

STATE OF VERMONT  
NATURAL RESOURCES BOARD  
DISTRICT #3 ENVIRONMENTAL COMMISSION

Re: State of Vermont Buildings and General Services Agricultural  
and Environmental Laboratory  
163 Admin Drive  
Randolph, VT 05061

#3R0581-15

**MEMORANDUM OF LAW REGARDING CRITERIA 8 AND 9(B)**

NOW COMES Pierre LaFrance and Lake Champagne Campground by and through their attorneys Tarrant, Gillies & Richardson and hereby submits the following memorandum of law in opposition to the proposed Vermont Agricultural and Environmental Laboratory in the above captioned Act 250 proceeding.

The proposed Vermont Agricultural and Environmental Laboratory does not comply with Act 250 Criteria 8 or 9(B) and the District Commission should deny the permit. First, the proposed development is substantially out of character with its surroundings and will have an adverse aesthetic impact under Act 250 Criterion 8. That adverse impact is undue because the Applicant has failed to take generally available mitigating steps to improve the project, because the project will offend the sensibilities of the average person, and because the project violates standards contained in the Zoning Regulations and Town and Regional Plans.

The Applicant has also failed to meet its burden of proving compliance with Act 250 Criterion 9(B). The Applicant has not shown that there are no lands owned or controlled by the Applicant reasonably suited for the development that do not contain agricultural soils, or that the development will minimize the reduction of agricultural potential through innovative compact development. In addition, there is insufficient mitigation because the State has underestimated

the impact to agricultural soils and also because the proposed mitigation site is not part of the land owned or controlled by the Applicant.

**I. The Project Does Not Comply with Act 250 Criterion 8**

In determining whether a proposed development complies with Act 250 Criterion 8 the Commission employs the traditional “two-pronged approach” known as the *Quechee* test. *In re Times & Seasons, LLC*, 2008 VT 7, ¶ 8. “First, it determines if the proposed project will have an adverse aesthetic impact, and if so, it considers whether the adverse impact would be undue.” *Id.* (citation omitted). While the burden of proof under Criterion 8 is on the opponents of a proposal, 10 V.S.A. § 6088(b), the Commission must still be able to make a positive findings of a lack of an undue adverse impact based on the evidence presented by the Applicant. See *In re Denio*, 158 Vt. 230, 236–37 (1992) (concluding that even where there was no opposition the Environmental Board was required to assess the aesthetic impacts based on the evidence provided by the applicant and make a determination based on that evidence). Based on the evidence presented by the Applicant and the filed testimony of Pierre LaFrance, the Commission should conclude that the proposed development will have an adverse impact.

“The cornerstone of the Criterion 8 analysis is the question: ‘[w]ill the proposed project be in harmony with its surroundings—will it ‘fit’ the context within which it will be located?’” *In re Goddard College*, Nos. 175-12-11 Vtec and 173-12-12 Vtec, slip op. at 11–12 (Vt. Super. Ct. Env'tl. Div. Jan. 6, 2014) (Walsh, J.) (quoting *Re: Quechee Lakes Corp.*, Nos. 3W0411-EB and 3W0439-EB, Findings of Fact, Conclusions of Law, and Order, at 18 (Vt. Env'tl. Bd. Nov. 4, 1985)). This analysis begins with consideration of the character of the surrounding area. Based on the testimony at the hearings, the information provided by the applicant, and the pre-filed testimony of Pierre LaFrance, all of which were put into context by the two site visits, the

Commission should conclude that the character of the area immediately surrounding the proposed development is rural, residential, agricultural, recreational, and includes the VTC college campus. The buildings in the area consist of historic houses, brick college buildings, and agricultural buildings. The area includes the Vermont Veterans Memorial Cemetery, an important State resource. Next the commission must consider the proposed building and whether it is “similar in scale, material, and form” to the surroundings. *Id.* at 13. As the documents provided by the Applicant and the testimony received demonstrate, the proposed building is not similar in scale, material, or form to the buildings in its surroundings. It will be highly visible from the Cemetery, from the Campground fields, and from Furnace Street. The Commission should conclude that the building is adverse to the character of the area.

The second prong of the *Quechee* test asks whether the adverse impact is undue. “An adverse impact is considered undue if *any one* of the three following questions is answered in the affirmative: (1) does the project violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area; (2) does the project offend the sensibilities of the average person; and (3) has the applicant failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings.” *Times & Seasons*, 2008 VT 7 at ¶ 8 (citations omitted). The proposed development violates at least two, if not all three of these criteria.

