

THE EFFECT OF ACT 250 ON PRIME FARMLAND IN VERMONT

INTRODUCTION

Concern over the loss of farmland across the United States has prompted a multitude of studies, reports, and different types of state and local programs designed to curb the loss of this irreplaceable natural resource.¹ In Vermont, demand for agricultural land for development purposes and the resulting high land prices are relatively recent phenomena. Until the development of the ski areas and the construction of the interstate highways, Vermont was largely untouched by the development pressures that were affecting more urban parts of the country.² Even now, many areas of Vermont are predominantly rural, with little pressure for conversion to uses other than agricultural. Farmland in these areas is still often affordable by farmers who want to expand their operations or by people who desire to go into farming. But in several counties in Vermont, and in the vicinity of some ski areas, demand for farmland for development purposes is great.³

Agricultural land is often ideal for residential, industrial, highway, and airport uses because it is flat, well drained, and already cleared. In areas of growth, good farmland is in great demand for these uses which often bring a higher economic return than agricultural production. Because of the increased demand and the willingness of developers to pay higher prices, market value for farmland in some areas has risen higher than farmers can afford to pay and still realize a reasonable return in agriculture.

While Vermont does not have a comprehensive agricultural land preservation program, it does have several laws which are in-

1. The extent of the loss of farmland due to conversion to other uses and the potential effects on the domestic food supply and on the quality of life in America have been documented by the National Agricultural Lands Study, a nation-wide survey and in-depth study of local, state, and national agricultural land issues. Some of the findings of the study were recently published in REGIONAL SCIENCE RESEARCH INSTITUTE, THE PROTECTION OF FARM-LAND: A REFERENCE GUIDEBOOK FOR STATE AND LOCAL GOVERNMENTS (1981) (U.S. Government Printing Office) [hereinafter cited as National Agricultural Lands Study].

2. Heeter, *Almost Getting it Together in Vermont*, in D.R. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 323, 326-27 (1976).

3. For example, Chittenden and Windham counties, the most urbanized in Vermont, have experienced rapid growth and consequent farmland loss. See, e.g., Windham Regional Planning and Development Commission, Brattleboro Agricultural Lands Study 8-9 (July 30, 1981).

tended to help preserve productive agricultural or other undeveloped land. The Vermont Land Gains Tax⁴ applies to gains on sales of land held by the seller for less than six years in order to discourage land speculation. Two different tax stabilization laws⁵ allow Vermont towns to contract with farmers and owners of open space land to keep their taxes at a fixed rate or their land assessments at a fixed valuation.⁶ The Current Use Value Assessment law,⁷ in effect since 1980, enables landowners with at least twenty-five acres in agricultural production or twenty-five acres of managed woodland to pay taxes only on the value of the land in its current use.⁸

While these laws do provide some tax relief to farmers, they effect a decrease in the sales of farmland for nonagricultural purposes only in those cases where farmers would be forced to sell due to high taxes. Good farmland goes out of production for a number of reasons other than high taxes.⁹ In areas of Vermont where demand for farmland for other uses is high, reduced taxes will not stop farmers from selling their land when they need cash.

The protection of agricultural land is more directly addressed in Act 250,¹⁰ Vermont's land use and development law, which regu-

4. VT. STAT. ANN. tit. 32, §§ 10001-10010 (1981). The validity of the Land Gains Tax was upheld in *Andrews v. Lathrop*, 132 Vt. 256, 315 A.2d 860 (1974).

5. VT. STAT. ANN. tit. 24, § 2741 (1975 & Supp. 1981) and VT. STAT. ANN. tit. 32, § 3846 (1981).

6. Twenty-eight Vermont towns currently have tax stabilization contracts with local farmers. See R. TOWNSEND, TAX STABILIZATION OF FARM, FOREST AND OPEN SPACE PROPERTY IN VERMONT (1980) (The Extension Service, University of Vermont). In towns which contract with landowners to stabilize taxes, the other property owners in the towns subsidize the taxes.

7. VT. STAT. ANN. tit. 32, §§ 3751-3760 (1981).

8. When farmers take advantage of current use value assessment, towns are directly reimbursed by the state for lost tax revenue. *Id.* § 3760. If the Legislature does not reappropriate funding for the program, the current fund will dry up and program will cease functioning.

9. The report prepared for the National Agricultural Lands Study, *supra* note 1, at 62, mentions two recent studies of the sale of farmland in New Jersey and in Maryland which found that

between 55 percent and 60 percent of farmland sales occurred between retirement and death or as part of an estate settlement. These sales are motivated primarily by personal considerations such as the retirement or death of the farmer or the absence of a family member who is willing and able to take over the farm.

10. VT. STAT. ANN. tit. 10, §§ 6001-6092 (1973 & Supp. 1981). Act 250 is not designed to prevent development, but to control it. Its purpose, recently affirmed by the Vermont Environmental Board, is "to insure that development projects are not unduly detrimental to the environment, that they promote the general welfare through orderly growth, and that they are suitable to the needs and demands of the people of the state." Act 250: A Performance

lates large developments¹¹ and subdivisions.¹² Enacted in 1970, Act 250 was amended in 1973¹³ to include section 6086(a)(9)(B) ("criterion 9(B)"). This section states that if the site of a proposed development subject to the Act's jurisdiction contains "primary agricultural soils,"¹⁴ the applicant either must demonstrate that the subdivision or development will not significantly reduce the agricultural potential of those soils or he must satisfy four subcriteria.¹⁵ These subcriteria include proving: (i) that he can realize a reasonable return on the fair market value of his land only by developing it;¹⁶ (ii) that he owns no nonagricultural or secondary agricultural land suitable for his purpose;¹⁷ (iii) that he has designed his development to minimize the impact on the agricultural potential of the land;¹⁸ and (iv) that the development will not significantly jeopardize the continuation of agriculture on, or reduce the agricultural potential of, adjoining lands.¹⁹

The purpose of this note is to evaluate the effectiveness of Act 250 in protecting agricultural land in Vermont, with particular emphasis on the application of criterion 9(B). This note discusses the structure, policies, and intent of Act 250 in order to provide a con-

Evaluation 4 (March 1981) (Vermont Environmental Board).

An Act 250 10-year anniversary conference in June 1980 "opened a six-month period of assessment and deliberation by the Environmental Board and its staff." *Id.* at 3. The findings and recommendations were published in *Act 250: A Performance Evaluation*, which is addressed to the Governor and the General Assembly. *Id.* at 1.

11. "Development" is defined in the statute as the construction of improvements on "more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial, or industrial purposes. . . ." or "more than one acre of land within a municipality which has not adopted permanent zoning and subdivision bylaws." The word "development" does not include "construction for farming, logging or forestry purposes below the elevation of 2500 feet." *Id.*, § 6001(3) (1973 & Supp. 1981).

In 1975, the Vermont Environmental Board modified the definition of development by adding: "[t]he construction of improvements for a road or roads to provide access to or within a tract of land . . . if the road is to provide access to more than 5 parcels or is more than 800 feet in length." *Vermont Environmental Board Rules, Rule 2(A)(6)* (March 1, 1980).

12. "Subdivision" is defined in the statute as any tract of land which has been divided for the purpose of resale into ten or more lots. *Vt. STAT. ANN. tit. 10, § 6001(19)* (Supp. 1981). A "lot" is defined as any undivided interest in land of less than ten acres. *Id.* § 6001(11) (Supp. 1981).

13. 1973 *Vt. Acts No. 85, § 10* (Adj. Sess.).

14. *Vt. STAT. ANN. tit. 10, § 6001(15)* (Supp. 1981). *See infra* notes 53-65 and accompanying text for a discussion of the meaning of "primary agricultural soils."

15. *Id.* § 6086(a)(9)(B)(i)-(iv).

16. *Id.* § 6086(a)(9)(B)(i).

17. *Id.* § 6086(a)(9)(B)(ii).

18. *Id.* § 6086(a)(9)(B)(iii).

19. *Id.* § 6086(a)(9)(B)(iv).

text for evaluating criterion 9(B). Specific cases are analyzed to determine how criterion 9(B) is being applied and what problems have arisen in its application. These problems are discussed, and recommendations that might increase the effectiveness of Act 250 are made.

I. THE ACT 250 REVIEW PROCESS

In order to evaluate properly the issues raised by criterion 9(B), an understanding of certain aspects of Act 250 and the context within which it was enacted is helpful. Act 250 was passed by the Vermont General Assembly in 1970 as a response to rapid and unregulated development in certain parts of the state.²⁰ It established a regulatory system which vests in the state Environmental Board²¹ and nine District Environmental Commissions²² the authority to grant or deny permits for major developments or subdivisions within the state.²³ A development falls within Act 250 jurisdiction if it involves the construction of improvements for commercial or industrial purposes on more than ten acres of land,²⁴ and a subdivision is subject to its jurisdiction if land is divided for resale into ten or more lots of less than ten acres each.²⁵

The three-member District Commissions are quasi-judicial bodies composed of lay people who have the "authority to determine whether and under what conditions a land use permit may be issued for development or subdivision of land subject to the jurisdiction of Act 250."²⁶ The Commissions are assisted by full-time staff members known as district environmental coordinators.²⁷

The Environmental Board hears appeals from District Commission decisions.²⁸ At the de novo hearings the Board provides

20. P. MYERS, *SO GOES VERMONT* 9-13 (1974) (The Conservation Foundation). For discussions of the enactment of Act 250 and descriptions of the Act 250 process, *see generally* G. HEALY & J. ROSENBERG, *LAND USE AND THE STATES* 43 (2d ed. 1979); Heeter, *supra* note 2; Heeter, *Act 250: Alive and Basically Well*, 28 *LAND USE L. & ZONING DIG.* 5 (1976); R. Reis, *Vermont's Act 250: Reflections on the First Decade and Recommendations for the Second* (1980) (Vermont Law School).

21. Vt. STAT. ANN. tit. 10, § 6021 (1973).

22. *Id.* § 6026 (Supp. 1981).

23. Vermont Environmental Board Rules, Rule 1 (March 1, 1980).

24. Vt. STAT. ANN. tit. 10, § 6001(3) (Supp. 1981). *See supra* note 11 for the statutory definition of development.

25. *Id.* § 6001(19). *See supra* note 12 for the statutory definition of subdivision.

26. Vermont Environmental Board Rules, Rule 1(B) (March 1, 1980).

27. *Id.*, Rule 1(B)(1).

28. Vt. STAT. ANN. tit. 10, § 6089(a) (Supp. 1981). An appeal may be removed by the

the same function as the District Commissions.²⁹ It also has the authority to "prepare and adopt rules to interpret and carry out the provisions of Act 250."³⁰

The heart of Act 250 lies in the ten criteria relating to the environmental impact of a proposed project which an applicant must successfully meet in order to be granted a permit.³¹ The District Commissioners review each application and hear testimony from interested parties³² at public hearings.³³ They then decide whether or not to issue a land use permit.³⁴ In most cases, permits are issued with conditions.

As originally enacted, Act 250 was designed to consist of three parts to be developed and passed in stages: an interim capability plan,³⁵ a capability and development plan,³⁶ and a land use plan.³⁷

applicant to superior court. *Id.*

29. Vermont Environmental Board Rules, Rule 1(C)(1) (March 1, 1980).

30. *Id.*, Rule 1(C)(3). *See also* VT. STAT. ANN. tit. 10, § 6025 (Supp. 1981).

31. *See* VT. STAT. ANN. tit. 10, § 6086 (Supp. 1981). In order for a District Commission or the Environmental Board to grant a permit, it must find that the subdivision or development:

- (1) Will not result in undue water or air pollution
- (2) Does have sufficient water available
- (3) Will not cause an unreasonable burden on an existing water supply
- (4) Will not cause unreasonable soil erosion
- (5) Will not cause unreasonable congestion or unsafe conditions with respect to . . . means of transportation
- (6) Will not cause an unreasonable burden on the ability of a municipality to provide educational services.
- (7) Will not place an unreasonable burden on the ability of the local governments to provide municipal government services.
- (8) Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.
- (9) Is in conformance with a duly adopted capability and development plan. . . .
- (10) Is in conformance with any duly adopted local or regional plan or capital program. . . .

Id.

The burden of proof is on the applicant with respect to criteria (1)-(4), (9), and (10), and on any opposing party with respect to (5)-(8). *Id.* § 6088 (1973).

