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STATE OF VERMONT
ENVIRONMENTALBOARD
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DATE: November 4, 1992
TO: Interested Persons
FROM: Stephanie *SK* Kaplan, General Counsel
RE: Sam and Rachel Smith
Edwin and Avis Smith
Declaratory Ruling #266

The Environmental Board has issued a Declaratory Ruling in which it ruled that an application for the Grice Brook development and master plan for the Smith farm in St. Albans is complete. The Board concluded that the information which the Smiths submitted is sufficient for the limited purpose of allowing the application to be accepted into the process to be reviewed by the District Commission. The Board confirmed its previous ruling that before the land can be developed or subdivided the District Commission must find that the master plan adequately protects the resources on the Smith farm, as required by Condition 20 of Land Use Permit #6F0391-EB.

In making this decision, the Board did not judge the merits of the master plan to determine whether it adequately protects the resources on the land, but determined that the Petitioners submitted sufficient information for the District Commission to hold a hearing to make that determination.

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

Re: Sam and Rachel Smith
Edwin and Avis Smith
Declaratory Ruling #266

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to a request for a declaratory ruling filed by Sam and Rachel Smith and Edwin and Avis Smith as an appeal from a determination of the District #6 Environmental Coordinator that an application for a permit for the Grice Brook development and master plan for the Smith farm is not complete. As is explained below, the Environmental Board concludes that the plan submitted by the Smiths as their master plan is sufficient for the purpose of allowing this application to be reviewed by the District Commission.

I. SUMMARY OF PROCEEDINGS

A petition for a declaratory ruling was filed on March 24, 1992. A prehearing conference was held on April 24, 1992 and a Prehearing Report and Order was issued on April 29, 1992.

The Board convened a hearing on July 15, 1992, with the following parties participating:

Sam and Rachel Smith and Edwin and Avis Smith (the Petitioners) by Carl O. Lisman, Esq.
Agency of Natural Resources (ANR) and the Department of Agriculture, Food, and Markets by Kurt Janson, Esq.

On July 28, the Petitioners filed Requests for Findings of Fact and Conclusions of Law and on July 29 ANR filed Proposed Findings of Fact and Memorandum of Law. The Board deliberated concerning this matter on October 21, 1992. On that date, following a review of the proposed decision and the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUE

Whether the application for the Grice Brook development is complete within the meaning of Board Rule 10.

III. FINDINGS OF FACT

1. Edwin and Avis Smith own a farm near exit 19 of Interstate 89 in St. Albans. The farm is approximately 448 acres in size and is divided by Interstate 89 and Route 104.
2. On May 11, 1989, the Environmental Board issued Land Use Permit #6F0391-EB (the permit) to Edwin and Avis Smith authorizing the Edwin Smiths to create a 14-lot subdivision on 8.48 acres of a 448-acre tract of land. The permit incorporated a stipulation, signed by the Edwin Smiths and ANR, in which the Edwin Smiths agreed to submit a "conceptual master plan" prior to the further development or subdivision of the 448-acre tract of land. Condition 20 of the permit outlines the areas which the master plan must address, taken directly from the parties' Stipulation. Condition 20 of the permit states:

Prior to the further development or subdivision of the Permittees' Land, the Permittees shall submit to the District Commission, for review and approval, a conceptual master plan that incorporates at least the following:

- a) designation of use areas by category (i.e., residential, commercial, industrial, agricultural, open space);
- b) identification of the location and size of primary agricultural soils on the involved lands and the location and size of those primary agricultural soils to be protected and preserved for the life of the Land Use Permit;
- c) identification of buffer zones between houses and agricultural land uses;
- d) identification of the size and location of open spaces which will remain unbuilt after development of the involved lands for the life of the Land Use Permit;
- e) intensity of uses;

- f) the master plan shall reflect a **good faith** attempt to create a favorable visual statement of the Applicants' land.
3. Condition 20 was based on the terms of a Stipulation between the Edwin Smiths and ANR which was developed during the course of the proceedings before the Board concerning the Edwin Smiths' application. The language of Condition 20 is identical to the language of paragraph 5 of the Stipulation.
4. The Stipulation contains the following pertinent provisions:

WHEREAS, the Applicants' lands are highly **visible** from Interstate 89, which the State asserts is a designated scenic corridor; and

WHEREAS, the State asserts that the Applicants should plan the future development of their land in a way which is compatible with the rural beauty and open character of the area and which minimizes the visual intrusion of the development on the Interstate scenic corridor; and

WHEREAS, a substantial portion of the Applicants' land ... consist [sic] of primary agricultural soils as defined by 10 V.S.A. Section 6001(15); and

WHEREAS, the Applicants wish to obtain an Act 250 permit for immediate development of the subdivision in order to generate the funds with which to develop a master development plan for its remaining land for submission to the District Environmental Commission No. 6 prior to any further development or subdivision of its remaining land; and

WHEREAS, the Agency and the Applicant recognize that the submission of a master plan is necessary in order to properly assess the cumulative impact of future development of the Applicants land in successive phases and to

minimize the reduction of the agricultural potential of the lands through proper land use planning; and

WHEREAS, the Applicants intend to provide a master plan to the District Environmental Commission No. 6 in order that the Applicants can proceed expeditiously in developing the land in multi-phases, while providing all parties an early opportunity to evaluate the overall project to assure orderly development and protection of open space and agricultural soils on significant portions of the land.

