

VERMONT ENVIRONMENTAL BOARD  
10 V.S.A. §§6001-6092

Re: *The Van Sicklen Limited Partnership*

Land Use Permit  
Application #4C1013R-EB

**MEMORANDUM OF DECISION**

This proceeding concerns an appeal by Friends of Muddy Brook Basin ("FMBB") from a decision by the District 4 Environmental Commission ("Commission") granting a permit to The Van Sicklen Limited Partnership ("VSLP") for a residential development on 61.77 acres off Hinesburg Road (Route 116) and Van Sicklen Road in South Burlington (the "Project").

Before the Environmental Board ("Board") at this time are evidentiary objections filed by FMBB as to certain testimony and exhibits filed by other parties.<sup>1</sup>

**I. Discussion and Rulings on Evidentiary Objections**

A general observation is appropriate before the Board addresses the specific objections raised by FMBB.

Many evidentiary rules exist in order to prevent juries from being unfairly influenced by testimony which may be at the edges of admissibility. The Board sits more as a judge, not a jury, and has the capacity, with the help of its legal staff, to screen out and not consider evidence which is truly improper and which should be excluded. Thus, while an objection may be proper and would lead to the exclusion of evidence in order to shield a jury from its influence, the Board has experience hearing cases and is thus not as likely to be unduly swayed by a questionable evidentiary offering. The Board therefore leans toward the side of admitting evidence and then, when considering it, giving it the weight, if any, that it deserves.

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<sup>1</sup> VSLP filed comments on FMBB's testimony but did not object to FMBB's filings. This decision, therefore, will address only FMBB's objections.

As to FMBB's specific objections:

1. **Jim Donovan Direct (Exhibit VSLP 17)**

a. ***A6, page 3-4: "These planned residential developments have been consistently located in the development areas identified in the latest version of the Southeast Quadrant's Official Zoning Map, which is Exhibit 32 of Robert Snyder's testimony."***

FMBB argues that Exhibit VSLP 32 (SEQ Official Zoning Map dated 10/16/00) is not admissible because it is not the version of the Official Zoning Map that was in effect at the time of application and is therefore irrelevant to this proceeding. It is also not admissible to the extent that it shows any developments which are not currently constructed. The character of the area for purposes of Criterion 8 is based upon existing conditions. Any "planned" but not constructed development is irrelevant.

VSLP responds that Exhibit VSLP 32 is not introduced or alleged to be the official zoning map for purposes of determining whether the Project complies with the map or zoning regulations. The purpose of the Exhibit is to show the City's implementation of the provisions of its Comprehensive Plan and Mr. Donovan refers to the map to help establish the character of the SEQ.

The Board will admit Exhibit VSLP 32. FMBB may cross-examine Donovan's use of the Map. Further, the Board reads Donovan's reference to "planned residential developments" to be a reference to PRDs, not to developments that have been planned but not yet built.

b. ***A7, page 4 - "The Existing Conditions Plan which is Exhibit VSLP 20 to my testimony shows the current conditions on the site."***

FMBB argues that Exhibit VSLP 20 is not admissible because (a) no foundation testimony as to how it was prepared has been provided, and (b) the map is misleading because it shows only some of the existing conditions (for example, some of the primary agricultural soils) but not all of them.

VSLP responds that Exhibit VSLP 20 is merely illustrative of the detailed descriptive testimony of the site found in Donovan's Answer 7. FMBB may attempt to establish at the hearing its claim that the Exhibit is misleading.

The Board finds that, as to objections based on the lack of a foundation for a proffered Exhibit, FMBB is correct: the foundation of an Exhibit, such as a map or a photograph, should be provided at the time that the Exhibit is proffered. The Board therefore sustains the objection but will allow VSLP the opportunity lay the proper foundation at the time the Exhibit is offered through a witness. If the Exhibit is inaccurate or attempts to be more than simply a map which provides a graphic of Donovan's testimony at Answer 7, FMBB may cross-examine on these points.

**c. A8, page 5 - "The second issue that impacted heavily in designing the project for reconsideration was the significant planning efforts that had been undertaken by the City of South Burlington to both accommodate and reshape the pattern of growth and preserve the special character of the SEQ. Beginning with the information of the natural areas in the SEQ generated by the Boyle Studies, promulgated in the adoption of the 1996 Comprehensive Plan and implemented by the adoption of Article VI: Southeast Quadrant District in the City's zoning regulations, the City of South Burlington has recognized the significance of the natural features of the SEQ and implemented policies to conserve the beauty of the area and its open space and natural resource values."**

FMBB asserts that the "planning efforts" that the City of South Burlington has undertaken are irrelevant to the issue of whether this project conforms with the 1996 Comprehensive Plan. Thus any references to the planning history, including the "Boyle Studies" and the "Boyle Study" itself (Exhibit VSLP 29), are irrelevant and should not be admitted.