32. *Id.* § 6085(c) (Supp. 1981); Vermont Environmental Board Rules, Rule 12(C) (March 1, 1980). *See Note, Party Status and Standing Under Vermont's Land Use and Development Law (Act 250)*, 2 VT. L. REV. 163 (1977).

33. VT. STAT. ANN. tit. 10, § 6085(a)-(d) (1973 & Supp. 1981).

34. Between June 1970 and December 1980 there were 3,830 applications for Act 250 permits. Three thousand seven hundred forty were acted upon. Of those, 3,412 permits were issued, 95 were denied, 164 were withdrawn, 90 were pending, and 69 were on inactive status. *Act 250, A Performance Evaluation, supra* note 10, at 19.

35. VT. STAT. ANN. tit. 10, § 6041 (1973).

36. *Id.* § 6042 (1973 & Supp. 1981).

The first of these plans, adopted in 1972, is basically a broad statement of general policies.³⁸ The second plan was approved by the Legislature in 1973 and contains more specific policy statements.³⁹ The land use plan, which was not adopted, was to "consist of a map and statements of present and prospective land uses . . . which determine in broad categories the proper use of the lands in the state whether for forestry, recreation, agriculture or urban purposes . . ."⁴⁰

During the public hearings on the capability and development plan, there was considerable opposition to that plan and to the proposed land use plan, both of which were viewed by some people as an attempt by the state to centralize control over the use and exchange of private property.⁴¹ This resistance to state regulations of private property was sufficiently widespread to cause the state to abandon its proposal after the land use plan was defeated in the Legislature.⁴²

37. *Id.* § 6043 (Supp. 1981).

38. Heeter, *supra* note 2, at 345. The interim capability plan has since expired.

39. *Id.* § 6042 (1973 & Supp. 1981). The policies appear as legislative findings in 1973 Vt. Acts No. 85 § 7 (Adj. Sess.) and are reprinted in this section of the statute.

40. Vt. STAT. ANN. tit. 10, § 6043 (Supp. 1981).

41. John McClaughry, a member of the Vermont House of Representatives from 1969 to 1973 and currently Senior Policy Advisor to President Reagan, actively opposed the capability and development plan and the land use plan. He believed that the state government was usurping the authority of local municipalities to design their own solutions to problems of land use. McClaughry, *The Land Use Planning Act—An Idea We Can Do Without*, 3 ENVTL. AFF. 595, 600-05 (1974)[hereinafter cited as McClaughry, *The Land Use Planning Act*]. In another article about the land use plan, McClaughry wrote:

The . . . proposed [land use] plan was simply a state zoning scheme. The state was to be subdivided into seven zones, each of which had its own set of purposes, allowed uses, prohibited uses, and density limitations. Local towns were given a year to prepare a zoning map "furthering the purposes of the State Land Use Plan." If they failed to do so, the State Environmental Board would supervise the zoning of the town. To satisfy the State Environmental Board, a town plan would have to comply with 16 detailed criteria. Any mention of compensating landowners for confiscated property rights was scrupulously avoided.

McClughry, *The New Feudalism—State Land Use Controls*, in NO LAND IS AN ISLAND 37, 43 (Institute for Contemporary Studies 1975).

42. In October 1972, the Environmental Board adopted a resolution asking the Legislature to change the definition of "development" to include one house unit on one lot in order to extend the jurisdiction of Act 250. McClaughry, *The Land Use Planning Act*, *supra* note 41, at 603. As an example of the anti-regulatory mood of the Legislature in 1973, its response to the Board's request was to amend Act 250 to include: "This act is not intended and shall not be construed to limit in any way the freedom of any person to sell or otherwise dispose of his land unless by so doing he will create a subdivision as defined . . ." Vt. STAT. ANN. tit. 10, § 6042(b) (Supp. 1981). See *infra* text accompanying notes 180-86 for a discussion of the problems which have resulted from the limited jurisdiction of Act 250.

Two major problems have arisen with respect to the application of criterion 9(B) by the Commissions. First, because there is no state-wide plan for identifying land that should be retained for agricultural use, when a conflict arises the Commissioners have no authority on which to rely to decide that a given piece of farmland should not be developed or to determine the most appropriate use of that land. The Commissioners must make their decisions based upon factors which are often nebulous and contradictory. The testimony of interested parties at permit hearings, the applicable local and regional plans,⁴³ and the criteria and policies contained in Act 250 are all factors which the Commissioners consider. Second, the lack of formal guidelines or explicit policies for the Commissioners to follow often results in inconsistent application of the criteria.⁴⁴

The Environmental Board has the authority to make rules⁴⁵ and it could use that power to require the Commissions to apply the criteria more uniformly. The Board, however, recognizes the need to balance centralized authority against a strong Vermont tradition of local control and decision-making, and it is careful not to assume too much control over the Commissions.⁴⁶ In 1974, when the Board attempted to clarify the criterion on aesthetics it met widespread opposition.⁴⁷ Since that time it has not proposed any

43. An applicant for an Act 250 permit must demonstrate that his proposed project conforms with "any duly adopted local or regional plan" VT. STAT. ANN. tit. 10, § 6086(a)(10) (Supp. 1981). See *infra* discussion in text accompanying notes 166-74.

44. See *infra* notes 45-48 and accompanying text.

45. VT. STAT. ANN. tit. 10, § 6025 (Supp. 1981).

46. Recognizing the need for relatively consistent application of the criteria, the Board does try to offer guidance to the District Commissions through its decisions. Richard Cowart, former Executive Officer of the Board, has stated:

The Board's goal is to promote certain common approaches, while retaining the flexibility of the District Commissions. Given the same type of land and the same type of development, a developer should get a similar response from each Commission. The grounds for each Commission's decisions should not be based on the whims of whoever happens to be sitting on the Commissions. However, the Board does not instruct the Commissions what to do; we try to guide them. My position is that the Board should use each case as it comes up as a vehicle for setting state-wide policy. It's a sort of common law system: laws evolve on a case-by-case basis.

Interview with Richard Cowart in Montpelier (Nov. 14, 1980). See, e.g., *In re Juster Assoc.*, No. 5W0556, Findings of Fact and Conclusions of Law at 26 (Dist. Entvl. Comm'n No. 5, Nov. 4, 1980), where a District Commission explicitly followed the policy set by the Board in another decision.

47. VT. STAT. ANN. tit. 10, § 6086(a)(8) (Supp. 1981).

substantive rules.⁴⁸

It is important to recognize the positive aspects of a locally administered law such as Act 250. As the Act is structured, it effectively achieves state-wide environmental control without giving up decision-making at the local level. The flexibility afforded by decentralized administration permits local and regional variations based upon varying circumstances and needs in different parts of the state. This flexibility has also contributed to its political acceptance.⁴⁹

During the early years of Act 250, the need for formal guidelines for criterion 9(B) did not seem pressing, and until the last few years that criterion was seldom addressed by either the District Commissions or the Board.⁵⁰ With increased attention upon the loss of farmland in Vermont, criterion 9(B) has assumed greater importance. Several applicants have been denied land use permits altogether for failure to meet one or more of the sub-criteria of criterion 9(B);⁵¹ others have had strict conditions imposed on their developments.⁵² As a result of the increased concern about the loss of farmland in Vermont and the more frequent use of criterion 9(B) as a vehicle to minimize that loss, formal guidelines for its interpretation and application may be necessary.

II. DEFINING PRIMARY AGRICULTURAL LAND

Primary agricultural soils are defined in Act 250 as:

48. Heeter, *supra* note 2, at 372-73. See Note, *Leaving the Scene: Aesthetic Considerations in Act 250*, 4 VT. LAW REV. 163 (1979) for a discussion of some of the problems resulting from inconsistencies in the application and interpretation of criterion 8 due to its vagueness.

49. Heeter, *supra* note 2, at 371.

50. The Commissions focused on immediately pressing fiscal and environmental problems such as air and water pollution, wastewater treatment, and basic town services, as these were the concerns which had originally prompted the enactment of Act 250. Interview with Richard Cowart, former Executive Officer of the Environmental Board, in Montpelier (Nov. 14, 1980).

51. See, e.g., *In re Davison*, No. 5L0444-EB (Vt. Envtl. Bd., July 28, 1978); *In re Windsor Improvement Corp. Indus. Park*, No. 2S0455 (Dist. Envtl. Comm'n No. 2, Aug. 11, 1980); *In re Peck*, No. 1R0383 (Dist. Envtl. Comm'n No. 1, July 31, 1980) (the applicant subsequently negotiated with the Vermont Department of Agriculture and redesigned his development to comply with Act 250, see *In re Peck*, No. 1R0412 (Dist. Envtl. Comm'n No. 1, Aug. 5, 1981)).

52. See, e.g., *In re LaBrecque*, No. 6G0217-EB (Vt. Envtl. Bd., Nov. 17, 1980); *In re State of Vt., Agency of Transp.*, No. 9A0071-EB (Vt. Envtl. Bd., Sept. 14, 1979); *In re Dowsville Farm Assoc.*, No. 5W0324 (Dist. Envtl. Comm'n No. 5, Feb. 7, 1980).

soils which have a potential for growing food and forage crops, are sufficiently well drained to allow sowing and harvesting with mechanized equipment, are well supplied with plant nutrients or highly responsive to the use of fertilizer, and have few limitations for cultivation or limitations which may be easily overcome. In order to qualify as primary agricultural soils, the average slope of the land containing such soils does not exceed 15 percent, and such land is of a size capable of supporting or contributing to an economic agricultural operation.⁵³

Some of the Commissions have misperceived the procedure to be followed in determining whether an applicant's land is primary agricultural land for purposes of applying criterion 9(B). Instead of first making a finding as to whether the land contains primary agricultural soils based on the Act's definition, Commissions sometimes decide that criterion 9(B) is not applicable because of factors other than those enumerated in the definition.⁵⁴ Many of the decisions contain findings that primary agricultural soils are or may be involved but that retaining the land for agricultural production is not feasible because of the high cost or location of the land.⁵⁵ In other decisions the Commissions either state or imply that a parcel of land is not primary agricultural solely because of factors such as

53. VT. STAT. ANN. tit. 10, § 6001(15) (Supp. 1981). The definition is based in part on the criteria developed by the United States Soil Conservation Service and modified as applied to Vermont soils to take into account Vermont's harsh environment and generally poorer soils.

Some critics have questioned the validity of a definition based solely on the physical capability and chemical properties of soils, without regard to whether the land is in current production or whether it is part of a larger agricultural infrastructure. They believe that primary agricultural land must be defined according to economic as well as physical criteria. "[F]armland without farmers can be meaningless A policy of agricultural land retention must seek to preserve those units that are viable relative to current and future commodity and market trends. Such a unit may be termed 'prime.'" Lapping, *Agricultural Land Retention Strategies: Some Underpinnings*, 34 J. SOIL & WATER CONS. 124-25 (1979). See also Raup, *What is Prime Land?*, 31 J. SOIL & WATER CONS. 180 (1976).

54. See cases cited *infra* notes 55 and 57. It is important to keep in mind the difference between prime soils, based on physical and chemical properties, and prime farmland, based on various, more subjective, factors. While consideration of factors other than those in the definition would be appropriate in determining whether the site is prime farmland, the Act only requires a finding as to the soil properties and the size of the parcel. The other factors should be addressed when applying the four subcriteria of criterion 9(B).

55. See, e.g., *In re Sheppard & Carrier*, No. 4C0439, Findings of Fact and Conclusions of Law at 5 (Dist. Envtl. Comm'n No. 4, July 17, 1980); *In re O'Brien Bros. Agency, Inc.*, No. 4C0434, Findings of Fact and Conclusions of Law at 5 (Dist. Envtl. Comm'n No. 4, June 20, 1980); *In re Fassetts Bakery*, No. 4C0339, Findings of Fact and Conclusions of Law at 4 (Dist. Envtl. Comm'n No. 4, Aug. 14, 1978); *In re Cooper*, No. 1R0290, Findings of Fact and Conclusions of Law at 2 (Dist. Envtl. Comm'n No. 1, Mar. 27, 1978).

its size,⁵⁶ location, or high cost.⁵⁷ In neither case do they methodically determine that the applicant has satisfied the four subcriteria of criterion 9(B).