5. Sam Smith is the son of Edwin and Avis Smith, and Rachel Smith is Sam Smith's wife. Sam and Rachel Smith are shareholders in Grice Brook Development Corporation (GBDC).
 6. In July, 1989, GBDC applied to the District #6 Environmental Commission for a permit to construct a 48-unit condominium project on an 11-acre tract of land adjacent to the Edwin Smiths' 448-acre property. The 11-acre tract of land was previously sold by the Edwin Smiths to Sam Smith. Grice Brook proposes to construct a 1,600-foot long road in a 60-foot wide right of way from Route 104 over a portion of the land owned by the Edwin Smiths that is subject to the master plan requirement.
 7. On March 7, 1990, the Environmental Board's Executive Officer issued Advisory Opinion EO-89-189. The Opinion upheld the Coordinator's determination that the master plan required by Condition 20 of the permit must be submitted and approved prior to the filing of an application for a permit for Grice Brook. The Opinion was not appealed.
 8. On October 3, 1990, Edwin and Avis Smith filed a request with the Environmental Board to amend Condition 20 of the permit to allow construction of the Grice Brook road to take place without a master plan. In a decision dated January 16, 1991, the Board concluded it had no authority to entertain an amendment request, and denied the request.
 9. On June 11, 1991, the District #6 Commission held a hearing on a conceptual master plan submitted for the Grice Brook application. The Commission concluded that
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the master plan did not comply with the requirements of Condition 20 of the permit and issued a decision on June 24, 1991 denying approval of the master plan. The Commission's decision was not appealed to the Board.

10. On July 15, 1991, the District #6 Coordinator determined an amendment application filed on behalf of the Smiths to be substantially incomplete.
11. On August 8, 1991, the Edwin Smiths filed a request with the District #6 Commission to amend Condition 20 of the permit. The Commission denied the request, finding that the question of whether a master plan should be required was previously decided by the Environmental Board and, since there were no changes to the project, re-review of the issue is barred by the doctrine of res iudicata. The Commission also declined to re-review the master plan which had already been reviewed twice by the Commission and determined insufficient.
12. Subsequently, the Smiths filed several more master plans, all of which were ruled incomplete applications by the District Coordinator. On March 24, 1992, Edwin and Avis Smith, and Sam and Rachel Smith, filed a petition for a declaratory ruling as an appeal from the Coordinator's February 24 determination that the application was substantially incomplete.
13. The master plan submitted to the Board consists of Exhibits 11, 11A, 11B, and 11C. Exhibit 11 is a narrative that describes the master plan; Exhibits 11A, 11B, and 11C are undated site plans that contain various pieces of information concerning the future use of the Smith farm lands. These documents contain information that designates use areas based upon St. Albans zoning; identifies adjoining property owners; identifies the location of some of the primary agricultural soils, the open spaces on the land, buffer areas, and intensity of uses; and describes a concept for proposed development and a "good faith visual statement."
14. Testimony is inconsistent concerning the amount of primary agricultural soils on the site. Exhibit 11, page 3, states that the site contains "about 100 acres" of primary agricultural soils. At the hearing, Sam Smith stated that all the soils on the site are primary agricultural.

15. The Petitioners claim that off-site agricultural land to be used as mitigation has been approved by the Department of Agriculture. However, a representative from the Department of Agriculture was not available at the hearing to verify this.

IV. CONCLUSIONS OF LAW

The sole question before the Board is whether the application for the **Grice** Brook development is complete. The District Coordinator ruled the application incomplete because of his determination that the master plan for the Smith farm property did not meet the requirements of Condition 20 of the Permit.

Board Rule 10(D) states:

An application that is incomplete in substantial respects shall not be accepted for filing by the district coordinator, and therefore shall not initiate the time and notice requirements of the Act and these rules. A coordinator's decision that an application is substantially incomplete is an advisory opinion subject to review as provided for in Rule 3(C) of these rules. A coordinator's decision that an application is complete is for the purpose of initiating the time and notice requirements and cannot be appealed (Amended, effective May 4, 1990).