The Board overrules the objection. Board admitted the Boyle Study<sup>2</sup> when the first incarnation of this matter was before it in 19988 - 1999. *Nile and Julie Duppstadt & Deborah and John Alden, #4C1013 (Corrected)- EB, Findings of Fact, Conclusions of Law, and Order (April 30, 1999)*. The Board will admit Exhibit VSLP 29 and the testimony and give them both the weight they deserve. The Board notes that the *Duppstadt* decision makes no reference to the Boyle Study in its Findings or Conclusions.

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<sup>2</sup> While there are references to the "Boyle Studies" in the testimony and in the South Burlington Comprehensive Plan, only one Study, Exhibit VSLP 29, has been submitted by any party as an exhibit in this case. It is only this Exhibit that the Board admits into evidence.

**d. A 11, page 10: The photos labeled Van Sicklen Road C, Van Sicklen Road D and Van Sicklen Road E of Exhibit VSLP 22 graphically depict the alterations that the proposed subdivision will make to the views from Van Sicklen Road."**

**A 11, page 11: as depicted on the photo captioned 'Hinesburg Road' in Exhibit VSLP 22."**

**A15, page 15 - "Photos captioned 'Walker Hill Road,' 'South Brownell Road' and 'Van Sicklen Road A' included in Exhibit VSLP 22, taken on the roadways in Williston from which the site can be seen, show the extent of nearby residential land uses.**

FMBB argues that no foundation has been provided for Exhibit VSLP 22.

The Board sustains the objection but will allow VSLP the opportunity lay the proper foundation at the time the Exhibit is offered.

**e. A15, page 15 - "That expectation is further validated by the fact that the SEQ is classified as Urban Mixed Use in the Chittenden County Regional Plan, a classification accorded 'areas that are primarily residential and adjacent to growth centers' where 'planned residential developments are strongly encouraged."**

FMBB objects to the admission of testimony based on Exhibit VSLP 31 (the Chittenden County Regional Plan), as the Regional Plan is not an issue in this appeal, and therefore references to it are irrelevant.

VSLP replies that the Exhibit is offered to show the proximity, and recognition of the proximity, of the SEQ to the regional growth center.

The Board admits this testimony for the limited purpose advanced by VSLP in its response. Testimony to the effect that the Project fits within the Regional Plan (and therefore complies with the South Burlington City Plan) is not admitted.

**2. Mark Lords Direct (Exhibit VSLP 23)**

**a. A9, page 6-7- "We had a very similar set of circumstances in a planned residential development we are presently constructing in the Town of Williston .... to the end of the answer on page 7.**

FMBB argues that this testimony about a different development and the process the applicant followed is irrelevant to any issue in this proceeding and should be stricken.

The Board sustains this objection; what happened in another project is not relevant to the Criterion 9(B) issue presented here. This testimony is excluded.

**b. A7, page 5: "... a copy of which is Exhibit VSLP 24 to my testimony."**

FMBB argues that there is insufficient foundation information provided for Exhibit VSLP 24. FMBB also asserts that the Exhibit is inconsistent with other delineations of the extent of primary agricultural soils on the site, and appears to be inaccurate.

The Board sustains the objection but will give VSLP the opportunity lay a proper foundation. As to the document's accuracy, this may be grounds for cross-examination on the Exhibit if a foundation is established, but it is not grounds for exclusion.

**c. A12, page 10 - "As I mentioned earlier, the Department, comfortable with the terms of the Stipulation, agreed to execute the Mitigation Agreement containing the formula used in Chittenden County."**

FMBB argues that Lords cannot testify as to how the Department of Agriculture felt about the Mitigation Agreement.

The Board will exclude the phrase, "comfortable with the terms of the Stipulation." The Mitigation Agreement speaks for itself.

**3. Robert Snyder Direct (Exhibit VSLP 26)**

**a. A6, page 4: Entire answer.**

FMBB argues that Answer 6 should be stricken in its entirety because (a) Snyder's "impression" as to South Burlington's motive is pure speculation and not based on his personal knowledge, see Vermont Rules of Evidence 602, and (b) the testimony in Answer 6 that relates to the Regional Plan is irrelevant, as the Regional Plan is not an issue in this proceeding.