The Environmental Board has explained the correct procedure to be followed when there is a possibility that a site contains primary agricultural soils. In *In re Davison*,⁵⁸ the first case in which the Board denied a permit solely because of a development's impact upon primary agricultural soils, the applicant argued that the soils were not primary agricultural because the land was not very productive, the site was surrounded by recreational development, and the value of the land was too high for any type of profitable agricultural operation.⁵⁹ The Board stated that a finding must first be made as to whether the site contains primary agricultural soils according to the definition in Act 250. If it does, then it must be determined whether the proposed development will significantly reduce the agricultural potential of the soils. If it will, then the applicant has the burden of meeting the four subcriteria of criterion 9(B).⁶⁰ Factors such as the character of the area or the profitability of farming relative to alternative uses of the land are not relevant to the threshold question of whether the soils are primary agricultural.⁶¹ The land need not be available for farming in large tracts. The Board's position is that a tract is "capable of contributing to an economic agricultural operation" if it is "large enough to permit the operation of modern farming equipment and productive enough to make the use of that equipment worthwhile."⁶² This interpretation is appropriate in Vermont because large areas of consistently high soil quality are rare, and many farmers rent supplemental land which often consists of small parcels, sometimes at some distance from their home farms.⁶³

56. See the Board's interpretation of the meaning of "size" in *supra* text accompanying note 62.

57. See, e.g., *In re Locust Hill Condominiums*, No. 4C0428, Findings of Fact and Conclusions of Law at 5 (Dist. Envtl. Comm'n No. 4, Oct. 10, 1980); *In re Bell*, No. 8B0189, Findings of Fact and Conclusions of Law at 2 (Dist. Envtl. Comm'n No. 8, Aug. 3, 1978).

58. No. 5L0444-EB (Vt. Envtl. Bd., July 21, 1978).

59. Transcript of Environmental Board Hearing at 24-26, *In re Davison*, No. 5L0444-EB (Vt. Envtl. Bd., June 27, 1978).

60. *In re Davison*, No. 520444-EB, Findings of Fact and Conclusions of Law at 5 (Vt. Envtl. Bd., July 21, 1978).

61. See, e.g., Transcript of Environmental Board Hearing, *supra* note 59, at 31, 146.

62. Interview with Richard Cowart, former Executive Officer of the Environmental Board, in Montpelier (Nov. 14, 1980).

63. In a study of the feasibility of purchasing development rights to preserve farmland in Vernon, Vermont, it was found that all eight of Vernon's full-time farmers rent land,

Despite the Board's clear enumeration of the correct procedure, some of the District Commissions still do not evaluate the threshold criteria in the definition independently of the factors to be evaluated under criterion 9(B). If the Commissions believe that the site is not appropriate for agricultural use, they conclude that the soils are not primary agricultural or that criterion 9(B) does not apply.⁶⁴ This approach results in the possible loss of important agricultural lands which are developed without the applicant being required to satisfy the criteria as mandated by Act 250. Furthermore, if the Commissions do not make a clear finding as to whether the soils are primary agricultural, they never get to the questions of whether the applicant owns or controls any nonagricultural soils which are reasonably suited to his purpose, whether the development can be designed to reduce the adverse impact on the soils, and whether the development will jeopardize the continuation of agriculture on adjoining lands or reduce their agricultural potential.⁶⁵

III. A REASONABLE RETURN ON FAIR MARKET VALUE

Subcriterion 9(B)(i) requires the applicant to demonstrate that although his development or subdivision will significantly reduce the agricultural potential of the soil, he can realize a reasonable return on the fair market value of his land only by devoting it to the proposed use.⁶⁶ The District Commissions' application of subcriterion 9(B)(i) reflects considerable confusion about its meaning. In order to understand what this subcriterion means, it is

some as far away as eight miles from their home farms. George D. Aiken Resource Conservation & Development Area, Purchase of Development Rights in Vernon, Vermont 19 (Feb. 1982).

64. See cases cited *supra* notes 55 and 57. For example, a permit was issued for 70 condominiums on 27 acres of land that presumably contained primary agricultural soils in *In re Locust Hill Condominiums*, No. 4C0428 (Dist. Envtl. Comm'n No. 4, Oct. 10, 1980). The Commission stated:

There are no adjacent operating farms. The location in a commercially and residentially developed area, the relatively small portion of the site which could be suitable for agriculture, and ownership patterns are not conducive to a viable commercial agricultural operation in the vicinity; therefore, we find that the soils on the project are not primary or secondary agricultural . . . soils.

Id., Findings of Fact and Conclusions of Law at 5.

65. The decisions made by District Commission No. 4 indicate to those unfamiliar with the Chittenden County area that there is little farmland in that district. In fact, there is a great deal of productive farmland there.

66. VT. STAT. ANN. tit. 10, § 6086(a)(9)(B)(i) (Supp. 1981).

helpful to look at the reasons for its inclusion in Act 250.

The passage of Act 250 reflected a recognition by the Legislature that Vermont's natural resources needed protection. The policy statements in the capability and development plan which encourage the protection of agricultural lands⁶⁷ were added to the Act during the same legislative session at which criterion 9(B) was enacted. During the hearings on the capability and development plan, however, there was considerable citizen opposition to state control over an individual's right to determine the uses of his land.⁶⁸ There was also concern among the legislators, many of whom were farmers themselves, that farmers would be prohibited from selling parcels of their land to raise needed cash.⁶⁹ It appears that subcriterion 9(B)(i) was included as a compromise to allow landowners to sell or develop small parcels of land containing primary agricultural soils without having to go through the Act 250 regulatory process.⁷⁰

The current confusion stems in part from a distortion of the

67. The capability and development plan includes:

(2) Utilization of natural resources

Products of the land and the stone and minerals under the land, as well as the beauty of our landscape are principal natural resources of the state. Preservation of the agricultural and forest productivity of the land and the economic viability of agricultural units, conservation of the recreational opportunity afforded by the state's hills, forests, streams and lakes, wise use of the state's nonrenewable earth and mineral reserves, and protection of the beauty of the landscape are matters of public good. Uses which threaten or significantly inhibit these resources should be permitted only when the public interest is clearly benefited thereby.

(4) Planning for growth

(B) Provision should be made for the renovation of village and town centers for commercial and industrial development, where feasible, and location of residential and other development off the main highways near the village center on land which is other than primary agricultural soil.

(16) Public facilities or services adjoining agricultural or forestry lands

The construction, expansion or provision of public facilities and services should not significantly reduce the resource value of adjoining agricultural or forestry lands unless there is no feasible and prudent alternative, and the facility or service has been planned to minimize its effect on the adjoining lands.

Id. § 6042

68. For analyses of the conflicts which arose, see Heeter, *supra* note 2; McClaughry, *The Land Use Planning Act*, *supra* note 41.

69. Farmers' assets are often completely tied up in their land; they have traditionally depended upon being able to sell their land when necessary. See P. MYERS, *supra* note 20, at 29.

70. See *id.*; Heeter, *supra* note 2, at 351 n.93.

original intent of this subcriterion to protect landowners: it has become a loophole used by purchasers of prime farmland for development purposes. Development of agricultural land by commercial developers is much more common now than it was at the time subcriterion 9(B)(i) was adopted, and the value of much of Vermont's farmland has risen considerably since then. The value of agricultural land for development purposes is usually higher than its value based on agricultural production (its "use" value) since a higher profit can be realized from development than from agricultural production. If a buyer plans to develop land, he is able to pay a higher price than the land is worth for agricultural use. Once he purchases the land, the price he paid becomes the fair market value. When demand for the land for uses more profitable than farming causes land prices to rise,⁷¹ the gap between market value and agricultural use value widens. A developer can then easily prove that he can realize a reasonable return on the fair market value of the land only by developing it. It has become increasingly difficult for the District Commissions and the Board to deny permits for development of land because the high prices have made it impossible for a landowner to realize a reasonable return on the fair market value in agricultural use. While their reluctance to deny a landowner a profit on his land in accordance with his investment is understandable, the result is that subcriterion 9(B)(i) is rendered meaningless whenever the fair market value of land substantially exceeds its agricultural use value.

The problems with subcriterion 9(B)(i) are compounded by the fact that "reasonable return on fair market value" for purposes of Act 250 is not defined and there are only cursory guidelines for its interpretation by the Commissions.⁷² The Commissions and the

71. The value of land also rises because of the expectation that demand for land in certain areas will increase. See G. BJORK, *LIFE, LIBERTY, AND PROPERTY* 83-85 (1980) for an explanation of the effect of the "expectation value" on land prices.

72. The Act 250 Procedure Manual, an unofficial implementation guidebook for use by the District Commissions and the Board, states under the heading, "Primary Agricultural Soils":

The Legislature has provided owners with reasonable alternatives to the development of primary agricultural soil. It is appropriate that receiving a reasonable return on the value of land be a major consideration; it is equally appropriate that a landowner with options for obtaining that economic return not select the option most likely to destroy the agricultural potential of the soil, even if that is the most expedient one and/or produces the highest return on the fair market value of the land.

Board interpret "fair market value" according to its common meaning: what a willing buyer will pay a willing seller.⁷³ The determination of fair market value in this context, however, is not that simple. For instance, the price that someone pays for land that he intends to develop is based upon the assumption that he will be allowed to develop it and that he will obtain a certain return on this investment. Part of its market value is therefore its "expectation value," or the value added to the land use by the expectation that it will be approved for development by an Act 250 Commission. Thus, if Act 250 approval is not assured, the fair market value of the land is discounted by the risk that approval might not occur. In that case, the fair market value would be less, the buyer would pay less for the land, and he would conceivably be able to realize a reasonable return on the land by using it for agricultural production. As a result, he would not meet the requirements of subcriterion 9(B)(i) and an Act 250 permit to develop the land would be denied.⁷⁴

District Commission No. 2 recognized the loophole created by the potentially circular interpretation of subcriterion 9(B)(i) in its decision denying a permit for an industrial park on a forty-four acre tract, thirty-three acres of which were primary agricultural soils.⁷⁵ The Commission stated that it would accept the applicant's fair market value figure of \$2,000 per acre for the purpose of saving time; it pointed out, however, that the figure was not necessarily the fair market value but rather the price the applicant paid for the land for the express purpose of building an industrial park.⁷⁶

The Board has addressed the meaning of "reasonable return" in several cases and has made it clear that a reasonable return does

73. See, e.g., *In re Davison*, No. 5L0444-EB, Findings of Fact and Conclusions of Law at 2 (Vt. Envtl. Bd., July 21, 1978), where the Board stated:

Using the accepted meaning of fair market value, it is unlikely that an agricultural use of all of this land would provide the owner with the return comparable to that which can be expected from development. It is acknowledged, therefore, that some development of the applicant's land is to be permitted if the applicant is to realize a reasonable return on the fair market value of the tract of land.

74. It appears that developers purchase land without considering the possibility that an Act 250 permit may be denied. They then argue that because they paid a high price for the land, denial of a permit would contravene the meaning of subcriterion 9(B)(i).

75. *In re Windsor Improvement Corp. Indus. Park*, No. 2S0455 (Dist. Envtl. Comm'n No. 2, Aug. 11, 1980).

76. See *id.*, Finding of Fact and Conclusions of Law at 9.

not necessarily mean the highest profit possible.⁷⁷ In *In re Davison*,⁷⁸ the applicant was denied a permit by both the District Commission and the Board because her proposed development could have been designed to create a lesser impact on the agricultural potential of the land and still have given her, in the Board's opinion, a reasonable rate of return on her investment. The Board stated that when alternative designs for a development exist, an applicant may not select the one that is most destructive to the agricultural potential of the land. These alternatives, the Board emphasized, may be required by the criterion even if they do not yield the most profitable rate of return possible.⁷⁹

In *In re LaBrecque*,⁸⁰ the Board further explained its interpretation of a "reasonable return on fair market value." In that case the market value of the land was at least \$2,000 per acre, while the return on the land in agriculture would be approximately \$50 per acre annually.⁸¹ Based on those figures, the Board found that a reasonable rate of return on the land was possible only by developing a portion of the property.⁸² The Board added, however, that

77. See, e.g., *In re LaBrecque*, No. 6G0217-EB, Findings of Fact and Conclusions of Law at 5-6 (Vt. Envtl. Bd., Nov. 17, 1980); *In re Davison*, No. 5L0444-EB, Findings of Fact and Conclusions of Law at 6 (Vt. Envtl. Bd., July 21, 1978). The Board's statement that a reasonable return does not necessarily mean the highest return possible comports with the United States Supreme Court's analysis in *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978). In that case, the owner of Grand Central Station had been denied permission to build a 50-story office building above the station, which had been designated a city "landmark." The owner sued the city, claiming that the restriction amounted to an unconstitutional "taking" without just compensation. *Id.* at 115-19. The Court found that in order for an otherwise valid regulation to constitute a "taking," all economic use of the property would have to be destroyed, and that expectation of profit does not establish a right to profit. *Id.* at 130-31. The Court stated: "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." *Id.* at 130.