First, the proposed project has failed to take generally available mitigating steps to improve the harmony of the proposed project with its surroundings. The project design is very unique and out of character with its surroundings. The failure to use appropriate colors or materials is the failure to take reasonably available mitigating steps. *See Re McDonald's Corp*, No. 100012-2B-EB, FCO at 21–22 (Vt. Envtl. Bd. Mar. 22, 2001) (concluding that painting the

roof of a McDonald's red was adverse to the character of the area and that because it could be mitigated by being repainted to a different color that repainting was a generally available mitigating step). Here, the entire building will be covered in red-ish rusted steel, grey cement, or silver metal screen. These materials are adverse to the character of the area and could reasonably be changed. Although some general explanation was given regarding benefits of these design choices for the project design goals, there was no testimony that the function of the lab required these design choices or that it was not reasonably possible to use different materials.

The project could also be sited at a different location on land owned by VTC where there would be less impact on the surroundings. While the Environmental Division rejected a similar argument in *Goddard College*, it did so due to a failure of the opponents to show that an alternative site was available. See *In re Goddard College*, 2014 VT 124, ¶ 11. Here, the State has considered many other sites and for reasons unrelated to impacts on neighbors, and in fact for many reasons which no longer exist, has decided to site the project in its current location. The evidence in the record supports a conclusion that there are reasonably available alternative locations that will not have the adverse impacts on several sensitive areas including the Campground, the Cemetery, and the agricultural soils on the proposed site. Thus, unlike in *Goddard*, the failure to locate this project somewhere else more suitable is the failure to take available mitigating steps. See *In re Hanlon*, 174 Vt. 514, 517-18, 811 A.2d 161, 165 (2002) (noting that where the applicant "conducted no analysis of alternative sites, objecting to them on the basis that he would have to cut down trees near his house, that there would be increased costs of installation at the alternative sites, and that relocation would still leave the project visible to two houses, one a quarter mile away, the other two miles away" it was not abuse of discretion for the Board to conclude that the applicant had failed to take mitigating steps). In *Hanlon* the

Board went on to state: "That implementing some of these mitigation measures would increase projects costs, cause power losses and may affect aesthetics on appellant's own property does not render the Board's conclusion that the turbine could be sited elsewhere an abuse of discretion."

*Id.* The record evidence indicates that other sites are reasonably available where there would not be impacts on the Campground, the Historic District, or the Veterans Memorial Cemetery. The permit should therefore be denied for failure of the applicant to take reasonably available mitigating steps.

The proposed development will also offend the sensibilities of the average person. Where a project is so clearly at odds with its surroundings and the size and scope are significantly out of character with the surrounding area then the project has an undue adverse impact. *Re: Southwestern Vermont Health Care Corp.*, No 8B0537-EB, FCO at 35 (Vt. Envtl. Bd. Feb 22, 2001). This building will be clearly at odds with its surroundings as viewed by the average person visiting the Campground or the Cemetery due to its unique materials, its size and scale, and the building design. While members of the public and a representative of the cemetery testified that this building would look "hideous," and the Commission should strongly consider this testimony, it is up to the Commission to determine whether an average person would consider the project to be offensive. *In re McShinsky*, 153 Vt. 586, 592 (1990) ("By statute, the Board, not the average person in the community, is required to determine whether a development will have an undue impact on the aesthetics of an area. Further, in making that determination, the Board need not poll the populace or require vociferous local opposition in order to conclude that an average person would consider the project to be offensive."). Here, the Board can conclude that due to the materials used and the building design the average person would conclude that the

project is out of character with the surroundings and find this large, rusted metal and glass building to be offensive.

Under the current Randolph Zoning Regulations this project is located in the Rural 5 acre zoning district which is intended “to protect and encourage farming of all kinds, as an important part of the Town’s economic base and to provide areas for residence at a density consistent with the capacity of the soils and topography as to furnish a potable water supply and to accommodate a private disposal system for such building.” Randolph Zoning Regulations § 6.4. This proposal will result in the destruction of farmland and involves a 38,000-square-foot industrial style building in an otherwise residential neighborhood. The Town Plan also states, at Page 44, that for the Village Districts “Residences would be allowed in this district, as would bed and breakfasts. Other uses should be conditional uses or limited in size or scope to fit the essentially residential purpose of the neighborhoods.” This was implemented in the Proposed Land Use Regulations for the RCV zoning district which limit the uses to low-impact office uses and provide for a maximum of 2,000 square foot buildings. The project is not limited in size and scope and is inconsistent with rural and residential uses proscribed for this area in the Zoning Regulations and Town Plan. These are clear written community standards that the proposed project violates.

The project will have an undue adverse impact on the aesthetics of the area and the Commission should conclude that the project does not conform with Act 250 Criterion 8.