The Board sustains the objections as to Snyder's impressions of South Burlington's "sense of urgency." The Board has already admitted the Regional Plan for

limited purposes. The Board admits Exhibit VSLP 30, the map of the area, which shows the relationship between the SEQ and other parts of Chittenden County and the testimony which discusses the map

**b. A7, page 4-5, A8, page 5-6**

FMBB contends that the entirety of Answers 7 and 8 are inadmissible because they are irrelevant and consist entirely of speculation and hearsay.

The Board sustains the objection. Some of Snyder's statements in Answers 7 and 8 are speculative (e.g. "... the City has shouldered the responsibilities placed on it..." and "South Burlington recognized...." and "... the City has been sensitive...") and others are pure argument. ("This is a direct reflection.... ") Further, little of these answers is actually testimony; rather, it is argument which should be proffered as such, not as testimony.

**c. A8, page 7 - "This is reflected in the latest updated Southeast Quadrant Official Zoning Map dated 10/16/00 which is Exhibit VSLP 32 to my testimony...."**

FMBB argues that both Exhibit VSLP 32 and any reference to it should be excluded because the applicable municipal plan and zoning regulations in this appeal are those dated 1996, as they were in effect when the application was filed.

In its response to objection 1(a), VSLP noted that Exhibit VSLP 32 "is not introduced or alleged to be the official zoning map for purposes of determining whether the Project complies with the map or zoning regulations." Rather, VSLP notes that Exhibit VSLP 28 (Southeast Quadrant Official Zoning Map) is the one which governs this case. Here, Snyder is merely stating that the present 2000 Map shows how other projects in South Burlington have "adhered to the boundaries of the development areas established in the Zoning Regulations." (Answer 8, p. 7) The Board will admit Exhibit VSLP 32 for the limited purposes advanced by VSLP.

**d. A9, page 7 - "To emphasize the differences from the previous Dupstadt subdivision, Exhibit VSLP 33 places the two site plans side by side."**

FMBB contends that both Exhibit VSLP 33 and testimony referring to the Exhibit should be stricken because (a) it lacks a foundation and (b) it is misleading because there is open space on the *Duppstadt* map that is not colored green, whereas the same open space is colored green on the map which is Exhibit VSLP 33.

As to the foundation objection, the Board sustains the objection but will give VSLP the opportunity lay a proper foundation at the time VSLP seeks to introduce the Exhibit through a witness. FMBB may explore the alleged inaccuracies of the Exhibit through cross-examination.

***e. A12, page 10: References to the Official Zoning Map, Future Land Use Map, and the Boyle Study***

FMBB argues that references to the Official Zoning Map, Future Land Use Map, and the Boyle Study, should be stricken for the reasons explained above. The Official Zoning Map was prepared in 2000, so that it does not apply to this project. The Boyle Study is irrelevant to the question of whether this project complies with the Comprehensive Plan.

As noted above, the 2000 Official Zoning Map is not offered as the governing document so the Board will admit it for the limited purposes stated earlier. As before, the Board will admit the Future Land Use Map (part of the Regional Plan) and the Boyle Study and given them the weight they deserve.

***f. A13, page 11 - "My conclusions are supported by the Findings of Fact and Decision of the South Burlington Development Review Board, a copy of which is Exhibit VSLP 35 to my testimony."***

FMBB argues that this statement and Exhibit VSLP 35 are not admissible because the decision of a Development Review Board has no relevance to the Environmental Board's determination of compliance with the City Plan. FMBB further states that the Board would start a dangerous precedent if it were to consider decisions of the local zoning board or planning commission or development review board in determining compliance with a municipal plan.

VSLP responds that the DRB decision is not introduced to show compliance with Criterion 10, but to show the City's interpretation of its Zoning Ordinance and Comprehensive Plan is consistent with Mr. Snyder's claims as to the specific elements of density and the Project's lack of encroachment into restricted areas.

Under the new language in 10 V.S.A. §6086(a)(10) added by the legislature, in making findings under Criterion 10, if there is ambiguity in the Town Plan, the Board must consider consistent zoning bylaws but "need not consider any other evidence." Thus, relevancy is not a ground to exclude the DRB decision, and it will be admitted.

Admission of the decision does not necessarily mean, however, that the Board will consider it.

**4. Exhibit VSLP 36**

FMBB argues that this Exhibit, along with attachments, does not appear to have been submitted in connection with anyone's testimony. Furthermore, it is not admissible because it is an analysis that compares the Plans of Williston and South Burlington, which was written by VSLP's attorney.

VSLP asserts that Snyder had a direct hand in the preparation of Exhibit A of Exhibit VSLP 36 and that he reviewed, revised and approved the letter which was furnished to the District Commission. FMBB can question Mr. Snyder as to his participation and the conclusions he arrived at.