The "taking" issue as it applies to the protection of natural resources has been developed in recent state cases concerning restrictions on development in privately-owned wetlands. In the last decade, courts have been more willing to uphold regulations which prohibit landowners from developing their land if by doing so they would destroy its natural resource values, even when the restrictions cause severe diminution of property values. See, e.g., *In re Loveladies Harbor, Inc.*, 176 N.J. Super. 69, 422 A.2d 107 (1980); *East Haven Economic Dev. Comm'n v. Dept. of Envtl. Protection*, 36 Conn. Supp. 1, 409 A.2d 158 (1979); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

78. No. 5L0444-EB (Vt. Envtl. Bd., July 21, 1978).

79. *Id.*, Findings of Fact and Conclusions of Law at 6. The language of the Board was incorporated into the Act 250 Procedure Manual. See *supra* note 72.

80. No. 6G0217-EB (Vt. Envtl. Bd., Nov. 17, 1980).

81. *Id.*, Findings of Fact and Conclusions of Law at 6.

82. *Id.*

the subcriterion does not require that an applicant must be allowed to develop just because development might be more profitable than agricultural use. The Board stated:

[W]e expressly reject the assertion made by all parties in this appeal that because the land is potentially or immediately more valuable in nonagricultural development than it is in agricultural use, its conversion to a subdivision is sanctioned by the subcriterion. The subcriterion is satisfied only when the applicant is unable to realize a reasonable return on fair market value of his land in agricultural use.⁸³

While the Board's policy of providing guidance to the Commissions through its opinions is often effective, when dealing with issues as complicated as those raised by subcriterion 9(B)(i), more explicit guidelines may be required. The Legislature, through Act 250, has emphasized the importance of preserving the state's natural resources and has made it clear that while there must be a balance between economic growth and natural resource protection, adverse impact on the natural resources must be reduced as much as possible.⁸⁴ The loss of many acres of farmland due to the discrepancy between market value and agricultural use value seems contrary to the policies of Act 250.

A possible remedy to the problems raised by subcriterion 9(B)(i) was suggested in an appeal to the Board by adjoining property owners in *In re John A. Russel Corp.*⁸⁵ The appellants argued that the applicant's inability to realize a reasonable return on the fair market value of his land unless he developed it as proposed should be disregarded when the land was bought for the purpose of subdividing or developing it.⁸⁶ While the Board did not act on the suggestion, it raises an interesting possibility for resolution of the loophole created by this subcriterion.

Another solution would be to remove subcriterion 9(B)(i) from the Act 250 permit process altogether. When they are required to

83. *Id.*

84. The capability and development plan states that "[p]reservation of the agricultural and forest productivity of the land, and the economic viability of agricultural units . . . are matters of public good. Uses which threaten or significantly inhibit these resources should be permitted only when the public interest is clearly benefited thereby." Capability and development plan, *supra* note 42, at (2).

85. No. 1R0257-EB (Vt. Envtl. Bd., Aug. 31, 1977).

86. Appellants' Request to Find at 2, *In re John A. Russell Corp.*, No. 1R0257-EB (Vt. Envtl. Bd., Aug. 11, 1977).

decide whether an applicant can realize a reasonable return on fair market value, the Commissioners are often called upon to make difficult judgments based on conflicting evidence and policies. The issue may be more appropriately addressed in a judicial context. At the time criterion 9(B) was drafted, some people thought that the issue of reasonable return on fair market value should not be decided by the District Commissions as part of the permit application process. They believed it to be a determination more appropriate for a judicial or other body with more experience and specialized knowledge.⁸⁷ If the subcriterion were removed from Act 250, courts could review cases to determine whether a denial of a permit amounted to an unconstitutional taking of property without just compensation,⁸⁸ and a difficult burden would be lifted from the Commissioners.

IV. OWNERSHIP OF NONAGRICULTURAL SOILS

Under subcriterion 9(B)(ii) an applicant must demonstrate that he owns or controls no land containing nonagricultural or secondary agricultural soils⁸⁹ which would be reasonably suited to his purpose.⁹⁰ Until recently, no problems have arisen with regard to an applicant's satisfying this subcriterion. In *In re Mitel Semiconductor*,⁹¹ however, a question was raised as to the identity of the applicant for purposes of satisfying the criteria of Act 250.⁹² The District Commission did not require the applicant to meet the subcriteria of criterion 9(B) because it found that the development would not significantly reduce the agricultural potential of the pri-

87. D. Heeter, *Conserving Agricultural Lands: Issues and a Possible Approach* (June 22, 1973) (unpublished paper prepared for the Vermont State Planning Office). In his paper, Heeter outlined a procedure that a landowner who has been refused permission to subdivide could follow when suing for compensation, including standards to help a court decide whether the land was taken in violation of the United States Constitution and suggestions about how to measure the loss.

88. See *infra* text accompanying notes 194-99.

89. Act 250 also contains criteria which must be satisfied in order to subdivide or develop land which contains forest or secondary agricultural soils. VT. STAT. ANN. tit. 10, § 6086(a)(9)(C)(Supp. 1981). For the statutory definition of "forest and secondary agricultural soils," see *id.* § 6001(8).

90. *Id.* § 6086(a)(9)(B)(ii).

91. No. 4C0473 (Dist. Envtl. Comm'n No. 4, June 19, 1981).

92. See, e.g., Motion on Applicant Status, *In re Mitel Semiconductor*, No. 4C0473 (Dist. Envtl. Comm'n No. 4, June 2, 1981); Request for Reconsideration of Ruling on Request for Rule of Co-Applicant Status for G.B.I.C., *In re Mitel Semiconductor*, No. 4C0473 (Dist. Envtl. Comm'n No. 4).

mary agricultural soils.⁹³ If the Commission had required findings under those subcriteria, however, the answer to who really owned or controlled the land would have been significant.⁹⁴

The property in question was originally owned by principals in a local real estate company who set up a holding company (BDR) to which they purported to convey title to the property.⁹⁵ The transfer was never recorded, however, and therefore notice was not provided.⁹⁶ BDR gave an option to purchase the property to the Greater Burlington Industrial Corporation,⁹⁷ who conveyed the option to Mitel.⁹⁸ At the time Mitel submitted its application to the District Commission, the record owners of the property were five individuals, three of whom were directors of the realty company.⁹⁹

An adjoining landowner¹⁰⁰ who opposed Mitel's application filed a motion to have the five record owners declared co-applicants.¹⁰¹ If the motion had been successful and the five individuals

93. *In re Mitel Semiconductor*, No. 4C0473, Findings of Fact and Conclusions of Law at 11 (Dist. Envtl. Comm'n No. 4, June 19, 1981).

94. Rule 6(A) of Vermont Environmental Board Rules (March 1, 1980) states:

Applications shall list the name or names of all persons who have a substantial interest in the tract of land by reason of ownership or control Unless the applicant's instrument of ownership or control is recorded in the land records of the municipality or will be recorded before commencement of the development or subdivision, the owners of the tract of involved land shall be the applicants or co-applicants.

95. See Motion on Applicant Status, *supra* note 92, at 1.

96. See Affidavit of Robert R. McKearin, counsel for Pillsbury Farms, Motion on Applicant Status, *supra* note 92.

97. Memorandum of Real Estate Contract (on file with Dist. Envtl. Comm'n No. 4 as Exhibit #3, *In re Mitel Semiconductor*, No. 4C0473 (Dist. Envtl. Comm'n No. 4, Jan. 29, 1981)).

98. Assignment of Contract (on file with Dist. Envtl. Comm'n No. 4 as Exhibit #83, *In re Mitel Semiconductor*, No. 4C0473 (Dist. Envtl. Comm'n No. 4, May 27, 1981)).

99. See Motion on Applicant Status, *supra* note 92, at 1-3.

100. The adjoining landowner was a farmer who had been leasing the land for agricultural purposes. He contended that the loss of this land could jeopardize his farming operation. *In re Mitel Semiconductor*, No. 4C0473, Findings of Fact and Conclusions of Law at 2 (Dist. Envtl. Comm'n No. 4, June 19, 1981). He subsequently withdrew his motion when he was able to negotiate a lease to continue farming the land. See letter from Dinse, Allen & Erdman, counsel for Pillsbury Farms, to Charles Tetzlaff, Chairman of District Environmental Commission No. 4, June 10, 1981). The five-year lease, however, neither guarantees that the land will remain available for agricultural production nor offers any security to the farmer, because the lessor may withdraw any part of the land from the lease at any time. See *In re Mitel Semiconductor*, No. 4C0473, Findings of Fact and Conclusions of Law at 12 (Dist. Envtl. Comm'n No. 4, June 19, 1981).

101. See Motion on Applicant Status, *supra* note 92. The Chittenden County Regional Planning Commission filed a request to have the Greater Burlington Industrial Corporation renamed as a co-applicant in the case because of its substantial interest in the land. See Re-

had been named as co-applicants, the scope of review under subcriterion 9(B)(ii) would have been significantly enlarged. As principals in a large real estate company, their land holdings could be extensive. Under subcriterion 9(B)(ii), the Commission would have been required to evaluate alternative sites for Mitel's proposed development. It is likely that an appropriate site on nonagricultural or secondary agricultural soil would have been found.

The significance of these transactions lies in the potential for circumventing review under subcriterion 9(B)(ii). Owners of land who wish to develop it could convey title to the property to a holding company to remove their names as record owners. The holding company would be named as the applicant for purposes of Act 250 and any property owned by the original owners would not be subject to evaluation under subcriterion 9(B)(ii). This presents a significant potential loophole for large developers with extensive real estate holdings. While it has not become widespread, the Commissions and the Board should be aware of the potential for the circumvention of this subcriterion.

V. MINIMIZING THE REDUCTION OF AGRICULTURAL POTENTIAL

Subcriterion 9(B)(iii), which requires the applicant to demonstrate that the proposed subdivision or development has been designed to minimize the reduction of the agricultural potential of the soils,¹⁰² is the most effective of the four subcriteria in helping to preserve good farmland for present or future agricultural production. The Board and the Commissions encourage applicants to design their developments to make the most efficient possible use of the land. Sometimes applicants who have not complied with subcriterion 9(B)(iii) are required to redesign their projects to minimize the reduction of the agricultural potential of the site.¹⁰³

Efficient use of land is encouraged in three different ways, de-

quest for Reconsideration of Ruling on Request for Rule of Co-applicant Status for G.B.I.C., *supra* note 92. The Planning Commission subsequently withdrew its request. See letter from Arthur A. Hogan, Jr., Executive Director of the Chittenden County Regional Planning Commission, to Charles Tetzlaff, Chairman of District Environmental Commission No. 4 (June 10, 1981).

102. An applicant for a permit is required to demonstrate that "the subdivision or development has been planned to minimize the reduction of agricultural potential by providing for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage." VT. STAT. ANN. tit. 10, § 6086(a)(9)(B)(iii) (Supp. 1981).

103. See cases cited *supra* note 51.

pending upon the circumstances. The first method is to recommend that residential units be clustered in one area of a tract of land, leaving the rest of the land undeveloped, thereby preserving large areas of open space. Cluster design for residential dwellings is effective because it provides needed housing while allowing large tracts of open space to remain in one piece. If the soils are good, the open areas can be used for agricultural production either now or at a future time.

Subdivision development in America has traditionally taken the form of free-standing homesteads on individual lots.¹⁰⁴ With the intention of preserving open space, towns in many rural areas have adopted "large-lot" zoning, with single family houses built on separate lots of two or more acres. In the last fifteen years, high land prices and the realization that large-lot zoning does not efficiently preserve open space have contributed to the acceptance of cluster housing and the recognition of its advantage.¹⁰⁵ Large-lot subdivision is actually as destructive to the use of land for future agricultural production as small-lot subdivision, because the fragmentation of ownership that takes place when farmland is subdivided, even into fairly large lots, precludes the use of the land as part of a farm unit.¹⁰⁶

Cluster designs seem to be a highly effective means of achieving a satisfactory compromise between a landowner's interest in obtaining a profit and the state's interest in preserving primary agricultural lands. For example, in *In re Peck*,¹⁰⁷ District Commission No. 1 denied a permit to extend an existing subdivision because the proposed two-acre lots would significantly reduce the agricultural potential of the land and the development did not "reflect cluster planning or any reasonable effort to prevent the significant interference with or jeopardy to the use of the primary agri-

104. W. WHYTE, THE LAST LANDSCAPE 199 (1968).

105. *Id.* at 199-212. "Clustering" is a Vermont tradition; villages are designed with houses close together around an open-space common area, the "green."

