THIS CHAPTER IS OUT OF DATE, AND IS CURRENTLY BEING REVISED. IN THE INTERIM, PLEASE REFER TO THE BOARD'S CRITERION 9(B) PROCEDURE (3/10/20).

22. Criterion 9(B) (Primary Agricultural Soils)

Criterion 9(B) requires the preservation of Vermont's primary agricultural soils. But such preservation can occur without an absolute prohibition against the development of such soils. *Re: Allen Brook Investments, LLC and Raymond Beaudry,* #4C1110-EB, Findings of Fact, Conclusions of Law, and Order at 13 (Jan. 27, 2004)

I. Requirements for Issuance of Permit

Criterion 9(B) reads:

> (B) Primary agricultural soils. A permit will be granted for the development or subdivision of primary agricultural soils only when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will not result in any reduction in the agricultural potential of the primary agricultural soils; or,:
>
> (i) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential; and
>
> (ii) except in the case of an application for a project located in a designated growth center, there are no lands other than primary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose of the development or subdivision; and
>
> (iii) except in the case of an application for a project located in a designated growth center, the subdivision or development has been planned to minimize the reduction of agricultural potential of the primary agricultural soils through innovative land use design resulting in compact development patterns, so that the remaining primary agricultural soils on the project tract are capable of supporting or contributing to an economic or commercial agricultural operation; and
>
> (iv) suitable mitigation will be provided for any reduction in the agricultural potential of the primary agricultural soils caused by the development or subdivision, in accordance with section 6093 of this title and rules adopted by the land use panel.

II. Burden of Proof

The burden of proof under Criterion 9(B) is on the applicant. 10 V.S.A. §6088(a). *In re Spear Street Associates,* 145 Vt. 496, 500 (1985); *Re: Times and Seasons, LLC and Hubert K. Benoit,* #3W0839 -2-EB (Altered), Findings of Fact, Conclusions of Law, and Order at 51 (Nov. 4, 2005), aff'd in part, rev'd in part *In re: Times and Seasons, LLC,* 2011 VT 76; *Re: Steven L. Reynolds and Harold and Eleanor Cadreact,* #4C1117-EB, Findings of Fact, Conclusions of Law, and Order at 5 (May 27, 2004); *Re: Allen Brook Investments, LLC and Raymond Beaudry,* #4C1110-EB, Findings of Fact, Conclusions of Law, and Order at 7 n.1 (Jan. 27, 2004)

III. Analysis

A. Definition of "primary agricultural soils"

The 2006 legislature amended the definition of "primary agricultural soils." 10 V.S.A. §6001(15) now reads:

> (15) "Primary agricultural soils" means soil map units with the best combination of physical and chemical characteristics that have a potential for growing food, feed, and forage crops, have sufficient moisture and drainage, plant nutrients or responsiveness to fertilizers, few limitations for cultivation or limitations which may be easily overcome, and an average slope that does not exceed 15 percent. Present uses may be cropland, pasture, regenerating forests, forestland, or other agricultural or silvicultural uses. However, the soils must be of a size and location, relative to adjoining land uses, so that those soils will be capable, following removal of any identified limitations, of supporting or contributing to an economic or commercial agricultural operation. If a tract of land includes other than primary agricultural soils, only the primary agricultural soils shall be impacted by criteria relating specifically to such soils. Unless contradicted by the qualifications stated in this subdivision, primary agricultural soils shall include important farmland soils map units with a rating of prime, statewide, or local importance as defined by the Natural Resources Conservation Service (NRCS) of the United States Department of Agriculture (USDA).

1. The existence of primary agricultural soils on the site.

The threshold issue in evaluating a project for conformance with Criterion 9(B) is whether the project site contains primary agricultural soils. *Re: Spear Street Associates*,

145 Vt. 496 (1985); *Re: Times and Seasons, LLC and Hubert K. Benoit,* #3W0839 -2-EB (Altered), Findings of Fact, Conclusions of Law, and Order at 51 (Nov. 4, 2005), aff'd in part, rev'd in part *In re: Times and Seasons, LLC,* 2011 VT 76; *Re: Steven L. Reynolds and Harold and Eleanor Cadreact,* #4C1117-EB, Findings of Fact, Conclusions of Law, and Order at 6 (May 27, 2004); *Re: The Van Sicklen Limited Partnership,* #4C1013R-EB, Findings of Fact, Conclusions of Law, and Order at 45 (Mar. 8, 2002).

Issues to determine:

a. ***Are there soils map units with a rating of prime, statewide, or local importance as defined by the NRCS?***

If no, then there are no primary agricultural soils on the site. If yes, proceed with the determination.

b. ***Does the average slope of the NRCS-rated soils exceed 15 percent?***

If yes, then those soils are not primary agricultural soils. Those areas of NRCS-rated soils that have an average slope of less than 15 percent may be primary agricultural soils.

c. ***Do the soils have few limitations for cultivation?***

Limitations include physical and chemical characteristics that would decrease the soils' potential for growing food, feed, and forage crops, such as excessive wetness or dryness, stones, and trees. If there are no limitations, then proceed with the determination.

If there are limitations then ask: ***can those limitations be easily overcome?***

Can dry soils be irrigated or wet soils be drained? Can the rocks and trees be removed? In *In re Village Assocs.*, 2010 VT 42, the Vermont Supreme Court held that treed land can be primary agricultural soils; but the cost of removal of trees is one of

many factors to be considered when determining whether physical and practical difficulties of that limitation can be overcome.

d. *Are the soils of a size and location, relative to adjoining land uses, so that those soils will be capable, following removal of any identified limitations, of supporting or contributing to an economic or commercial agricultural operation?*

Soils that are too small in acreage to support an economic or commercial agricultural operation cannot be primary agricultural soils. However, those same size soils, if they are adjoining an existing farm, could "contribute" to that farm and could thus be primary agricultural soils.