## **II. The Project Does Not Comply with Act 250 Criterion 9(B).**

The proposed project site contains prime and statewide primary agricultural soils protected by Act 250 Criterion 9(B). As such, the Applicant must satisfy its burden of proof with regard to the four sub-criteria of Criterion 9(B). See *In re Times and Seasons, LLC*, 2011 VT 76,

¶ 3 (noting that burden of proof for all four subcriteria is on the applicant). Those four subcriteria are:

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

(ii) except in the case of an application for a project located in a designated area listed in subdivision 6093(a)(1) of this title, there are no lands other than primary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose of the development or subdivision;

(iii) except in the case of an application for a project located in a designated area listed in subdivision 6093(a)(1) of this title, the subdivision or development has been planned to minimize the reduction of agricultural potential of the primary agricultural soils through innovative land use design resulting in compact development patterns, so that the remaining primary agricultural soils on the project tract are capable of supporting or contributing to an economic or commercial agricultural operation; and

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

10 V.S.A. § 6086(a)(9)(B).

Based on the record evidence presented the Commission should conclude that the Applicant has not carried its burden of proving compliance with these criteria. The project is surrounded by agricultural soils and existing agricultural uses. The burden is on the Applicant to prove that the development will not interfere with agricultural uses in the area and no evidence was presented to meet the Applicant's burden of proof with regard to subcriteria (i).

The Applicant has also failed to meet its burden of proof under subcriterion (ii) which requires the applicant to prove that there are no lands other than primary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose of the development. The Applicant in this case is the State of Vermont Department of Buildings and General Services. It is the State that will operate this laboratory and the connection with Vermont Technical College is viewed as an added benefit of the lab building being located where it is proposed but there has

been no testimony or evidence indicating that the function of the laboratory requires it to be located at VTC. The State of Vermont considered over a dozen other sites where the project could be reasonably located, many of which are in previously developed areas with no primary agricultural soils. While the State has indicated that based on its own criteria that it prefers the VTC site this is not sufficient to meet its burden to prove that no reasonable alternative exists. Where statutory language is clear it must be enforced according to its plain language. *Tarrant v. Dept. of Taxes*, 169 Vt. 189, 197 (1999) (“Initially, in our attempts to ascertain legislative intent we look for guidance in the plain meaning of the words used. If legislative intent is clear, the statute must be enforced according to its terms without resorting to statutory construction.”). The statute at issue unambiguously states that the applicant must show “there are no lands other than primary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose of the development or subdivision.” 10 V.S.A. § 6086(a)(9)(B)(ii).

There has been no evidence that this State laboratory building needs to be located in Randolph; in fact, it is intended to replace a similar laboratory that was located in Waterbury and is currently located on the University of Vermont campus in Burlington. Where an applicant seeks to serve a particular community consideration of whether a piece of land is “reasonably suited” for the development will be geographically limited to that community and sites within the community that could accommodate the development. See *Re: Southwestern Vermont Health Care Corp.*, No. 8B0537-EB, FCO at 49–50 (Vt. Envtl. Bd. Feb. 22, 2001) (determining that while the applicant owned several properties within the immediate proximity of Bennington none were suitable due to size or restrictions on use). The proposed retirement community in that case was intended to serve the residents of Bennington and the surrounding area and therefore it could not be located elsewhere. In the present case, the proposed laboratory provides its services to the

entire State of Vermont. It could be located anywhere in the State. The State has provided no analysis of the presence or quality of primary agricultural soils on any of the 18 other sites that were considered much less all land owned or controlled by the State of Vermont. The State has also not met its burden to prove that none of those sites is "reasonably suited" for the Laboratory. Those sites need not be the best possible site, only reasonably suited for the development.

Even if consideration of alternative sites is incorrectly limited to sites suitable for a joint venture between the State lab and VTC, the site at the VTC Tech Center off of Route 66 could be developed without impacting any primary agricultural soils according to Applicant's own witness. This site was considered as a possible location and a basic site plan of the building on the site was included in the site assessment analysis. The evidence indicates that it is possible to locate the building at this site and Applicant has failed to prove that it could not reasonably locate the lab at this site. Applicant has therefore not met its burden of proof regarding subcriterion (ii) and the Commission should deny the application for that reason.

Subcriterion (iii) requires that the project be "planned to minimize the reduction of agricultural potential of the primary agricultural soils through innovative land use design resulting in compact development patterns, so that the remaining primary agricultural soils on the project tract are capable of supporting or contributing to an economic or commercial agricultural operation." 10 V.S.A. § 6086(a)(9)(B)(iii). The Applicant has not designed the project to minimize impacts on the agricultural soils. Any meaningful review of the site plan by the Commission will indicate that the building was designed in such a way so that it completely bisects an existing agricultural field with a building that is as long as a football field. While there was some testimony regarding designing the project so that the building could be located between existing electrical and water lines, the Applicant has not met its burden of showing that it