106. Once a farm has been subdivided and developed, it would be nearly impossible to later farm it as a unit. A farmer needs large, contiguous tracts of land to conduct an economically viable agricultural operation. The Environmental Board has identified other problems with large-lot subdivisions: "Large-lot subdivisions involve many of the same environmental and fiscal problems of small-lot subdivisions: impacts on schools, town roads, scenic and natural areas, water and energy supply and others. Moreover, large-lot subdivisions have resulted in the unnecessary carving up of productive farm and forest land." Act 250: A Performance Evaluation, *supra* note 10, at 15.

107. No. 1R0383 (Dist. Env'tl. Comm'n No. 1, July 31, 1980).

cultural soils."¹⁰⁸ The applicant was encouraged to work with the State Department of Agriculture to redesign his subdivision to satisfy the requirements of subcriterion 9(B)(iii), and his proposal was subsequently approved when he revised his plan.¹⁰⁹

An example of the kind of design compromise which can be achieved by negotiation between a cooperative applicant and a Commission is apparent from *In re R. A. Smith, Inc.*¹¹⁰ In that case, District Commission No. 2 successfully persuaded the applicant to change his design for developing 40.7 acres into fourteen one-acre lots and eighty-two camping sites by locating all permanent structures on one side of the parcel, leaving a large amount of primary agricultural land undeveloped.¹¹¹

Creative methods are sometimes used to comply with subcriterion 9(B)(iii).¹¹² Even subdivisions of single family house lots can be designed to minimize the impact on primary agricultural soils.

108. *Id.*, Findings of Fact and Conclusions of Law at 3-4. But cf. *In re Foster*, No. 4C0351 (Dist. Envtl. Comm'n No. 4, Oct. 10, 1978), where the Commission found that "[t]hough the Palatine soils are prime agricultural soils, the ten acre parcels will not create a major impairment of the land use." *Id.*, Findings of Fact and Conclusions of Law at 3.

109. *In re Peck*, No. 1R0412 (Dist. Envtl. Comm'n No. 1, Aug. 5, 1981).

110. No. 2S0303 (Dist. Envtl. Comm'n No. 2, Sept. 11, 1978).

111. The language of the Commission in its Findings of Fact and Conclusions of Law provides an unusually clear description of the reasoning it used and an example of the positive influence the Commissions can have in protecting primary agricultural soils:

- a. The soils in the area of the proposed campground have been classified as Hadley — one of Vermont's best soils for agricultural use.
- b. Although the land area may not be large enough to be conducive to large scale farming, such superior land ought not to be lost to agriculture unnecessarily.
- c. Therefore the applicants, at the Commission's request, have revised their plans to relocate all permanent structures on one side of the parcel and the concrete pads will be eliminated by condition of the permit.
- d. The soils on the upper plateau are classified as Windsor — a soil type which is classified as having good potential for agricultural use when properly managed, and may be considered a primary agricultural soil in Vermont.
- e. The applicants cannot realize a fair return on this land by agriculture . . . They hold no nonagricultural lands reasonably suited to the use. By avoidance of the destruction of the Hadley soils, the reduction of agricultural potential has been minimized.

Id., Findings of Fact and Conclusions of Law at 2-3.

112. Richard Cowart, former Executive Officer of the Vermont Environmental Board, believes that the District Commissioners would be more aggressive in requiring developers to use designs which minimize the impact on the agricultural potential of land if they were shown different design possibilities. Training sessions with the Commissioners and the Board members would increase their ability to make informed decisions. Interview with Richard Cowart in Montpelier (Nov. 14, 1980).

In *In re Gardenside Associates*¹¹³ the applicant was found to have met the requirements of subcriterion 9(B)(iii) while subdividing thirty acres into eighteen single family residential lots because an additional sixty acres of the tract were set aside as common land and restricted to "passive recreation."¹¹⁴

Some developers have gone even further in protecting agricultural land. In *In re Ross*,¹¹⁵ the applicant's proposal, which was approved, included protective covenants requiring that the open lands continue to be hayed.¹¹⁶ Another developer created an agricultural landowners' association for the purpose of preserving and protecting "the agricultural potential of the . . . lands by holding in common, controlling [sic] administering and using . . . the agricultural and forestry rights to said lands, for the mutual benefit of the members of the Association."¹¹⁷

The second method used by the Commissions and the Board to reduce the adverse impact on primary agricultural soils is to issue a permit for the development of a portion of the land on the condition that the remainder of the land not be developed without the permission of the Commission. In *In re LaBrecque*,¹¹⁸ the Board emphasized that the subdivision of eighteen acres in one corner of the 147 acre tract complied with subcriterion 9(B)(iii) only when considered in relationship to the land as a whole.¹¹⁹ The Board retained jurisdiction over the entire parcel and issued the permit on the condition that any "[f]urther conversion of the agricultural soils on the remainder of the farm will be subject to the

113. No. 4C0446 (Dist. Envtl. Comm'n No. 4, Oct. 15, 1980).

114. *Id.*, Findings of Fact and Conclusions of Law at 5.

115. No. 4C0441 (Dist. Envtl. Comm'n No. 4, June 18, 1980).

116. *Id.*, Findings of Fact and Conclusions of Law at 4.

117. *In re Fayette*, No. 6F0193, Findings of Fact and Conclusions of Law at 7 (Dist. Envtl. Comm'n No. 6, Sept. 20, 1978).

118. No. 6G0217-EB (Vt. Envtl. Bd., Nov. 17, 1980).

119. The Board stated:

[T]he applicants do not intend to develop the remainder of the property. Consequently, the loss of 18 acres, or 13% of the farm, from agricultural use is a reasonable attempt to minimize the reduction in the agricultural potential of the farm as a whole. We observe, however, that this finding is possible only because we view the entire LaBrecque farm as a whole, and because we find that the conversion of these 18 acres is reasonable when placed in that context. If the 18 acres were viewed in isolation, we would be forced to conclude that the conversion of 100% of that site did not represent a reasonable effort to minimize the reduction of the agricultural potential of the relevant agricultural lands.

Id., Findings of Fact and Conclusions of Law at 7.

review of the District Environmental Commission.”¹²⁰

The third method used by the Commissions and the Board to encourage efficient use of land is site planning for non-residential development. For example, the Board required the Vermont Agency of Transportation¹²¹ to redesign its plans for reconstructing a portion of a highway in order to reduce the impact on agricultural lands.¹²² As it was designed, twenty-six acres of primary agricultural soils would have been lost and, more significantly, the removal of four barns would have affected and possibly seriously jeopardized continued agricultural use of several hundred acres of farmland.¹²³ The District Commission issued a permit with the condition that the Agency of Transportation replace the barns.¹²⁴ The Agency appealed to the Board, and the conditions of the permit were upheld.¹²⁵ The Board’s decision was based in large part upon the fact that the highway reconstruction could be accomplished in such a way as not to jeopardize the agricultural potential of the soils. The Board stated: “[W]here government has reasonable alternatives to the disruption of the environment . . . the General Assembly makes clear that government, like private development, must use them.”¹²⁶

Industries and commercial enterprises are also required to plan their site locations carefully when building on primary agricultural soils. Due to the particular needs of industries, however, such as widely spaced buildings for parking, fire and truck access, parking lots for employees, and space for future expansion, it is

120. *Id.* at 9. See also *In re Mitel Semiconductor*, No. 4C0473, Findings of Fact and Conclusions of Law at 13 (Dist. Envtl. Comm’n No. 4, June 19, 1981), where the Commission stated that any future expansion of the project will be subject to review by the Commission.

121. State agencies are not exempt from Act 250 review. “Development,” for purposes of Act 250 jurisdiction, includes “the construction of improvements on a tract of land involving more than 10 acres which is to be used for municipal or state purposes.” VT. STAT. ANN. tit. 10, § 6001(3) (Supp. 1981). See Exec. Or. No. 52 (Sept. 25, 1980) (issued by Governor Richard Snelling) which established an Agricultural Lands Review Board to “review proposed actions of state agencies that will have a significant impact on productive agricultural lands or primary agricultural soils.” *Id.* at 3.

122. *In re State of Vermont*, Agency of Transp., No. 9A0071-EB, Findings of Fact and Conclusions of Law at 3, 9-10 (Vt. Envtl. Bd., Sept. 14, 1979).

123. *Id.*

124. *In re State of Vermont*, Agency of Transp., No. 9A0071, Land Use Permit at 2 (Dist. Envtl. Comm’n No. 9, March 29, 1979).

125. *In re State of Vermont*, Agency of Transp., No. 9A0071-EB, Findings of Fact and Conclusions of Law at 3 (Vt. Envtl. Bd., Sept. 14, 1979).

126. *Id.* See *supra* note 121.

often not feasible for industries to locate on nonprimary agricultural soils. In *In re C & K Brattleboro Associates*,¹²⁷ District Commission No. 2 originally issued a permit for industrial development on the condition that it be built away from the primary agricultural land.¹²⁸ The Board, however, found that it was not reasonable to insist that the industrial park use that type of location design, since it conflicted with the applicant's needs and did not result in the retention of a significant amount of usable agricultural land.¹²⁹ Since then, several Commissions have relied on the Board's position and not required a cluster-type design for industries or commercial enterprises.¹³⁰

In some cases, industries could locate away from the primary agricultural soils, especially when they need only a few acres of a larger tract for their buildings. In *In re Knight Consulting Engineers*,¹³¹ the applicant's proposed office building and parking lot were planned to minimize the reduction of the agricultural potential of the soils. By locating the development on three acres in the wettest area of the twenty-five acre tract, the primary agricultural soils were left undeveloped.¹³² When site design such as this is possible, the Commissions should encourage it.

VI. IMPACT ON ADJOINING LANDS

Subcriterion 9(B)(iv) states that the applicant must prove that "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."¹³³ The proper interpretation of the word "adjoining" has been the subject of considerable controversy. It has been argued that consideration of criterion 9(B)(iv) should be limited to those

127. No. 2W0434 (Dist. Envtl. Comm'n No. 2, Oct. 4, 1979).

128. *Id.*, Land Use Permit at 7.

129. *In re C & K Brattleboro Assoc.*, No. 2W0434-EB, Findings of Fact and Conclusions of Law at 4 (Vt. Envtl. Bd., Jan. 2, 1980).

130. See, e.g., *In re C & S Wholesale Distribution Warehouse*, No. 2W0472 (Dist. Envtl. Comm'n No. 2, June 27, 1980), another industrial park case that came before the Commission several months after its decision in *In re C & K Brattleboro Associates* was reversed by the Board. In *In re C & S Wholesale Distribution Warehouse*, the Commission stated that subcriterion 9(B)(ii) does not apply to industrial sites. *Id.*, Findings of Fact and Conclusions of Law at 5. See also *In re Juster Associates*, No. 5W0556, Findings of Fact and Conclusions of Law at 26 (Dist. Envtl. Comm'n No. 5, Nov. 4, 1980).

131. No. 4C0430 (Dist. Envtl. Comm'n No. 4, May 5, 1980).

132. *Id.*, Findings of Fact and Conclusions of Law at 4.

133. Vt. STAT. ANN. tit. 10, § 6086(a)(9)(B)(iv)(Supp. 1981).

lands which are geographically contiguous to the applicant's property.¹³⁴ The District Commissions usually do not consider farmland which is close to, but not physically touching, the applicant's land in their review.¹³⁵ Some individuals believe, however, that the intent of criterion 9(B) is to protect the viability of agriculture and that such a limitation is inconsistent with the purpose of subcriterion 9(B)(iv).¹³⁶ They argue that the subcriterion should be interpreted broadly to apply to a larger geographical area.¹³⁷ The rationale is that in Vermont many farmers rent land which is not physically contiguous to their home farms.¹³⁸ While a farm may not be physically touching the site of a proposed development, if a farmer is using the land as part of his operation, its loss could affect his agricultural operation just as severely as if it were part of the farm unit. Also, given the uncertainty of future land use needs, paving over productive farmland may not be a wise course of action.