What is "too small?" In *In re Brosseau/Wedgewood Act 250 PRD Application*, No. 260-11-08 Vtec, Decision and Order (Dec. 8, 2010), the Environmental Court found that a 27-acre parcel was too small because other farmers would not travel to it to farm it. This decision is questionable on two fronts: first, by any measure, a 27-acre parcel is a large piece of land. Second, because the statute speaks of land capable of "supporting" an agricultural operation, a home farm could be established on the 27 acres; there is no requirement in the statute that other farmers must find the parcel inviting. (The court also incorrectly placed the burden on the Agency of Agriculture to show that other farmers would farm the land, not on the applicant to show that other farmers would not farm it.)

The *location* of the soils must also be considered. Three acres of soils in downtown Burlington likely should not be protected; the law was not designed to create pocket parks under the guise of primary agricultural soils. But three acres of soils in Williston might be primary agricultural soils; the analysis might depend on whether the soils are large enough to be commercially farmed by someone who would keep all of his farming equipment on site. If farm equipment would need to be brought to the site, then the ease on which the equipment could travel local roads should be considered.

The phrase *"relative to adjoining land uses"* must also be considered. Soils in an industrial area or dense residential area might not be primary agricultural soils; those in a rural agricultural or residential area probably would be.

Closeness to markets is not necessarily a controlling factor, but it is one to consider. See, *Re: Chester and Donna Brileya*, #1R0580-EB Findings of Fact, Conclusions of Law, and Order (May 1, 1986). In *Brosseau,* the court found that,

because the soils were on a secondary, not well-traveled road, the viability of a roadside farmstand would be questionable and caused the location of the soils to detract from their value as primary agricultural soils. But this presumes that no farm without a roadside stand can survive; and, in any event, the soils at issue in *Brosseau* were only ten miles from Burlington.

B. Effect of a primary agricultural soils determination

If there are no primary agricultural soils on the project site, Criterion 9(B) is satisfied. *Re: Allen Brook Investments, LLC and Raymond Beaudry,* #4C1110-EB, Findings of Fact, Conclusions of Law, and Order at 6 -7 (Jan. 27, 2004); *Re: Northwestern Developers, Inc. and Alferie & Mildred LaFleur,* #6F0416-EB Findings of Fact, Conclusions of Law, and Order (Apr. 16, 1991).

If a tract of land includes other than primary agricultural soils, only the primary agricultural soils shall be affected by criteria relating specifically to such soils. *In re Spear Street Associates*, 145 Vt. 496, 499 (1985). This is probably just stating the obvious.

1. The impact of the subdivision or development on the agricultural potential of the primary agricultural soils

Before the 2006 amendments, the statute required that the viability of the soils be "significantly reduced." Now, "*any* reduction" in the agricultural *potential* of the primary agricultural soils will trigger the need for compliance with the subcriteria of Criterion 9(B).

a. Reduction of the agricultural *potential* of the soils

The issue of the soils' potential is based on physical and chemical characteristics of the soils and *not* whether the soils have been or are presently being farmed or the likelihood that they will be farmed in the future. "The Board interprets the word 'potential' to require a consideration of whether the design and location of the subdivision on the property will preclude agricultural use of the primary agricultural soils and not whether agricultural use of those soils is likely in light of current economics and surrounding land uses." *Re: Times and Seasons, LLC and Hubert K. Benoit,* #3W0839 -2-EB (Altered), Findings of Fact, Conclusions of Law, and Order at 51 (Nov. 4, 2005), aff'd in part, rev'd in part *In re: Times and Seasons, LLC,* 2011 VT 76; *Re: Raymond Duff,* #5W0921-2R-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 13

(Jun. 14, 1991); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact,* #4C1117-EB, Findings of Fact, Conclusions of Law, and Order at 7 (May 27, 2004) [EB #837]; *Re: Allen Brook Investments, LLC and Raymond Beaudry,* #4C1110-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Jan. 27, 2004); *Re: Southwestern Vermont Health Care Corp*., #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 37 (Feb. 22, 2001). *Re: Flanders Lumber Company*, #4C0695-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Apr. 18, 1988)

Note that "[T]he very act of dividing the ownership of the parcel can significantly reduce the agricultural potential of the primary agricultural soils." *In re Spear Street Associates*, 145 Vt. 496, 501 (1985).

If the project will not reduce the agricultural potential of the soils, the project satisfies Criterion 9(B). If the project will reduce the agricultural potential, the project must also meet the four subcriteria of Criterion 9(B).

C. The four subcriteria of Criterion 9(B)

If any reduction in the agricultural potential of the primary agricultural soils will occur as a result of the construction of the project, then the project must meet the requirements of the four subcriteria.

A project's failure to satisfy its burden of proof *as to any one* of the four Criterion 9(B) subcriteria will result in a denial. *In re Spear Street Associates*, 145 Vt. 496, 501 (1985); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact,* #4C1117-EB, Findings of Fact, Conclusions of Law, and Order at 14 -15 (May 27, 2004) (legislature's use of the word "and" between each of the subcriteria indicates that *all* of the subcriteria must be met and that each of the subcriteria is of equal weight).

No subcriterion has any more weight than another. There is no balancing test inherent in an analysis of the subcriteria; the statute does not weigh one subcriterion against another. *Re: Steven L. Reynolds and Harold and Eleanor Cadreact,* #4C1117-EB, Findings of Fact, Conclusions of Law, and Order at 14 (May 27, 2004).

