent, per-acre cost to

acquire conservation easements for primary agricultural soils in the same geographic region as the proposed development or subdivision.

(2) Project located outside designated growth center. If the project tract is not located in a designated growth center, mitigation shall be provided on site in order to preserve primary agricultural soils for present and future agricultural use, with special emphasis on preserving prime agricultural soils. Preservation of primary agricultural soils shall be accomplished through innovative land use design resulting in compact development patterns which will maintain a sufficient acreage of primary agricultural soils on the project tract capable of supporting or contributing to an economic or commercial agricultural operation and shall be enforceable by permit conditions issued by the district commission. The number of acres of primary agricultural soils to be preserved shall be derived by:

(A) determining the number of acres of primary agricultural soils affected by the proposed development or subdivision; and

(B) multiplying the number of affected acres of primary agricultural soils by a factor based on the quality of those primary agricultural soils, and other factors as the secretary of agriculture, food and markets may deem relevant, including the soil's location; accessibility; tract size; existing agricultural operations; water sources; drainage; slope; the presence of ledge or protected wetlands; the infrastructure of the existing farm or municipality in which the soils are located; and the N.R.C.S. rating system for Vermont soils. This factor shall result in a ratio of no less than 2:1, but no more than 3:1, protected acres to acres of impacted primary agricultural soils.

(3) Mitigation flexibility.

(A) Notwithstanding the provisions of subdivision (1) of this subsection pertaining to a development or subdivision on primary agricultural soils within a designated growth center, the district commission may, in appropriate circumstances, require onsite mitigation with special emphasis on preserving prime agricultural soils if that action is deemed consistent with the agricultural elements of local and regional plans and the goals of section 4302 of Title 24. In this situation, the approved plans must designate specific soils that shall be preserved inside growth centers. For projects located within a designated growth center, all factors used to calculate suitable mitigation acreage or fees, or some combination of these measures, shall be as specified in this subsection, subject to a ratio of 1:1.

(B) Notwithstanding the provisions of subdivision (2) of this subsection pertaining to a development or subdivision on primary agricultural soils outside a designated growth center, the district commission may, in appropriate circumstances, approve off-site mitigation or some combination of onsite and off-site mitigation if that action is deemed consistent with the agricultural elements of local and regional plans and the goals of section 4302 of Title 24. For projects located outside a designated growth center, all factors used to calculate suitable mitigation acreage or fees, or some combination of these measures, shall be as specified in this subsection, subject to a ratio of no less than 2:1, but no more than 3:1.

Note: Legislative intent for the phrase “appropriate circumstances” appearing in this subdivision is summarized in a letter from Senator Ginny Lyons, Chair of the Senate Natural Resources Committee to NRB Chair Pat Moulton Powden dated March 30, 2006 and includes the following:

Primary agricultural soils [off site] mitigation is appropriate in circumstances in which agricultural viability of the subject parcel is limited, where the use of surrounding parcels is non-agricultural, and where off-site mitigation will best further the goal of preserving primary agricultural soils for present and future agricultural use with special emphasis on protecting prim[e] agricultural soils.

Note: As previously mentioned, for projects located outside designated growth centers, the requirements of subcriterion 9(B)(iii) and subdivision 6093(a)(2) (implementing subcriterion 9(B)(iv)) are identical. So in order to implement any regulatory flexibility as provided for above, a district commission needs to evaluate first whether “appropriate circumstances” exist and then it needs to make the necessary determination whether to waive a strict application of the “onsite mitigation” requirements of both subcriteria 9(B)(iii) and 9(B)(iv). The flexibility language above will allow for “offsite mitigation,” in “appropriate circumstances,” or some combination of “onsite or offsite mitigation.” Please refer to the Statement of Procedure regarding the Preservation of Primary Agricultural Soils adopted by the Land Use Panel of the Natural Resources Board on June 27, 2006 which gives greater guidance regarding how the phrase “appropriate circumstances” should be interpreted.

(4) Industrial parks.

(A) Notwithstanding any provision of this chapter to the contrary, a conversion of primary agricultural soils located in an industrial park as defined in subdivision 212(7) of this title and permitted under this chapter and in existence as of January 1, 2006, shall be allowed to pay a mitigation fee computed according to the provisions of subdivision (1) of this subsection, except that it shall be

entitled to a ratio of 1:1, protected acres to acres of affected primary agricultural soil. If an industrial park is developed to the fullest extent before any expansion, this ratio shall apply to any contiguous expansion of such an industrial park that totals no more than 25 percent of the area of the park or no more than 10 acres, whichever is larger; provided any expansion based on percentage does not exceed 50 acres. Any expansion larger than that described in this subdivision shall be subject to the mitigation provisions of this subsection at ratios that depend upon the location of the expansion.

(B) In any application to a district commission for expansion of an existing industrial park, compact development patterns shall be encouraged that assure the most efficient use of land and the realization of maximum economic development potential through appropriate densities. Industrial park expansions and industrial park infill shall not be subject to requirements established in subdivision 6086(a)(9)(B)(iii) of this title, nor to requirements established in subdivision (9)(C)(iii).

Note: There is no “clustering” requirement for expansion of industrial parks in existence as of January 1, 2006, subject to the limitations stated above. New parks proposed on primary agricultural soils, outside of designated growth centers, will be required to meet the so called “clustering” requirements of subcriterion 9(B)(iii) subject to any appropriate exercise of mitigation flexibility in subdivision (3)(B) of Section 6093(a) of Title 10.

For further assistance, please contact your District Environmental Coordinator or call 1-802-828-3300 for Michael Zahner, Executive Director.

Last Updated: April 6, 2007

*

J:\ADMIN\TRAINING\MANUAL\final\Act 183 - 9(B) Guidance Document (6 28 06).doc