A broader interpretation of subcriterion 9(B)(iv) affords an opportunity for consideration of the impact of a proposed development on farmland which may not touch the site but will be affected by the loss of the farmland in question. The economic viability of agriculture in Vermont is dependent upon the preservation of agricultural communities, which are necessary to maintain a market for those businesses and services essential to agriculture. These include feed and fertilizer stores, repair services, and veterinarians.¹³⁹ A critical mass of farms, which is the mini-

134. Memorandum of Law for Applicant, *In re Windsor Improvement Corp. Indus. Park*, No. 2S0455 (Dist. Envtl. Comm'n No. 2, May 2, 1980).

135. See, e.g., *In re Juster Associates*, No. 5W0556, Findings of Fact and Conclusions of Law at 26 (Dist. Envtl. Comm'n No. 5, Nov. 4, 1980); *In re Sheppard & Carrier*, No. 4C0439, Findings of Fact and Conclusions of Law at 5 (Dist. Envtl. Comm'n No. 4, July 17, 1980); *In re Bell*, No. 8B0189, Findings of Fact and Conclusions of Law at 2 (Dist. Envtl. Comm'n No. 8, Aug. 3, 1978).

136. See the policies of the capability and development plan enumerated *supra*, at note 67.

137. See Memorandum of Law for Ottawaquechee Natural Resources Conservation District [hereinafter cited as ONRCD] at 3-4, *In re Windsor Improvement Corp. Indus. Park*, No. 2S0455 (Dist. Envtl. Comm'n No. 2, May 23, 1980).

138. See *supra* note 63.

139. Lapping, *supra* note 53, at 125. New York State has a law which enables voluntary creation of agricultural districts of at least 500 acres which afford participating farmers certain advantages in return for which they agree not to convert their land to nonagricultural uses. N.Y. AGRIC. & MKTS. LAW § 303, 305 (McKinney Supp. 1981-82). For assessments of the New York program, see, e.g., Conklin & Bryant, *Agricultural Districts: A Compromise Approach to Agricultural Preservation*, 56 AM. J. AGRIC. ECON. 607 (Aug. 1974); Lapping, Bevins & Herbers, *Differential Assessment and Other Techniques to Preserve Missouri's*

mum number of farm units necessary to support those businesses and services, is vital for the continuing health of an agricultural community.¹⁴⁰ Because the development of farmland in the midst of an agricultural area can begin the erosion of agriculture,¹⁴¹ a proposed development on primary agricultural land in an area in which the number of farms is close to that minimum number should be reviewed carefully to make sure that it will not jeopardize the continuation of agriculture in that community.¹⁴² Subcriterion 9(B)(iv) can be used as a vehicle by which the District Commissions and the Board can ensure that a development proposal is thoroughly scrutinized for its impact on the viability of agriculture in a given area.

The issue of whether subcriterion 9(B)(iv) should be interpreted broadly or narrowly was the focus of controversy in *In re Windsor Improvement Corporation Industrial Park*.¹⁴³ In that case, District Commission No. 2 denied a permit for construction of an industrial park on a forty-four acre tract containing primary agricultural soils two miles north of Windsor village.¹⁴⁴ There was considerable testimony at the hearings that this development would have an adverse effect on nearby farms and on the critical mass of the agricultural community.¹⁴⁵ The proposed site is in the middle of about 160 acres of land that until the previous year had been used for agricultural production. Testimony indicated that a parcel immediately north of the site had been taken off the market as a farm "due to the activity of the applicant"¹⁴⁶ and that the conversion of this forty-four acres from farmland to an industrial site could induce the conversion of the sixteen working farms in

Farmlands, 42 Mo. L. Rev. 369, 404-06 (1977).

140. Lapping, *supra* note 53, at 125. See also Phillon & Derr, *Critical Mass of Agriculture and the Maintenance of Land in Agriculture*, 3 J. N.E. AGRIC. ECON. COUN. 1 (May 1974).

141. Sometimes an industry will install sewer and water lines which are made available to new development in the area. Because these services carry a high initial expense, once they are installed it becomes economically feasible for other people in the area to develop their land.

142. It has been estimated that in Vermont 11-15 farms is the minimum number necessary to maintain a healthy farm community. *In re Windsor Improvement Corp. Indus. Park*, No. 2S0455, Findings of Fact and Conclusions of Law at 11 (Dist. Envtl. Comm'n No. 2, Aug. 11, 1980).

143. No. 2S0455 (Dist. Envtl. Comm'n No. 2, Aug. 11, 1980).

144. *Id.*, Findings of Fact and Conclusions of Law at 12.

145. *Id.* at 10-11.

146. *Id.* at 10.

the area.¹⁴⁷ The sewer and water systems the applicant proposed to install would be available for use by others wanting to develop additional agricultural land in the area, potentially affecting the critical mass required to maintain a viable farming community.¹⁴⁸

The applicant argued that consideration of subcriterion 9(B)(iv) should be "limited exclusively to adjoining lands, meaning those lands touching and abutting the subject property."¹⁴⁹ The Ottauquechee Natural Resources Conservation District (ONRCD), a conservation organization that opposed the proposed development,¹⁵⁰ argued that if the Commission adhered to a narrow interpretation of "adjoining," the intent of the Legislature in adopting that subcriterion would be frustrated.¹⁵¹

When the legislature has stated that preservation of agricultural productivity and the economic viability of agricultural units are matters of public good, worthy of state regulation, it cannot have meant to restrict an Environmental Commission's inquiry on the impacts of proposals to those lands which actually touch those slated for development.¹⁵²

Furthermore, ONRCD argued that the impact on farms that "adjoin each other through economic interconnection" should be scrutinized because of the economic interdependency among farms in an agricultural community.¹⁵³ ONRCD also pointed out that if subcriterion 9(B)(iv) were limited in its application only to those lands actually touching the site, a developer could easily circumvent that subcriterion by deeding the adjoining portions of his property to nonagricultural users, thereby eliminating any "adjoining" farmland.¹⁵⁴

The Commission rejected the applicant's argument that "adjoining" should be limited to those lands touching the subject property, stating that "due to the nature of Vermont farming operations (a home farm with rented supplemental land usually at

147. *Id.* at 10-11.

148. *Id.* at 10.

149. Motion for Applicant, *In re Windsor Improvement Corp. Indus. Park*, No. 2S0455 (Dist. Envtl. Comm'n No. 2, May 2, 1980).

150. ONRCD was admitted as a party under Vermont Environmental Board Rules, Rule 12(C) (March 1, 1980).

151. Memorandum of Law for ONRCD at 3-4, *In re Windsor Improvement Corp. Indus. Park*, No. 2S0455 (Dist. Envtl. Comm'n No. 2, May 23, 1980).

152. *Id.* at 4.

153. *Id.* at 9.

154. *Id.*

some distance from the home farm), it is unreasonable to limit impacts on agricultural potential to lands physically touching the property of any particular project."¹⁵⁵

While the Commission's conclusions seem reasonable, because no official guidelines exist for the proper interpretation of subcriterion 9(B)(iv) the Board and the Commissions have been applying the subcriterion inconsistently. In some cases they limit the meaning of "adjoining" to "physically touching," even when a consideration of the impact on a larger area would be appropriate.¹⁵⁶ In other cases they consider the character of the area and the impact the subdivision or development will have on the surrounding community.¹⁵⁷ Sometimes they do both in the same case. Addressing subcriterion 9(B)(iv) in *In re C & S Wholesale Grocers*,¹⁵⁸ for example, Commission No. 2 stated: "There are no farms physically touching the project site. Within a 10-mile radius measured by traveling on the road, there are about 11 operating farms. The loss of the 12 ± acres of farmland is not likely to jeopardize the continuation of agriculture."¹⁵⁹ In that case the Commission issued a permit for the construction of a food distribution warehouse on a 22.3 acre parcel which contained primary agricultural soils. The site was several miles from the recently approved C & K Brattleboro Associates industrial park in a densely developed commercial strip outside the town of Brattleboro. One of the Commissioners dissented from the issuance of the permit.¹⁶⁰ Taking into consideration the impact on agriculture in the area, she argued that the development would jeopardize the continuation of agriculture on adjoining lands. The site was being used for growing corn and "although some agricultural land in the vicinity of this proposed development has been converted to industrial use, the amount of primary agricultural land remaining is large enough to

155. Dist. Envtl. Comm'n No. 2 Orders for Windsor Improvement Corp. Indus. Park at 1, *In re Windsor Improvement Corp. Indus. Park*, No. 2S0455 (Dist. Envtl. Comm'n No. 2, Aug. 11, 1980).

156. See, e.g., cases cited *supra* note 135.

157. See, e.g., *In re Windsor Improvement Corp. Indus. Park*, No. 2S0455, Findings of Fact and Conclusions of Law at 10-11 (Dist. Envtl. Comm'n No. 2, Aug. 11, 1980); *In re Peck*, No. 1R0383, Findings of Fact and Conclusions of Law at 5 (Dist. Envtl. Comm'n No. 1, July 31, 1980).

158. No. 2W0472 (Dist. Envtl. Comm'n No. 2, June 27, 1980).

159. *Id.*, Findings of Fact and Conclusions of Law at 5.

160. Minority Opinion of Findings of Fact on Criterion 9(B) Primary Agricultural Soils, *In re C & S Wholesale Grocers*, No. 2W0472 (Dist. Envtl. Comm'n No. 2, June 27, 1980).

be viable as farm land."¹⁶¹

Due to the importance of the issues raised by subcriterion 9(B)(iv), a rule which explicitly sets forth the considerations required by the subcriterion is called for. Without such a clarification, developers are not able to predict the scope of review under subcriterion 9(B)(iv) and the Commissioners do know what factors they should evaluate. In light of the policy considerations examined here, it seems unreasonable to limit the application of subcriterion 9(B)(iv) only to those lands physically contiguous to a proposed development site. A ruling by the Board which would require the Commissions to consider the impact of a proposed development on the agricultural community would make the Commissioners' jobs considerably less difficult and would further the state policy of protecting the viability of the agricultural economy.¹⁶²

It can be argued that a broader interpretation would add to the confusion because without a delineated geographical area, the scope of review could be carried to absurd extremes. A common sense approach, however, would limit consideration to those farms which are close enough to be affected by the potential conversion of the land in question. While the scope would obviously vary in different areas, testimony of farmers in the community as to whether they use or need the land for their agricultural operations should be considered. Local farmers could also be consulted about the long-range impact on the agricultural community. Furthermore, evidence from the State Department of Agriculture could establish whether the land is important to future agricultural production in Vermont and whether it should be preserved for that purpose.

If the Commissions broadly interpret subcriterion 9(B)(iv) and consider the impact of a proposed subdivision or development on the surrounding agricultural community, the basis on which they determine the proper uses of land when there is conflict remains unclear. During the hearings on the proposed C & K Brattleboro Associates industrial park, there was conflicting testimony con-

161. *Id.*

162. Executive Order No. 52 (Sept. 25, 1980) directs that state agencies must not eliminate or significantly interfere with or jeopardize the continuation of agriculture on productive agricultural lands or reduce the agricultural potential on primary agricultural soils unless there is no feasible and prudent alternative and the facility or service has been planned to minimize its effects on such lands.

cerning the impact of the conversion of the prime land on agriculture in the area.¹⁶³ Testimony was presented that this land was valuable to local agriculture. Other testimony indicated that the site was more appropriate for industrial development. The Department of Economic Development testified that this was the last industrial site in Brattleboro and important for providing employment; that due to the character of the area and the high land values it was not a feasible location for agriculture; and that the land had previously been zoned for industrial use.

The question of the best use of land is particularly difficult in areas which already contain considerable development, and there are different philosophies regarding the feasibility or desirability of trying to retain relatively small pieces of farmland in such areas. During the *C & K Brattleboro Associates* hearings, a county agricultural extension agent testified that agricultural use of the land was feasible even though it was surrounded by commercial and industrial enterprises. He stated:

Its location affords a farm with an ideal location for operating a retail vegetable-small fruit operation. Brattleboro gains a relatively secure source of food and green space Farmers in other urban locales in vegetable and nursery production have withstood pressures of the urbanizing market.¹⁶⁴

The state land use plan which was not adopted would have provided a map on which important agricultural land would have been designated.¹⁶⁵ Without such a map or plan, the Commissions are required to evaluate testimony and determine whether the land should remain in agriculture or whether the interests of the land-

163. *In re C & K Brattleboro Assoc.*, No. 2W0434, Findings of Fact and Conclusions of Law at 11-13 (Dist. Envtl. Comm'n No. 2, Oct. 4, 1979).