Nor must one subcriterion bend whenever it is be perceived to be in conflict with another. *Re: Steven L. Reynolds and Harold and Eleanor Cadreact,* #4C1117-EB, Findings of Fact, Conclusions of Law, and Order at 15 (May 27, 2004).

1. Subcriterion (i)

Subcriterion (i) requires the Commissions to determine whether the project will significantly interfere with or jeopardize the continuation of agricultural operations on adjoining lands. While this is often not a problem, some projects have been denied for failing to meet this requirement. *See, Re: Nile and Julie Duppstadt*, #4C1013-EB, Findings of Fact, Conclusions of Law, and Order at 41(Apr. 30, 1999) (homes bordering on the neighboring farmland would likely result in the conflicts inherently associated with these incompatible uses in close proximity; for example, noises, dusts and odors typically associated with farming operations are incompatible with the typical uses of intense residential development, especially outdoor uses such as backyard recreation); *Re: John D. and Margaret O. Berkley*, #2W0942-EB (Revised) (Oct. 27, 1994); *Re: Thomas W. Bryant and John P. Skinner d/b/a J.O.T.O. Associates*, #4C0795-EB (Jun. 26, 1991).

It is unclear how large the neighboring agricultural operation must be before it should be considered. In determining whether a neighbor could obtain party status under Criterion (9)(B), the court in *In re: Morgan Meadows/Black Dog Realty,* Decision and Order, No. 267-12-07 Vtec (Dec. 1, 2008), looked to subcriterion (i) for guidance. The neighbor cultivated "extensive heirloom vegetable, herb, and berry gardens and an orchard" and raised heirloom poultry; he claimed "an interest in preserving the 'agricultural community' created by his own small farm adjoining the larger one on the project property, and that his enjoyment of his property will be diminished if this community is destroyed." The court found these interests to be protected under the subcriterion and granted him party status; the court also noted that "the language of the statute does not require that such neighboring operations be 'commercial' or 'economic,'[1]" In a later ruling in the same case, the court noted that the statute did not establish a minimum size for the farm that might be impacted by the project.

2. Subcriterion (ii)

Under this subcriterion, the applicant must demonstrate that it neither owns nor controls any lands other than primary agricultural soils which are reasonably suited to the purpose of the development or subdivision. See, *Southwestern Vermont Health*

[1] The court cited to this Training Manual noting that it "interprets an 'economic' agricultural operation as having a lower threshold than a 'commercial' one, stating that "a backyard vegetable garden can have economic value to a household, even if the produce is not sold commercially."

Care Corp., #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 49 (Feb. 22, 2001) (analyzing similar (but not identical) language in the pre-2008 version of subcriterion (ii)).[2]

Subcriterion (ii) does not apply to projects located in a designated growth center. Subcriterion (ii) is still operative for all projects on primary agricultural soils located *outside* of designated growth centers. Since very few "growth centers" have been designated thus far, this is almost everywhere in Vermont.

3. Subcriterion (iii)

The language of subcriterion (iii) reads:

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

The purpose of this subcriterion is to minimize fragmentation of agricultural land; the focus of the new language is the same as it has been over the past 35 years has been - - whether a project has been adequately designed to be "clustered" on the project site so as to reduce its impacts on primary agricultural soils. *Re: Steven L. Reynolds and Harold and Eleanor Cadreact,* #4C1117-EB, Findings of Fact, Conclusions of Law, and Order at 17 – 18 (May 27, 2004), *citing Southwestern Vermont Health Care Corp*., #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 50 (Feb. 22, 2001); *Re: Nile and Julie Duppstadt*, #4C1013-EB, Findings of Fact, Conclusions of Law, and Order at 40 (Apr. 30, 1999); *Re: Thomas W. Bryant and John P. Skinner d/b/a J.O.T.O. Associates*, #4C0795-EB, Findings of Fact, Conclusions of

[2] The former subcriterion (ii) implied that if there were secondary agricultural soils, a project should be sited on those secondary soils instead of on primary agricultural soils. Unfortunately, if an application moved his project onto secondary agricultural soils, it would then be subject to (and possibly denied) under Criterion 9(C). While this Catch-22 has been remedied by the removal of references to secondary agricultural soils in Criterion 9(C), since the real purpose of Criterion 9(B)(ii) was to move projects from primary agricultural soils onto less important soils, the revised subcriterion (ii) has been amended to reflect this intent.

Law, and Order (Jun. 26, 1991); *Spear Street Associates*, #4C0489-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 26, 1982), *aff'd*, *In re Spear Street Associates*, 145 Vt. 496, 502 (1985) (the subcriterion requires "careful consideration of design alternatives that could reduce a project's impact on primary agricultural soils, and [requiring] adoption of a land-conserving design when it is reasonable to do so.")

A project which has made no effort to cluster, will fail. See, *Re: Allen Brook Investments, LLC and Raymond Beaudry,* #4C1110-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Jan. 27, 2004) (the phrase "to the extent reasonably feasible," does not allow applicant to avoid "clustering" provisions of subcriterion (iii)). Granted, *Allen Brook* was decided before the 2006 amendments, but, as noted in the later discussion, the existence of mitigation flexibility does not excuse an applicant from making an effort to cluster his project. .

The subcriterion is directed at the planning which occurs at the project site itself, not on a project's location within the larger context of a town-wide plan, because Act 250 can only regulate activities that occur on lands which are subject to the Act's jurisdiction; thus, the subcriterion is not interpreted to include community-wide clustering. In *Re: Steven L. Reynolds and Harold and Eleanor Cadreact,* #4C1117-EB, Findings of Fact, Conclusions of Law, and Order at 16 – 19 (May 27, 2004).