The Board will admit Exhibit VSLP 36. It was submitted in connection with Snyder's testimony. See Exhibit VSLP 26, Answer 18 at p. 18. FMBB may cross-examine Snyder on the Exhibit.

**5. Jim Donovan Rebuttal (Exhibit VSLP R4)**

**a. A2, page 3 – "Exhibit VSLP R5 shows a cross section through the site and some of the highest single family homes, as well as those furthest away from Hinesburg Road. These are the homes which viewers on Hinesburg Road would be most likely to see. The cross-section shows that the existing vegetation, which is thick enough in the winter to form a dense mass, will obscure the houses from views along Hinesburg Road."**

**"The photographs in Exhibit VSLP R6, as well as some of my prior exhibits, illustrate that point."**

FMBB argues that these statements, as well as Exhibits VSLP R5 and R6, are inadmissible because no foundation testimony has been provided.

VSLP responds that the information on where the Exhibit VSLP R6 photos were taken is pinpointed on Exhibit VSLP R5, and the reasons for the photos are in the testimony.

While it is correct that Exhibit VSLP R5 shows the places the Exhibit VSLP R6



photos were taken and the testimony provides the reasons for the photos, this is not a sufficient foundation for the photos. The Board therefore sustains the objection but will allow VSLP the opportunity lay a proper foundation at the time the Exhibits are offered through a witness.

**b. A3, page 5: "South Burlington recognized that the portion of the Development Area comprised of the meadow would mean clustered houses would be visible from Van Sicklen Road, but felt that visibility is more than outweighed by the benefits of having the houses located in the meadow."**

FMBB argues that this testimony is speculation and hearsay, as Donovan cannot testify, based on first hand knowledge, what South Burlington "recognized" or how South Burlington "felt." Such testimony, FMBB claims, is also irrelevant to whether the project complies with Criteria 8 or 10.

The Board sustains the objection.

**c. A4, page 6 - "Exhibit VSLP R6 pictorially depicts where Brownell Mountain is visible from Van Sicklen Road. In addition, Exhibit VSLP R5 pinpoints where the photographs were taken and just how short a stretch of Van Sicklen Road the mountain can actually be seen from. The exhibits speak for themselves."**

FMBB argues that there is no foundation for Exhibits VSLP R5 and R6.

The Board sustains the objection but will allow VSLP the opportunity lay a proper foundation at the time the Exhibits are offered through a witness.

**d. A5, page 7- "This open space, which excludes the area around the carriage homes previously included, is depicted on Exhibit VSLP R7."**

FMBB argues that there is no foundation for Exhibit VSLP R7. FMBB also contends that there is no explanation for determining what should be included as green.

VSLP responds that, as to Exhibit VSLP R7, the coloring information is determined by referring to the Legend on the Exhibit.

The Board sustains the objection but will allow VSLP the opportunity lay a proper foundation at the time the Exhibits are offered through a witness. As to the color, while there are references to "open space" on the map itself, the Board's can find no

explanation in the Legend as to what should be included as green. This, however, is not a ground for exclusion of the Exhibit. FMBB can cross-examine Donovan to learn the answers to its questions.

**e. A5, page 8- "The most visible and valuable are those soils along Hinesburg Road which are being preserved. A portion of the agricultural soils in the lower meadow will be used for development purposes, but those agricultural soils are less valuable and fall in the Development Area on the project site."**

FMBB argues that there is no foundation provided for Donovan to have an opinion about the "value" of the primary agricultural soils, as he has not been qualified as a witness on agricultural soils.

The Board sustains the objection and strikes the references to the soils' value.

**f. Q7 and A7, page 10-11**

FMBB argues that the entire answer should be stricken because it is not proper rebuttal testimony, as the question asks Donovan to "elaborate" on his original testimony but does not ask for testimony that rebuts any of FMBB's direct testimony.

VSLP responds that Donovan is merely pointing out that Criterion 9(H) is not before this Board in this appeal.

The Board overrules the objection. The Board has held that if rebuttal testimony is responsive and relates to direct testimony, it is admissible. *Re: City of Montpelier and Ellery E. & Jennifer D. Packard*, 5W0840-6-WFP, Memorandum of Decision at 4 (Feb. 2, 2000). Donovan's answer addresses Brian Shupe's testimony (FMBB's Exhibit F3-A) as to leapfrogging sprawl (see Exhibit F3-A, p. 16, Answer 10).

**g. A7, page 11 - "This fact was recognized by the District Commission when it reviewed this project and concluded that the project does not constitute scattered development nor 'leapfrogging' as the FMBB would have one believe, conclusions which were not appealed to this Board."**

FMBB argues that it is irrelevant what the District Commission did or said in this de novo appeal at the Environmental Board. Further, FMBB did appeal Criteria 8 and 10, so that Donovan is incorrect in stating that the Commission's conclusions were not appealed to the Board.