considered “innovative land use design resulting in compact development patterns, so that the remaining primary agricultural soils on the project tract are capable of supporting or contributing to an economic or commercial agricultural operation.” 10 V.S.A. § 6086(a)(9)(B)(iii). The Applicant’s position, shown in Exhibit 56, that the 1.13 acres to the west of the proposed building will not be impacted by the proposed development is completely unsupported. As the Environmental Court has recognized, leaving a small narrow area of agricultural soils between a development and a non-agricultural use results in an impact to those agricultural soils. *In re Brosseau/Wedgewood Act 250 PRD Application*, No. 260-11-08 Vtec, slip op. at 5–6 (Vt. Super. Ct. Envtl. Div. Dec. 8, 2010) (Wright, J.). The Court discussed a similar circumstance to here:

The one acre at the front of the property is separated from the remainder of the property by the cabins’ driveway and the arc of cabins themselves. Although that acre is flat and accessible to agricultural equipment, the existence of the rental cabins prevents the acre at the front of the property from being used for commercial or economic agriculture. The additional 1.8-acre area is a long, narrow area, only about forty feet wide at its narrowest point, located generally between the project property’s westerly boundary and the knoll in the northwest area of the property. It adjoins the back yards of five residential properties and adjoins the cemetery. Although access to the 1.8-acre area is available over a relatively flat path or woods road between the cemetery and the knoll, the 1.8-acre area is too narrow, too close to the residential back yards, and too isolated from the remaining soils to be used for any reasonable agricultural purpose and therefore to be classified as primary agricultural soils.

*Id.* There is no support for the conclusion that the 1.13 acres west of the proposed site can be used for a commercial or economic agricultural purpose and common sense indicates that it cannot. It is located between a 300+-foot-long building with the associated parking area and athletic field. In addition portions of the site east of the proposed project are now being used for landscaping and screening in order to help minimize aesthetic impacts on the Cemetery. These rows of apple trees and a small copse of sugar maples, although agricultural crops in other settings, are not an commercial or economically viable agricultural use of the property and would

actually interfere with the remaining land east of the building being put to a commercial or economically viable agricultural operation.

There was ample testimony indicating that the location of the building within the site was to minimize views of the building from the athletic field and from the Randolph Center Village National Historic District by locating it at a lower elevation. This attempt at minimizing views of the building ignores the mandates of subcriterion (iii) that the development be designed to maintain large tracts of agricultural land and compact development in order to minimize impacts on agricultural soils. The soils to the east and west of the building will be impacted and those impacts could be avoided through better location or better design. The Applicant has failed to meet its burden of proof with this subcriteria.

With regard to on-site mitigation required by 10 V.S.A. §§ 6086(a)(9)(B)(iv) and 6093, the State proposes to use land that is not part of the project site, and underestimates the number of acres that will be impacted.

First the State of Vermont is leasing a 13+ acre parcel of land from the Vermont State Colleges in order to construct and operate the proposed Agricultural and Environmental Laboratory. This is the parcel of land or the site on which the development is located. The proposed mitigation adjacent to the Vermont Veterans Memorial Cemetery will be under different legal ownership than the land proposed for the development and therefore should not constitute on-site mitigation required by 10 V.S.A. § 6093(a)(2). The permit condition recommended in the Applicant's Exhibit 56 would not be enforceable as the State of Vermont Department of Buildings and General Services would have no legal control over the land at issue. Because the mitigation land is not part of the site owned or controlled by the Vermont State

agency operating the project Applicant has not provided for on-site mitigation required under § 6093(a)(2) and therefore has not complied with the requirements of Criterion 9(B)(iv).

Alternatively, and for the reasons discussed above, the Commission should determine that the majority of the site will be impacted and therefore require additional on-site mitigation. Including the 1.15 acres to the west and an additional 3 acres to the east to accommodate the landscaping and land adjacent to the parking areas, results in a total impacted area of 6.3 acres. Which at the statutory minimum of a 2:1 ration would require 12.6 acres of on-site mitigation. Because the mitigation proposed is neither sufficient to offset the actual amount of agricultural soils impacts nor owned or controlled by the State of Vermont (it is owned and controlled by the Vermont State Colleges, a distinct entity) the Applicant has failed to meet its burden of proof with regard to subcriterion (iv) of Criterion 9(B).

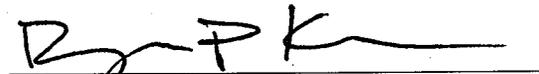
### Conclusion

For the reasons set out above and based on the evidence presented, the Commission should conclude that the proposed development does not comply with Act 250 Criteria 8 or 9(B) and should deny the permit application.

Dated at Montpelier, Vermont, this 15<sup>th</sup> day of September, 2016.

Respectfully submitted,  
for Pierre LaFrance and  
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BY:



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