Subcriterion (iii) does *not* apply to projects which are located within designated growth centers. The intent is that such projects will be developed to the maximum density allowed by local zoning, in order to reduce pressure on primary agricultural soils outside designated growth centers.

a. The requirement that enough primary agricultural soils must be "left over" to farm after the project is built

The 2006 amendments added a requirement that was not present in the former subcriterion: the project must be designed "so that the remaining primary agricultural soils on the project tract are capable of supporting or contributing to an economic or commercial agricultural operation." This could create some unintended consequences, as it appears that even if the Commission is satisfied that a project is well-designed and planned to have minimal impacts on primary agricultural soils, the project may have to be denied if the remaining lands (those not impacted by the project) are not large enough to support or contribute to an agricultural operation.

Thus, two identical projects in the same area may see two different results. A project on a tract with enough "left over" primary agricultural soils will be granted an Act 250 permit; one on a tract without enough such soils will be denied. We will discuss this in greater detail when we look at mitigation flexibility under subcriterion (iv).

4. Subcriterion (iv)

Subcriterion (iv) requires that:

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

Subcriterion (iv) requires that all applicants mitigate for any reduction of potential of primary agricultural soils on the project tract. It thus codifies the agricultural mitigation program which the Commissions have employed, in one form or another, for the past 20 years.

a. Mitigation analysis

Until the 2006 amendments, there was no mention of off-site mitigation in the statute; mitigation was, therefore, entirely a creation of the Board. The Board had held that the primary agricultural soils mitigation program to be legal, *Re: Southwestern Vermont Health Care Corp.*, #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 38 - 43 (Feb. 22, 2001), but the legality of the program was never tested in court.

i. the history of mitigation

Mitigation was based on a concept, first stated in *Re: J. Philip Gerbode*, #6F0357R-EB, Findings of Fact, Conclusions of Law, and Order (Mar. 26, 1991), that if one provides off-site mitigation (payment of a fee) there has not been a "significant reduction" in the potential of the primary agricultural soils on the project tract. Certainly, there is a "significant reduction" for any soils which will be developed on the project site, but, statewide, because other soils would be forever preserved by the use of the monies

generated by the mitigation program, the reasoning in *Gerbode* was that this would not be a significant reduction.

Up until 2001, applicants were able to "buy" their way out of Criterion 9(B) merely by writing a check to cover to cost of mitigation. Beginning with the Environmental Board's decision in *Southwestern Vermont Health Care Corp*., #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 44 (Feb. 22, 2001) (*SVHC)*, mitigation got a little bit more difficult. In *SVHC*, the Board held that "*Mitigation Agreements should be used only as a last resort - - only when an applicant has seriously attempted, but failed, to meet the subcriteria." Id.* (emphasis in original). The Board also held that before a mitigation agreement would be accepted, "an applicant must also design its project to meet the subcriteria (ii) and (iii) of Criterion 9(B) to the extent reasonably feasible" and the applicant's project must meet subcriterion (iv). *Id.*

SVHC also made it clear that "funds donated under a Mitigation Agreement" must be "of an amount sufficient to ensure that at least two acres of farmland will be purchased or otherwise protected for every acre of primary agricultural soils that will be lost to development. This 2:1 ratio has been historically applied under the Mitigation Program, and it is one which the Board believes must, at the very least, be maintained." *Id.*

Subcriterion (iv), and its reference to a new Act 250 provision, 10 V.S.A. §6093, gives legislative blessing to mitigation and, for the first time, makes it a *requirement* for compliance under Criterion 9(B). Before the 2006 amendments, applicants could attempt to satisfy Criterion 9(B) by meeting all of the four subcriteria. While this was often difficult, see *Re: Steven L. Reynolds and Harold and Eleanor Cadreact,* #4C1117-EB, Findings of Fact, Conclusions of Law, and Order (May 27, 2004); and *Southwestern Vermont Health Care Corp*., #8B0537-EB, Findings of Fact, Conclusions of Law, and Order (Feb. 22, 2001), it was still an option. With the 2006 amendments, however, mitigation (either on-site or off-site) is no longer a voluntary option; *it is required*.

ii. "Off-site" and "on-site" mitigation

The kind of mitigation that is required depends on the location of the project. Projects which are located within designated growth centers will generally be required to do *"off-site"* mitigation - - the payment of a fee to the Vermont Housing and Conservation Board (VHCB). Projects outside of designated growth centers will be required to do *"onsite"* mitigation - - the preservation of primary agricultural soils which are located on the project tract. Some flexibility is afforded to the Commissions to

modify the type of mitigation required.

a. "off-site" mitigation for projects within designated growth centers

If a project is located within a designated growth center, the applicant must pay a mitigation fee. The amount of the fee is calculated by multiplying

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

x

(b) a "price-per-acre" value, which shall be based on the amount that the secretary of agriculture, food and markets has determined to be the recent, per-acre cost to acquire conservation easements for primary agricultural soils in the same geographic region as the proposed development or subdivision.

Thus, for example, if 15 acres of primary agricultural soils are affected by the project, and the cost to acquire conservation easements is $3000/acre, the mitigation fee is $45,000.

There is no fee for certain affordable housing projects. *See* 10 V.S.A. §6093(a)(1)(b)(ii).