The Board sustains the objection and strikes the part of Donovan's testimony as to what the District Commission may or may not have recognized. FMBB has given no evidentiary basis for excluding Donovan's statements as to which conclusions were appealed, so this objection is overruled.

**6. Mark Lords Rebuttal (Exhibit VSLP R8)**

**a. A2, page 1 - "In the original Duppsstadt hearing the Board recognized the poor viability of the 9 acre site and only classified it as primary agricultural soils because an underground drainage system could be installed to 'dry out' the site."**

FMBB argues that this testimony should be stricken because it mischaracterizes the Board's *Duppsstadt* decision, has no probative value, and is misleading testimony, which violates VRE 403.

The Board overrules the objection. Whether the testimony mischaracterizes the *Duppsstadt* decision is an area for cross-examination, not exclusion. As to VRE 403, which addresses misleading a *jury*, the Board is not likely to be misled.

**b. A5, page 7**

FMBB argues, *inter alia*, that the second paragraph should be stricken because it is irrelevant to the question of whether the Project uses "cluster and new community planning designed to economize on the cost of roads, utilities and land usage."

The objection is sustained; testimony comparing the Project to other developments which the principals of VSLP have built elsewhere is not relevant.

**7. Robert Snyder Rebuttal (Exhibit VSLP R10)**

**a. A2, page 4-6: starting on line 8 of the middle paragraph on page 4, through the first two sentences on page 6.**

FMBB argues, *inter alia*, that Snyder's discussion of the history of planning in Chittenden County and South Burlington is irrelevant to any consideration of whether this project complies with the South Burlington Comprehensive Plan.

The Board sustains the objection; Snyder's testimony as to the history of the Regional Plan and as to South Burlington's motivations is not relevant to this case.

**b. A2, page 6 - I would refer you to my Exhibit 36 which explains our position regarding Williston 's regulations."**

FMBB argues that Exhibit VSLP 36 was not submitted in connection with any witnesses' testimony, and it does not constitute testimony but rather is an analysis prepared by VSLP's lawyer.

The Board will admit Exhibit VSLP 36. It was submitted in connection with Snyder's testimony. See Exhibit VSLP 26, Answer 18 at p. 18. FMBB may cross-examine Snyder on Exhibit VSLP 36.

**8. Terry Boyle Direct (Exhibit SBPC-1)**

**a. A6 through A7, page 2-3**

FMBB argues that Boyle's testimony about the history of planning efforts in South Burlington and the alleged reasons for some of the provisions of the Plan are irrelevant to the question of whether the Project complies with the South Burlington Comprehensive Plan and should therefore be stricken.

The South Burlington Planning Commission ("SBPC") responds that the Boyle Studies are relevant to several issues before the Board. Much of the remainder of the Planning Commission's response is argument on the merits of this case.

As noted above, the Board admitted the Boyle Study (Exhibit VSLP 29) in the *Duppstadt* appeal, and the Study is specifically referenced in the Comprehensive Plan. In *Duppstadt*, the Board also admitted prefiled testimony from Terry Boyle concerning the adoption of the 1996 Comprehensive Plan. The Board will therefore admit the Study and testimony from Terry Boyle concerning Exhibit VSLP 29 and give both the weight they deserve.

**b. A12 -A13, page 4-6, and Exhibit SBPC-6**

FMBB argues that Boyle's testimony about the Chittenden County Regional Plan is irrelevant to this appeal. FMBB further argues that Exhibit SBPC-6 (the 1995 Land Use Map from the Draft 2001 Regional Plan) should also not be admitted.

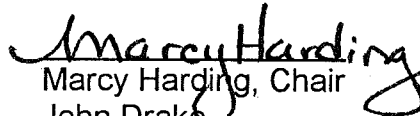
SBPC replies that Boyle's testimony regarding the Regional Plan and the growth center concept responds to assertions by FMBB's witnesses (Vissering and Shupe) tha

the Project reflects a leapfrogging sprawl pattern, is not close to any growth center, and does not provide an appropriate reduction in density. Furthermore, SBPC asserts, Exhibit SBPC-6 is provided in direct response to FMBB Exhibit FI-J, which fails to accurately depict Chittenden County growth centers.

The Board overrules the objections and admits Boyle's testimony and Exhibit SBPC-6 for the purposes stated by SBPC.

Dated at Montpelier, Vermont this 28th day of September 2001.

ENVIRONMENTAL BOARD



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