164. Letter from David Key (June 11, 1979) (on file with Dist. Envtl. Comm'n No. 2). While small pieces of primary agricultural land may not be viable for dairy farming, they can be valuable for growing fruits or vegetables. The diversification of agriculture in Vermont, which is predominantly a dairy farming state, is being promoted by the Vermont Department of Agriculture. The economic feasibility of future agricultural development efforts is currently being studied for the purpose of formulating and implementing an agricultural development program. See *Building an Agricultural Development Effort in the Upper Connecticut River Valley: A Joint Effort of the States of Vermont and New Hampshire* (available at the Vermont Department of Agriculture) which was written as the project was beginning in 1980.

The co-existence of agriculture and industry on the same site is also being encouraged by the state. See *In re Mitel Semiconductor*, No. 4C0473, Findings of Fact and Conclusions of Law at 12 (Dist. Envtl. Comm'n No. 4, June 19, 1981).

165. VT. STAT. ANN. tit. 10, § 6043 (Supp. 1981). For a discussion of the proposed land use plan, see *supra* notes 40-42 and accompanying text.

owner or the town in developing it are overriding.

In trying to make such a determination, the Commissions often look to the local or regional plans. Both town and regional planning commissions have the authority to draw up plans of long-term land use policies, which in some cases are implemented through municipal zoning ordinances.¹⁶⁶ These plans are not always helpful.¹⁶⁷ Not all towns have adopted plans, and even fewer have permanent zoning ordinances.¹⁶⁸ Many of the plans were written before preserving agricultural land was a concern. Furthermore, sometimes town and regional plans contain contradictory goals, encouraging both industrial development and conservation of natural resources. During the *C & K Brattleboro Associates* hearings, the difficulty of determining the proper uses of land when the goals in the local and regional plans conflict was a major issue.¹⁶⁹

Towns often encourage industrial development because of the jobs and tax revenue which industries provide. While local economic health is important, the economic benefits of industry often cause a town to overlook or ignore the long-range consequences to the area.¹⁷⁰ For example, the City of South Burlington, located in

166. VT. STAT. ANN. tit. 24, §§ 4301-4493 (1975 & Supp. 1981).

167. While criterion 10 of Act 250 states that an applicant must demonstrate that his proposed development or subdivision “[i]s in conformance with any duly adopted local or regional plan . . . ,” VT. STAT. ANN. tit. 10, § 6086(10) (Supp. 1981), the Environmental Board has pointed out the practical limitations of the effectiveness of this criterion:

The district commissions and the Board continually find that the provisions of the Act for reviewing permit applications for compliance with local plans is of very limited utility in the many towns of the state that are either without duly adopted plans or with plans that are too general or vague to be considered To an extent, the creation of regional plans has constructively contributed to the Act 250 process in some districts, but in other areas regional plans have not provided concrete and coherent guidance for the evaluation of the suitability of the proposed development.

Act 250: A Performance Evaluation, *supra* note 10, at 7.

168. Of the 311 municipalities in Vermont, 221 have adopted land use plans and of those, 179 have permanent zoning ordinances. Report to the General Assembly on the 1980 Special Appropriations for Regional Planning and Development Commissions (prepared by the Department of Housing and Community Affairs for the Vermont State Planning Office).

169. In its discussion, District Environmental Commission No. 2 pointed out the difficulties caused by the conflicting goals: “The Commission is given no idea how [the conflicting] policies are ranked nor the thought process by which a town or region decides where farming or industry will take place when in conflict. In the future the Commission would like to have more help making this kind of decision from the towns and regions through their duly adopted plans.” *In re C & K Brattleboro Assoc.*, No. 2W0434, Findings of Fact and Conclusions of Law at 15 (Dist. Envtl. Comm'n No. 2, Oct. 4, 1979).

170. Professor Norman Williams, Jr. has written that the financial consequences of a

the most rapidly developing county in Vermont, recently changed its zoning designation within a 4,000 acre farming area (the "Southeast Quadrant") in order to allow the location of an industry there.¹⁷¹ The change was encouraged by the Greater Burlington Industrial Corporation which actively solicited Mitel Semiconductor to locate on that parcel.¹⁷² Mitel's plant is the first encroachment onto the 4,000 acres of undeveloped, highly productive farmland of the Southeast Quadrant. Until this time, the interstate highway had served as a natural barrier against development of the farmland in that area. Many people have expressed concern about future industrial expansion into this section of South Burlington and the effect it will have on the agricultural community.¹⁷³ Because the area is now rezoned for industrial use, it is likely that other landowners will sell or develop pieces of their properties and the viability of the agricultural community will be destroyed.¹⁷⁴

proposed land use often determine whether or not it will be approved by a town, depending on whether the use is a "good ratable."

A "good ratable" is a type of land use which brings in a lot of taxes but does not require much in public services . . .

. As a result of . . . heavy financial pressure upon municipalities, all the major land use controls are distorted from their legitimate purposes. Zoning decisions are frequently based primarily upon the search for the good ratable—thereby often encouraging development which, by any other criteria, may not belong in [a] town

Williams, *The Three Systems of Land Use Control*, 25 RUTGERS L. REV. 80, 83-84 (1970).

171. See, e.g., letter from David H. Spitz of the City of South Burlington Planning Commission to Richard Trudell, Consulting Engineer for Mitel Semiconductor (Apr. 8, 1981) (on file with Dist. Envtl. Comm'n No. 4 as Exhibit #1).

172. See, e.g., letter from Walter G. Bruska, Executive Director of Greater Burlington Industrial Corporation, to Ralph A. Bennett, Vice President and General Manager of Mitel Semiconductor (Dec. 16, 1980) (on file with Dist. Envtl. Comm'n No. 4 as Exhibit #81).

173. See, e.g., letter from Darby Bradley of the Vermont Natural Resources Council to Charles Tetzlaff, Chairman of District Environmental Commission No. 4 (May 21, 1981).

174. See *supra* notes 139-42 and accompanying text. Because the building was located on ledge, this development was praised for locating its facilities away from the primary agricultural soils. See, e.g., letter from George M. Dunsmore, Vermont Commissioner of Agriculture, to Charles Tetzlaff, Chairman of District Environmental Commission No. 4 (June 2, 1981) (on file with Dist. Envtl. Comm'n No. 4 as Exhibit #4). Mitel was also commended for contracting with a local farmer for continued agricultural production on unused portions of the site. See, e.g., *In re Mitel Semiconductor*, No. 4C0473, Findings of Fact and Conclusions of Law at 12-13 (Dist. Envtl. Comm'n No. 4, June 19, 1981). It is interesting to note, however, that the titles of a number of documents submitted in conjunction with the permit hearings strongly suggest that plans for further development of the site were already underway. See, e.g., Master Site Plan for Mitel, Mountain View Industrial Park (prepared by Trudell Consulting Engineers, Inc., Apr. 1, 1981) (on file with Dist. Envtl. Comm'n No. 4 as Exhibit #10); Preliminary Report on Traffic for Mitel Mountain View Industrial Park, South Burlington, Vermont (prepared by Trudell Consulting Engineers, Inc., Mar. 6, 1981).

Some of the decisions of the Board and the Commissions reflect a presumption that it is not feasible to preserve agricultural land in developing areas. When a proposed development site is in an area which contains considerable development, a permit is frequently issued.¹⁷⁵ That presumption is reasonable in light of the problems often created by conflicting land uses and of the need for a critical mass of farms for a healthy agricultural community.¹⁷⁶ It is sometimes appropriate, however, to consider the effect that the loss of more farmland will have on the remaining farms in a community, even if only a few remain, and the cumulative effect on the conversion of many small parcels.¹⁷⁷ Furthermore, while it may not be economically feasible to preserve farmland in the midst of development, there are serious long-range consequences to an area and to the whole state when towns become completely urbanized. Much of Vermont's economy is dependent on tourism and recreation, and its desirability as both a place to live and to visit is due largely to its rural character. It is therefore imperative that the Commissions be given guidance as to the appropriate factors to evaluate when considering the impact of a proposed development on primary agricultural land, other than the short-term economic benefits. Perhaps an explicit policy statement by the Board regarding the importance of retaining highly productive or otherwise valuable farmland would encourage the Commissioners to more carefully scrutinize the effect of proposed developments.

Despite the problems which have arisen in the interpretation of subcriterion 9(B)(iv) and the inconsistencies in its application, if properly clarified, it could be used in conjunction with regional and town plans as a satisfactory method of designating the uses of land on a local level without the need for a state-wide land use plan. Even without formal action by the Board, town and regional plans written with emphasis on retaining important agricultural lands could significantly facilitate the job of the Commissioners in evaluating the nature and extent of the impact of a proposed develop-

(on file with Dist. Envtl. Comm'n No. 4 as Exhibit #25).

175. See, e.g., *In re C & K Brattleboro Assoc.*, No. 2W0434-EB (Vt. Envtl. Bd., Jan. 2, 1980); *In re Locust Hill Condominiums*, No. 4C0428 (Dist. Envtl. Comm'n No. 4, Oct. 10, 1980); *In re Sheppard & Carrier*, No. 4C0439 (Dist. Envtl. Comm'n No. 4, July 17, 1980); *In re Fassett's Bakery*, No. 4C0339 (Dist. Envtl. Comm'n No. 4, Aug. 14, 1978). District Commission No. 4 includes Burlington, Vermont's largest city and most rapidly developing area.

176. See *supra* notes 139-42 and accompanying text.

177. See *infra* note 184.

ment on agriculture in the area.¹⁷⁸ A broader interpretation of the subcriterion could afford an opportunity for input into the decision-making process from those directly affected by a proposed development. Essential information could also be provided to the Commissions by the Vermont Department of Agriculture, which has begun to take a more active role in reviewing Act 250 applications affecting primary agricultural land. The Agriculture Department is in a good position to provide a broader perspective on the needs of the state. The Commissions could be further assisted in obtaining relevant information at educational sessions run by the Board. These sessions could provide a factual overview of farmland resources and the various factors which should enter into the review of applications.¹⁷⁹

VII. FURTHER LIMITATIONS OF ACT 250

In addition to the problems concerning the application of criterion 9(B), there are other limitations to Act 250's effectiveness in protecting farmland. There is a widespread belief that the most serious problem is that the majority of developments and subdivisions in the state are not subject to Act 250 review.¹⁸⁰ The jurisdiction of Act 250 extends only to commercial or industrial development on more than ten acres and subdivisions of ten or more lots of less than ten acres each.¹⁸¹ In order to escape Act 250 review, many developers have taken advantage of the "ten-acre loophole" by creating subdivisions of 10.1 acre lots. The result has been the unnecessary and wasteful fragmentation of land.¹⁸²

The question of where to draw the line on Act 250's jurisdiction

178. The Windham Regional Planning and Development Commission, which advises towns in its district about the preparation of municipal plans, conducted a study of agriculture in the Brattleboro area in southeastern Vermont. The results of the study were published in a report which calls for the town of Brattleboro to adopt a comprehensive agricultural land use policy to identify and prevent the conversion of important agricultural land in the area. *Brattleboro Agricultural Lands Study*, *supra* note 3, at 15.

179. See *infra* note 190.

180. See, e.g., Act 250: A Performance Evaluation, *supra* note 10, at 15: "There was a large measure of agreement among the participants in the conference that the most needed change in Act 250 was the elimination or modification of the exemption of parcels of land of over 10 acres from the provisions for subdivision jurisdiction."

181. See *supra* notes 11-12.

182. Developments typically contain parcels designed to abut an existing road because construction of a road that is more than 800 feet in length or that provides access to more than five parcels triggers Act 250 review. *Vermont Environmental Board Rules*, Rule 2(A)(6) (March 1, 1980).

tion has been debated since Act 250 was first conceived.¹⁸³ It is economically inefficient and politically unacceptable for the state to review all subdivision and development regardless of size. On the other hand, with the line drawn where it is, the consequence has been numerous, small, haphazard, and inefficiently designed developments which have cumulatively destroyed the agricultural potential of many acres of land.¹⁸⁴

Because of the considerable concern in Vermont regarding the extent of state regulation, the Board has not attempted to gain further authority over development.¹⁸⁵ When the policies in Act 250 calling for the efficient use of land are so obviously being circumvented, however, the Legislature should be concerned enough to try to find a solution which would further the intent of the law without unnecessarily infringing on individual property rights. A possible solution would be to redefine "lot" to include any conveyance of property for commercial purposes.¹⁸⁶ This would not affect an individual's right to develop his land for personal use or to create up to nine lots for development, but would ensure that commercial subdivisions of ten or more lots of any size would be reviewed and subject to the ten criteria of Act 250. This would eliminate the artificial "incentive" to create large lots in order to avoid Act 250 review.