All fees are paid to the VHCB. This codifies the requirement established in *Re: Allen Brook Investments, LLC and Raymond Beaudry,* #4C1110-EB, Findings of Fact, Conclusions of Law, and Order at 13 - 14 (Jan. 27, 2004)

b. "on-site mitigation for projects outside designated growth centers

If a project is located outside of a designated growth center, the applicant must mitigate by preserving primary agricultural soils *on the project tract.* The number of acres to be preserved is calculated by multiplying

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

x

(b) a factor based on the quality of those primary agricultural soils, and other factors as the secretary of agriculture, food and markets may deem relevant, including the soil's location; accessibility; tract size; existing agricultural operations; water sources; drainage; slope; the presence of ledge or protected wetlands; the infrastructure of the existing farm or municipality in which the soils are located; and the N.R.C.S. rating system for Vermont soils.

This factor must be a ratio of no less than 2:1, but no more than 3:1 (protected acres to acres of impacted primary agricultural soils).

Thus, for example, if 15 acres of primary agricultural soils are affected by the project, and the factor is determined to be 2, then 30 acres of primary agricultural soils must be preserved on site. If the factor is determined to be 2.5, then 37.5 acres must be preserved; if the factor is determined to be 3, then 45 acres must be preserved.

iii. mitigation flexibility

Some discretion is given to Commissions to be flexible in determining the type of mitigation that should occur. See 10 V.S.A. §6093(a)(3). If a project is located in a designated growth center, the Commission may require onsite mitigation, instead of the payment of a mitigation fee, if that action is consistent with the agricultural elements of local and regional plans and the goals of section 24 V.S.A. §4302 and the community has specifically identified the soils to be protected. 10 V.S.A. §6093(a)(3)(A). The Commission can also require some combination of off-site and onsite mitigation for a project within a designated growth center, and the ratio of fee/protected acres to acres of impacted primary agricultural soils is 1:1.

Likewise, for projects located *outside* of a designated growth center, the Commission may allow off-site mitigation (the payment of a fee), instead of on-site mitigation (protecting primary agricultural soils on the project tract), or some combination of a fee and on-site protection, again if that action is consistent with the agricultural elements of local and regional plans and the goals of section 24 V.S.A. §4302. 10 V.S.A. §6093(a)(3)(B).

For projects outside of a designated growth center, fees to be paid and/or acreage to be preserved for mitigation is to be determined using the 2:1 to 3:1 ratio.

"Appropriate circumstances"

A departure from the general rule that mitigation for projects located *outside* of a designated growth center must occur onsite is allowed only where there are "appropriate circumstances." The Senate Natural Resources Committee has (unofficially, in a letter from its Chair) defined to mean:

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

In 2006, the Land Use Panel adopted a Statement of Procedure that set out how Commissions are to determine whether "appropriate circumstances" exist. On September 11, 2012, the Panel amended the Procedure. See, **Appendix A** to this section of the Training Manual.

The Procedure was amended to address an anomaly that exists between the mitigation flexibility concepts in subcriterion (iv) for projects outside of growth areas, 10 V.S.A. §6093(a)(3)(B), and the clustering requirements of subcriterion (iii). For an analysis of this "anomaly" and an explanation as to how the amended Procedure addresses the perceived conflict between §6086(a)(9)(B)(iii) and §6093(a)(3)(B), please read **Appendix B.**

D. Industrial parks

Note that industrial parks have their own Criterion 9(B) provisions.

First, existing industrial parks can convert primary agricultural soils to development and pay a mitigation fee at a 1:1 ratio. Existing industrial parks which are fully developed may expand on contiguous lands up to 25% of their area (up to a maximum of 50 acres) or 10 acres, whichever is larger; provided any expansion based on percentage does not exceed 50%. Expansions mitigate at whatever ratio applies to their location (growth center or non-growth center)

Existing industrial parks which expand need not cluster in accordance with subcriterion (iii). Indeed, the language of the statute implies that land in an industrial park should be developed to the maximum extent possible. 10 V.S.A. §6093(a)(4).

APPENDIX A

Natural Resources Board
Land Use Panel

Statement of Procedure: Preservation of Primary Agricultural Soils

Revised and adopted by the Land Use Panel: September 11, 2012
Effective September 11, 2012

(A) Purpose. In accordance with Chapter 25 of Title 3 – Vermont's Administrative Procedure Act, the land use panel of the natural resources board hereby adopts a procedure to define and implement certain elements of 10 V.S.A. §6086(a)(9)(B) as amended and 10 V.S.A. §6093, as added by Legislative Act 183 effective July 1, 2006, relating to the protection of primary agricultural soils.

(B) Definitions.

(1) "Reduction in the potential of the primary agricultural soils" means any loss or impairment of the potential of the primary agricultural soils on the project tract to contribute or support an economic or commercial agricultural operation.

(2) "Compact development patterns" means the use of innovative land use design specifically intended to minimize or eliminate the fragmentation of primary agricultural soils on a project tract, thus preserving a percentage of the primary agricultural soils on a project tract or tracts, capable of supporting or contributing to an economic or commercial agricultural operation, consistent with the ratio requirements of 10 V.S.A. §6093.

(C) Primary Agricultural Soils Mitigation Flexibility.

(1) Projects located outside designated growth centers. In appropriate circumstances, the district environmental commission may, in lieu of the provisions of subdivision (2) of 10 V.S.A. §6093 require payment of an offsite mitigation fee; or, any combination of onsite or offsite mitigation.

(2) "Appropriate circumstances" enabling the exercise of mitigation flexibility.

(a) A determination of "appropriate circumstances," as used in 10 V.S.A. §6093(a)(3)(B), may be based on the following findings by a district commission:

(1) (A) the tract of land containing primary agricultural soils is of limited value in terms of contributing to an economic or commercial agricultural operation and that devoting the land to agricultural uses is considered to be impractical based on the size of the tract of land, or its location in relationship to other agricultural and nonagricultural uses, or

(B) the project tract is surrounded by or adjacent to other high density development with supporting infrastructure and, as a result of good land use design, the project will contribute to the existing compact development patterns in the area, or

(C) the area contains a mixture of uses, including commercial and industrial uses, and a significant residential component, supported by municipal infrastructure,

and

(2) the district commission determines that payment of an offsite mitigation fee, or some combination of onsite or offsite mitigation, will best further the goal of preserving primary agricultural soils for present and future agricultural use with special emphasis on protecting prime agricultural soils thus serving to strengthen the long-term economic viability of Vermont's agricultural resources.