After reviewing the submissions of the Petitioners, the Board concludes that solely for the purpose of accepting the application into the process, the application is complete. See Re: Killington, Ltd., #1R0584-EB, Memorandum of Decision (Aug. 8, 1986), where the Board stated:

When an application is filed, the **coordinator** reviews it for completeness under Rule 10(D). When the coordinator has received sufficient information to convene a hearing, he or she deems the application to be complete. That decision is simply an administrative decision for purposes of moving forward to the next procedural step. ...

The purpose of Rule 10(B) is to make the hearing process more efficient. If the commission realizes at the outset of a hearing that there are significant gaps in the information submitted in an application, such that the commission cannot fairly and properly review the proposal, it may require this information to be submitted before the hearing on the merits begins. However, a commission should not expect an applicant to submit every piece of evidence relevant to its decision in advance of a hearing. The need for efficiency in the hearing process must be balanced with the right of an applicant to receive a decision on the merits of the project being proposed. If a commission concludes during the **course** of the hearing on the merits that additional information is needed, Rule 20(A) gives it **ample** authority to require that information be submitted. If the information is not submitted, and the commission finds that the information is necessary to make an adequate evaluation of an application under the criteria of 10 V.S.A. § 6086(a), it must deny the application. It is therefore in the applicant's best interest to provide the commission with the information requested.

Id. at 4-6.¹

The Petitioners submitted information to the Board concerning a) existing zoning use designations, b) the location of the primary agricultural soils, c) the location of buffer zones, and d) the location of open spaces. This information was provided in the Petitioners' Exhibits 11, 11A, 11B, and 11C.² Some of the information submitted

¹After the ~~Killington~~ decision, the Board amended Rule 10 by adding: "A coordinator's decision that an application is complete is for the purpose of initiating the time and notice requirements"

²It appears that the Petitioners submitted additional information to the Board that had not been provided to the Coordinator. It is difficult to tell, however, since the Petitioners submitted to the Board as their master plan three different site plans, each containing some pieces of information, and none of the plans contains a date.

regarding primary agricultural soils was inconsistent and incomplete. However, sufficient information was provided for the application to be accepted into the process for a hearing according to the standards articulated in the Killinston decision and in Board Rule 10(D).

The Board's belief that the application should be accepted into the process does not negate the requirement of Condition 20 that before the Smiths' land can be developed or subdivided the District Commission must approve a master plan for the property. There is no question that the preparation, submission, and approval of a master plan for the Smith farm are prerequisites to any development on the land. This was agreed to by the Smiths in order to obtain a land use permit for the previous subdivision on their land. Although the Petitioners claim that construction of a 1,600-foot road on the Smiths' farm should not trigger the requirement for a master plan, construction of the road is development and has the potential, by itself and in conjunction with any future use of the road, to affect the values which were sought to be protected by the agreement embodied in the Stipulation and in the permit.

We agree with ANR that a master plan is the product of a planning process and must include a comprehensive inventory of the land's natural features and identification of sensitive environmental resources that warrant protection. We also agree with ANR that the items listed in Condition 20 of the Permit constitute the minimum components that would be included in a master planning process. The information submitted by the Petitioners in Exhibits 11 through 11C do not appear to be the result of a planning process.

The purpose of this proceeding, however, is not for the Board to evaluate whether the master plan submitted by the Petitioners sufficiently identifies and protects the natural resources on the Smith farm lands, but for the Board to determine whether the master plan contains sufficient information for the Coordinator to accept it as a complete application. At this point, the application for approval of the master plan and the **Grice** Brook development should be accepted if the application contains all other necessary items. The District Commission should hold a hearing to determine whether the master plan submitted by the applicants adequately protects the values sought to be

protected by the Stipulation and the Act 250 criteria before proceeding to review of the Grice Brook project.

In order for the District Commission to be able to determine whether the Petitioner's master plan adequately protects the resources on the land, the District Commission will need more information than was submitted to the Board. The District Commission will be unable to make findings without a visual analysis that identifies what the scenic resource is, where it is, and how it is vulnerable to change. Expert testimony should include an analysis of the view from Interstate 89, both northbound and southbound, in order for the Commission to determine the location, extent, and sensitivity of the visual resources. The District Commission may also need testimony from the Department of Agriculture concerning the location of the primary agricultural soils and the means of protecting those soils. The Board believes it is important that the Petitioners and the State provide the District Commission with expert testimony so that the Commission will have sufficient information on which to make an informed decision.

V. ORDER

1. The application for approval for a master plan for the Smith farm lands is complete for the purposes of accepting it into the process, pursuant to Board Rule 10.
2. The Petitioners shall submit to the District Commission a new application package consisting at least of the information submitted to the Board, with all mapped information consolidated onto one map.

Dated at Montpelier, Vermont this 3rd day of November, 1992.

ENVIRONMENTAL BOARD



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