183. Jonathan Brownell, one of the original draftsmen of Act 250, wrote in 1974:

Unless we can resolve the jurisdictional problem, we may force a paradoxical result, that of stopping the large developments which may be the very ones the community should encourage because of their substantial capital investments in pollution control equipment, road and school construction and open space planning, while allowing the smaller developments to slip under the net of regulation, even though they are the ones too small to afford either the protection of natural resources or the prevention of fiscal impact on the community.

Brownell, *State Land Use Regulation—Where Are We Going?* 9 REAL PROP. PROB. & TR. J. 29, 30 (1974).

184. Mark Lapping, an authority on farmland preservation in Vermont and author of numerous articles and studies, wrote that many small subdivisions in Vermont which do not fall within Act 250's jurisdiction are gradually using up a great deal of productive farmland, a process which he termed "the nickel and diming of Vermont farmland." "[W]e are witnessing a very incremental process. When all the 'increments' are added up, however, substantial land resources have been taken out of production. In essence, we are 'nickel and diming' ourselves out of agriculture on some of our most productive lands." Lapping, *The Nickel and Diming of Vermont Farmland*, The Sunday Rutland Herald, Apr. 9, 1978, § 4, at 3, col. 1.

185. See *supra* notes 41-42 and accompanying text.

186. An amendment which would change the definition of "lot" in Act 250 to mean any undivided interest in land has been submitted to the 1982 Adjourned Session of the General Assembly. H.R. 513, Adj. Sess. (1982).

Another factor which limits the effectiveness of Act 250 in preserving farmland is the small budget allocated to the Board for administration,¹⁸⁷ the result of which has been a severe limitation on the availability of resources to provide information to the Commissions. A case-by-case review system will work well only if the people who make the decisions receive good information; the availability of such information is the very heart of a successful program of this nature. The Environmental Board does not have its own expert staff and relies on other state agencies and the public to provide the information necessary for the Commissioners to make informed decisions.¹⁸⁸ At one time each district had an environmental advisor whose job was to look at proposed development sites and to testify at the hearings on behalf of the state. The Environmental Board no longer has access to these advisors.¹⁸⁹ Without adequate technical data, it is difficult for the Commissioners to properly evaluate the environmental impact of proposed developments.¹⁹⁰

187. The annual budget for state-wide 250 administration was approximately \$350,000 in 1981.

188. "Other departments and agencies of state government shall cooperate with the board and make available to it data, facilities and personnel as may be needed to assist the board in carrying out its duties and functions." VT. STAT. ANN. tit. 10, § 6024 (1973).

189. The unavailability of environmental advisors also places a burden on the Agency of Environmental Conservation, which is primarily responsible for representing the state's interest at permit hearings.

There is only one attorney to develop evidence and represent the interests of the state in all of the Act 250 hearings throughout the state. With approximately 350 permit applications, 300 amendments, 30 appeals and 15 declaratory rulings to be heard each year, there are approximately 800 hearings through the state each year. It is virtually impossible for a single person to evaluate the potential significance of the issues that might be raised in these hearings each working day of the year. Many important issues and important cases are therefore not addressed by state representatives at all, and very few can be addressed by the Agency's counsel in person.

Act 250: A Performance Evaluation, *supra* note 10, at 11.

190. Another state agency administrative problem requiring attention is that frequently district commissions and the Board are faced with differences of opinion on highly technical matters between qualified state agency professionals and those representing parties to a permit application. Lay members are asked to make judgments on issues on which they have no expert knowledge.

Id.

The problems created by the lack of technical information could be partially remedied if the Board were allocated relatively small sums to conduct educational training sessions for the Commissioners. While this would not answer questions regarding specific applications, it would greatly add to the Commissioners' knowledge regarding the kinds of factual decisions they are required to make and facilitate more consistent application of the criteria.

VIII. CONSTITUTIONAL AND EQUITY ISSUES

The decision to deny or severely restrict an applicant's proposed development raises constitutional issues. It is within the police power of the state to impose restrictions on the use of land as long as the restriction serves a legitimate purpose, is reasonably designed to reach that purpose, and is not unduly restrictive of economic opportunity.¹⁹¹ Zoning areas for designated uses, even when the result is severe reduction in property values, has been upheld as valid police power regulation since *Euclid v. Ambler Realty Co.* in 1926.¹⁹² Courts have usually held that as long as some reasonable use remains in private property, a restriction on it is not an unconstitutional taking without just compensation within the meaning of the fifth amendment to the Constitution.¹⁹³

In *Galanes v. Town of Brattleboro*, a leading Vermont case on the constitutionality of zoning, the Vermont Supreme Court held that the decline in value of a property from \$50,000 to \$15,000, which resulted from a zoning regulation, did not constitute an unconstitutional confiscation of property.¹⁹⁴ The court stated that it is within the police power to zone without compensating the owner for loss of value of the property, provided there remains in the owner some practical use of his land and there exists sufficient public need to justify the property owner's loss.¹⁹⁵ The Vermont Supreme Court has never addressed the question of whether a permit denial under Act 250 amounts to a taking of property without just compensation. It would likely uphold a denial if it considered the preservation of the land sufficiently important and if some reasonable use of the property remained.¹⁹⁶

While restricting the use of land to agricultural production notwithstanding a loss of profit to the landowner may be a valid exercise of the police power, it raises serious political and equity

191. See, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590, 594-95 (1961), citing with approval *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

192. 272 U.S. 365 (1926).

193. See *supra* discussion at note 77. See also *Keene, Agricultural Land Preservation: Legal and Constitutional Issues*, 15 GONZAGA L. REV. 621 (1980) for an analysis of the constitutionality of government regulations to protect land.

194. 136 Vt. 235, 388 A.2d 406 (1978).

195. *Id.* at 240, 388 A.2d at 409.

196. In *Andrews v. Lathrop*, 132 Vt. 256, 315 A.2d 860 (1974), a case upholding the constitutionality of the Vermont Land Gains Tax, see *supra* note 4, the court took judicial notice "of an increasing concern within the State over the use and development of land as a natural resource" *Id.* at 261, 315 A.2d at 863.

issues beyond the issue of constitutionality. Farmers and other landowners in Vermont generally oppose restrictions on the use of their land.¹⁹⁷ In order for significant amounts of farmland to be preserved, some kind of compensation may be necessary. A number of states and counties have implemented a system for purchasing the development rights on important farmland to insure that the land will remain undeveloped and available for agricultural production in perpetuity.¹⁹⁸ The state or county pays a landowner the value of the development rights of the land, which are usually defined as the difference between the market value and the use value in agriculture. While this method is effective and has been well accepted both by landowners and the general public, it can be quite costly.¹⁹⁹ Given the severe lack of funds available in Vermont, a state-wide program for purchasing development rights on a large scale is probably not feasible at this time. Concern in Vermont about the loss of farmland and the limitations of tax measures and of Act 250 in preserving significant amounts of agricultural land is increasing. A comprehensive plan needs to be developed and should include appropriation of funds to purchase the development rights on important farmland in jeopardy of being converted to nonagricultural uses.²⁰⁰

197. See *supra* notes 41-42 and accompanying text. For an insightful discussion of the point of view of farmers and other rural landowners, see R. Bevins, *The Ambivalence of Land Owners: Why Some People Don't Want To Be Protected* (unpublished manuscript, Department of Agricultural Economics, University of Missouri).

198. E.g., CONN. GEN. STAT. ANN. §§ 22-26aa to 22-26ii (West Supp. 1981); MASS. GEN. LAWS ANN. ch. 132A, §§ 11A-11D (1981); N.H. REV. STAT. ANN. §§ 36-D:1 to 36-D:8 (Supp. 1979); N.Y. GEN. MUN. LAW § 247 (McKinney 1974 & Supp. 1982). For discussions of the experience of Suffolk County, New York with a purchase of development rights program, see Lesher & Eiler, *An Assessment of Suffolk County's Farmland Preservation Program*, 60 AMER. J. AGRIC. ECON. 140 (Feb. 1978); Peterson & McCarthy, *Farmland Preservation by Purchase of Development Rights: The Long Island Experiment*, 26 DEPAUL L. REV. 447 (1977).

199. In Massachusetts, for instance, the development rights for eight farms cost an average of \$2,215 per acre. Draft report to the Gillette Sub-Committee on Agriculture of the Wetmore Commission on the Agricultural Preservation Restriction Program app. B, at 2 (Apr. 30, 1980). The value of development rights varies with the demand for the land for non-agricultural uses. See Batie & Looney, *Preserving Agricultural Lands: Issues and Answers*, 1 AGRIC. L.J. 600, 608 (1980).

200. An Agricultural Lands Task Force has been established in Vermont under the direction of the State Department of Agriculture. It has recently drafted a resolution which was adopted by the Vermont General Assembly as a statement of legislative support for preservation of agricultural land in Vermont. The resolution requests the Agricultural Lands Task Force to "develop a report describing the loss of farmland in Vermont and suggesting possible responses for consideration by the Governor and the 1983 General Assembly . . ." H.R.J. Res. 43, Adj. Sess. (1982). For assessments of various programs and techniques for farmland retention, see, e.g., Batie & Looney, *supra* note 199; Keene, *supra*

CONCLUSION

This note has focused on some of the problems which have arisen in the application of the sections of Act 250 which address primary agricultural soils. Nonetheless, Act 250 does have the potential to be an effective means of evaluating proposed conversions of farmland and of encouraging efficient use of land with minimum adverse effect on its agricultural potential. The strongest argument for using Act 250 as a vehicle for protection of farmland is that it affords an opportunity for decisions to be made at a local level by individuals familiar with the needs of a community. Without better guidance from the Environmental Board to the Commissions and stronger support from the Legislature, however, the ability of Act 250 to preserve important farmland in Vermont is severely limited.

The Environmental Board could facilitate more careful review of projects involving primary agricultural soils in a number of ways. The Board could achieve this by making rules, by issuing formal guidelines which the Commissions would be required to follow, and by setting policy through its appellate decisions which would be binding on the Commissions.

The factors to be taken into account in applying criterion 9(B) need to be explicitly stated. First, the Board should clarify the procedure to be followed by the Commissions when they make their initial determination whether a proposed site contains primary agricultural soils. The standards to be used in evaluating the threshold criteria contained in the definition of "primary agricultural soils" should be explicit. This would ensure that applicants whose land parcels contain primary agricultural soils would be required to satisfy the requirements of criterion 9(B) regardless of factors not contained in the definition.

Second, the Board should delineate the standards by which each of the four subcriteria of criterion 9(B) are to be reviewed. Recommendations for the proper interpretation of the subcriteria are summarized as follows:

1) A "reasonable return on fair market value" does not necessarily mean the highest profit that could be obtained from a particular piece of land if it were developed. When development of

note 193; Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming*, 19 NAT. RESOURCES J. 119 (1979); Lapping, Bevins & Herbers, *supra* note 139.

prime farmland is involved, the Commissions should require an applicant to make a clear showing that a reasonable return is not possible from agricultural production. All alternatives which may yield less profit but which will be less harmful to the agricultural potential must be seriously considered.

2) The Commissions should strictly apply subcriterion 9(B)(ii) by carefully scrutinizing all other property owned or controlled by the applicant, regardless of the form in which the land is owned or controlled.

3) The Commissions should continue to encourage the most efficient design for a proposed project and not issue a permit for any development which unnecessarily fragments productive agricultural land. Cluster designs and efficient site planning should be required whenever feasible.

4) The Board should promulgate a rule that requires the Commissions to broadly interpret the word "adjoining" in subcriterion 9(B)(iv). The Commissions should consider the impact of a proposed development on the agricultural community, taking into account the present and long-range effect on existing farms in the area.

The Environmental Board could give better direction to the Commissions if it received stronger support from the Legislature. Funds should be appropriated to finance environmental advisors and educational sessions to provide technical information to the Commissioners.

The Commissioners would be greatly assisted in their review process if regional and town planning commissions were required to write their regional and town plans and zoning by-laws with emphasis on preserving important agricultural lands. Prior identification of areas of non-primary agricultural land suitable for development would eliminate some of the conflicts regarding the appropriate use of land which the Commissions are often required to resolve.

A number of recommendations for better review of proposed developments on primary agricultural soils have been offered in this note. Some of them may not be feasible from a practical standpoint. If even a few of the suggestions were implemented, Act 250 would be considerably more effective in protecting agricultural land in Vermont.

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