(b) A finding of "appropriate circumstances" shall not relieve an applicant from reasonable compliance with 10 V.S.A. §6086(a)(9)(B)(iii).

(c) An applicant's reasonable compliance with 10 V.S.A. §6086(a)(9)(B)(iii) will inform the district commission as to what primary agricultural soils remain available for purposes of on-site mitigation, and therefore, in some cases, a finding of "appropriate circumstances" may allow for positive findings under §6086(a)(9)(B)(iii), even when no (or an insufficient number of) acres of primary agricultural soils capable of supporting or contributing to an economic or commercial agricultural operation are preserved on the project tract or tracts,

(D) Preliminary Agreement with Agency of Agriculture. An applicant may enter into a preliminary agreement with the secretary of agriculture, food, and markets that identifies the primary agricultural soils on the project tract or tracts; and, outlines the proposed mitigation for any reduction in the potential of the primary agricultural soils on those lands. Any such agreement shall serve as evidence that the soils have been adequately identified and that the proposed mitigation satisfies the pertinent requirements of 10 V.S.A. §6086(a)(9)(B)(iii) and (iv), subject to final approval by the district environmental commission.

(E) General Requirements: Protection of Primary Agricultural Soils. All primary agricultural soils preserved for agricultural use on a project tract shall, at a minimum, be protected by permit conditions issued by the district environmental commission. In certain situations, conservation easements may be conveyed to a qualified holder, as defined in 10 V.S.A. §821, with the ability to monitor and enforce easements in perpetuity.

APPENDIX B

The so-called subcriterion (iii) and subcriterion (iv) "anomaly"

Subcriterion (iii) requires that project located outside of growth areas use "innovative land use designs (be "clustered") *and* that, once a project is constructed enough Primary Agricultural Soils be "left over" on the project site to allow an agricultural operation. The provision reads:

> 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.

10 V.S.A. §6086(a)(9)(B)(iii).

10 V.S.A. §6093(a)(2) is the section of Act 250 that discusses how the mitigation requirements of subcriterion (iv) are to be imposed for projects which are located outside of growth areas. Section 6093(a)(2) also requires such projects to be "clustered" and satisfy the same "enough land left over" requirements as demanded by subcriterion (iii). Such projects must engage in:

> innovative land use design resulting in compact development patterns which will maintain a sufficient acreage of primary agricultural soils on the project tract capable of supporting or contributing to an economic or commercial agricultural operation …

10 V.S.A. §6093(a)(2).

Note the similarity between the language in §6093(a)(2) and §6086(a)(9)(B)(iii) (subcriterion (iii)).

Importantly, the mitigation requirements of 10 V.S.A. §6093(a)(3)(B) allow a person whose project is outside of a growth area to escape the strict on-site mitigation requirements of §6093(a)(2) and to mitigate off-site (through the payment of the mitigation fee) or through some combination of on-site and off-site mitigation, if "appropriate circumstances" are present.

Section 6093(a)(3)(B) begins with the phrase, "Notwithstanding the provisions of *subsection 2 of this section.*…" (Emphasis added). Reading the "notwithstanding" phrase's specific reference to only §6093(a)(2) narrowly, all that one can escape via §6093(a)(3)(B) is the on-site clustering and "enough land left over" requirements of §6093(a)(2). *There is no reference to subcriterion (iii) in §6093(a)(3)(B).*

But can it be read more broadly? Because the language used in §6093(a)(2) is so similar to the provisions of §6086(a)(9)(B)(iii) can the flexibility afforded by §6093(a)(3)(B) allow a person to escape not only the clustering and "enough land left over" requirements in §6093(a)(2) but also the identical requirements in subcriterion (iii)? Did the legislature intend to allow an applicant to ignore the clustering requirements in subcriterion (iii) entirely, if he can show that he meets the "appropriate circumstances" test of §6093(a)(3)(B)? Or was something lesser intended?

How should a Commission read these two apparently conflicting provisions for a project located outside of a growth center?

The new "appropriate circumstances" Procedure (adopted and effective, September 11, 2012) answers this question.

Some advocates for applicants argue that the "appropriate circumstances" exemption language of §6093(a)(3)(B) pre-empts the clustering requirements not only of

§6093(a)(2) but also of §6086(a)(9)(B)(iii) (subcriterion (iii)). But this interpretation would allow an exemption under one part of a statute to repeal the language of another part of a statute and is contrary to the general rule of statutory construction that an exemption should be read no more broadly that what is required to effectuate its purpose, *Piedmont & N R. Co. V. Interstate Commerce Commission,* 286 U.S. 299, 311 - 12 (1932); 73 Am. Jur. 2d Statutes § 203, especially when the statute at issue is "remedial legislation" and thus entitlled to a liberal interpretation. *State v. Therrien*, 161 Vt. 26, 30 (1993) (Act 250 is a remedial statute); *In re Preseault*, 130 Vt. 343, 346 (1972)(remedial statutes should receive a liberal construction).

Here, the exemption that comes from a finding that "appropriate circumstances" exist allows one to escape the strict requirement (or default) that all projects located outside of growth centers must mitigate on-site. Nothing in the exemption implies that it is also intended to allow one to be relieved of the clustering provisions in subcriterion (iii), and that an applicant can choose to not make any attempts to cluster based on its claim (even if it is supported by a finding) that its project meets the "appropriate circumstances" test.

But if there is no absolute pre-emption of the full requirements of subcriterion (iii) when a finding of "appropriate circumstances" is made, how, then, should a Commission approach a case in which "appropriate circumstances" do exist?

Statutes sometimes include provisions that conflict with other laws or are themselves internally inconsistent. In such cases, general rules of statutory construction are applied. One such rule is that "when provisions of a statute are in apparent conflict, [the courts] favor the interpretation that harmonizes the conflicting provisions." *State Agency of Natural Resources v. Riendeau*, 157 Vt. 615, 620 (1991).

One way to effectuate this rule is to look at what the Legislature was attempting to address when it added the mitigation flexibility language of §6093(a)(3). Certainly, there are instances where it makes no sense to strictly apply the on-site mitigation requirement for a project located outside of a growth center, and the Procedure adopted by the Panel recognizes this. But this does not mean that a finding of "appropriate circumstances" allows a player to draw a "Get Out of Clustering" card. Rather, we believe that the Legislature recognized that there are instances in which a strict application of the on-site mitigation requirement would lead to unfair results and in such circumstances some flexibility is appropriate. The 2012 Procedure addresses and allows this flexibility.

Consider three identical projects all in the same location outside of a growth area. A, B and C propose to build projects that will require 5 acres of land, and for the purposes of this discussion, we will assume that all three developers have done all the clustering that anyone could ask for.

A owns a 20-acre parcel, all Primary Agricultural Soils. He can meet subcriterion (iii) because the 15 acres he has left over allows him to mitigate on site, even at a 3:1 ratio, so he satisfies subcriterion (iv), and because the 15 acres is also large enough to support or contribute to an agricultural operation, he meets subcriterion (iii). He gets his permit under the provisions of 10 V.S.A. § 6093(a)(2) without any need to resort to the "appropriate circumstances" analysis.

B owns a 15-acre parcel, all Primary Agricultural Soils. If we assume that the 10 acres he has left over after development are large enough to support or contribute to an agricultural operation, he meets the "enough land left over" requirement of subcriterion (iii). If the ratio for mitigation is 2:1, he can mitigate on site and meet subcriterion (iv). If the ratio is 3:1, he can only mitigate by a combination of on and off site mitigation, and if he can meet the "appropriate circumstances" test, he gets his permit. If he can't, his permit is denied.

C owns a 6-acre parcel, all Primary Agricultural Soils. Because he only has one acre "left over" on his site after he builds his project, he has to seek permission to mitigate by a combination of on and off site mitigation. If he can meet the appropriate circumstances test, he can satisfy subcriterion (iv) and engage in on-site and off-site mitigation. But since he cannot meet the "enough land left over" requirement of subcriterion (iii) (because the one acre is too small for an agricultural operation), he fails subcriterion (iii). It is possible that, in Scenario C, the legislature intended that C's project should fail, even if "appropriate circumstances" exist to allow him to mitigate off site. If this is what the legislature intended, then even though the environmental impacts of all three projects are identical, a strict application of the "enough land left over" requirement of subcriterion (iii) means that A will receive a permit, B may receive a permit, and C will never receive a permit.

But it seems rather odd that this should be the result, given the fact that the language used in subcriterion (iii) is identical to that in 10 V.S.A. § 6093(a)(2) and, as regards all three scenarios, the only difference between a grant and a denial is the size of the parcel that the developer owns.

An interpretation (now embodied in the September 2012 Procedure) that allows a Commission to ignore the strict "enough land left over" language of subcriterion (iii) when all other requirements are satisfied furthers the goal of "harmonizing" the apparently conflicting statutory provisions. After all, the Commission, by finding "appropriate circumstances" has determined that the Primary Agricultural Soils on the project site need not be totally protected from development, and it may make little sense to deny a project that would be allowed to mitigate off site (in whole or in part) merely because the Primary Agricultural Soils that remain after development are too small to support an agricultural operation.

At the same time, the Commission's decision would respect that portion of subcriterion (iii) that requires that a project be clustered.

In summary, the September 2012 Procedure requires that a project must still comply with the "clustering" requirements of subcriterion (iii). But it also recognizes that if (a) the project has objectively done its best to "cluster" (i.e. reduce its footprint and impact on the primary agricultural soils), and (b) the Commission finds that "appropriate circumstances" exist to allow the project to engage in off-site mitigation, then the interplay between §6093(a)(3) and 6086(a)(9)(B)(iii) can allow the Commission to grant a permit, even if clustering does not result in retained land large enough to support or contribute to an economic or commercial agricultural operation.

APPENDIX C

District Commission Flow Chart For Analysis Under Criterion 9(B)

Initial Determinations by the Commission

1. Are there soils on the site which are mapped as primary agricultural soils (PAS) by the Natural Resource Conservation Service (NRCS)?

   a. Do the soils meet the definition of primary agricultural soils found at 10 V.S.A. § 6001(15)?

      i. "Primary agricultural soils" means soil map units with the best combination of physical and chemical characteristics that have a potential for growing food, feed, and forage crops,

ii. have sufficient moisture and drainage, plant nutrients or responsiveness to fertilizers, and

iii. few limitations for cultivation or limitations which may be easily overcome and an average slope that does not exceed 15 percent.

iv. Present uses may be cropland, pasture, regenerating forests, forestland, or other agricultural or silvicultural uses.

v. However, the soils must be of a size and location, relative to adjoining land uses, so that those soils will be capable, following removal of any identified limitations, of supporting or contributing to an economic or commercial agricultural operation.

vi. Unless contradicted by the qualifications stated in this subdivision, primary agricultural soils shall include important farmland soils map units with a rating of prime, statewide, or local importance as defined by the Natural Resources Conservation Service (N.R.C.S.) of the United States Department of Agriculture (U.S.D.A.).

b. Generally, the soils are presumed to meet the definition of Primary Agricultural Soils unless the applicant contests the presumption, or unless the Commission determines on its own motion that the soils do not meet the definition. If the applicant contests the presumption, the District Commission must determine whether the soils meet the definition.

i. Has Agency of Agriculture provided a soils review letter or other evidence?

ii. Has the applicant provided evidence for the Commission to consider?

If the Commission concludes that the soils **do not meet the definition**, inquiry under 9(B) is complete. The Commission must issue a written ruling (Recess Memo, Memorandum of Decision, or Findings of Fact) regarding this determination. If the Commission determines that the soils **do meet the definition**, proceed to d. (Note: At the request of the applicant, the Commission may issue a written ruling confirming that the soils meet the definition.)

c. How many acres of Primary Agricultural Soils will be impacted by project, either directly or indirectly (e.g. through fragmentation)? Do the applicant, Agency of Agriculture, and District Commission agree on this number? If there will be any reduction in the potential of the primary agricultural soils, the subcriteria of 9(B) must be addressed.

2. The Subcriteria of 9(B)

a. Subcriterion (i): Will the development significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential? If YES, the District Commission must deny the project unless this impact can be substantially mitigated or eliminated. If NO, proceed to b.

b. Is the project located in a duly designated growth center? If NO proceed to c. If YES, proceed to d.

c. Project Located on Primary Agricultural Soils Outside Designated Growth Center: default mitigation is on-site; ratio is 2:1 – 3:1 depending on quality of soils and other factors specified in §6093(a)(2)(B).

i. subcriterion (ii): Are there lands other than primary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose of the development or subdivision? If YES, the Commission must deny the project. If NO, proceed to ii.

ii. subcriterion (iii): Has the applicant designed the project using "innovative land use design resulting in compact development patterns *which will maintain a sufficient acreage of primary agricultural soils on the project tract capable of supporting or contributing to an economic or commercial agricultural operation*"? In other words, has the project been designed so that a sufficient acreage of Primary Agricultural Soils will be maintained on site, *using the appropriate mitigation ratio*, and these soils are capable of supporting or contributing to an economic or commercial agricultural operation? If YES, proceed to iii.

iii. subcriterion (iv): The applicant must provide suitable mitigation *on site* through protection of the appropriate number of acres of Primary Agricultural Soils on the project tract pursuant to 10 V.S.A. § 6093. The

Commission will include a permit condition requiring the on site protection of the required number of acres of Primary Agricultural Soils. The Agency of Agriculture may also seek imposition of a "right to farm" condition to avoid future land use conflicts with adjoining property owners.

If the applicant cannot mitigate on site, the Commission must deny the project, unless the Commission finds that it is appropriate to allow for mitigation flexibility.

In order to find that "appropriate circumstances" exist, the Commission must find one of the following:

A, the tract of land containing primary agricultural soils is of relatively limited value in terms of contributing to an economic or commercial agricultural operation and that devoting the land to agricultural uses is considered to be impractical based on the size of the tract of land, or its location in relationship to other agricultural and nonagricultural uses, or

B. the project tract is surrounded by or adjacent to other high density development with supporting infrastructure and, as a result of good land use design, the project will contribute to the existing compact development patterns in the area, or

C. the area contains a mixture of uses, including commercial and industrial uses, and a significant residential component, supported by municipal infrastructure.

The Commission must also find that:

D. payment of an offsite mitigation fee, or some combination of onsite or offsite mitigation, will best further the goal of preserving primary agricultural soils for present and future agricultural use with special emphasis on protecting prime agricultural soils thus serving to strengthen the long-term economic viability of Vermont's agricultural resources. The commission must also determine that such action is consistent with the agricultural elements of local and regional plans, as well as the pertaining goals of section 4302 of Title 24.

If the Commission finds that appropriate circumstances exist to allow for mitigation flexibility, the Commission may approve a combination of on-site and off-site mitigation or may approve off-site mitigation for all of the impacted Primary Agricultural Soils. Generally, if there is a suitable acreage of Primary Agricultural Soils on site that the Commission determines capable of supporting or contributing to an economic or commercial agricultural operation, it may be preferable to protect these soils though on site mitigation, which will reduce the amount of any required off site mitigation fee to be paid to VHCB. However, in certain situations, it may be preferable to maximize the development potential of the soils on the project tract and require an off site mitigation fee for *all* impacted soils. The Commission should issue a written decision confirming its finding that appropriate circumstances exist. This decision should also request that the Agency of Agriculture, Food, and Markets (AAFM) provide "the recent, per-acre cost to acquire conservation easements for primary agricultural soils in the same geographic region as the proposed development or subdivision" and the appropriate mitigation ratio for the soils involved. The Commission must then incorporate this information into a permit condition requiring the applicant to pay a mitigation fee to VHCB. At its discretion, the Commission may also direct the applicant to work with AAFM to develop a mitigation agreement to be executed prior to permit issuance.

A sample calculation for combination of on-site and off-site mitigation for projects located outside of designated growth centers:

- Total Number of Acres of PAS = **40**

- Acres of PAS to be Impacted by Development = 15

  10 Acres of Prime Soils X 2.5 (mitigation ratio) = 25
  5 Acres of Statewide Soils X 2 (mitigation ratio) = 10
  Mitigation Acreage required **35**

- PAS Available for On-Site Mitigation: 40 - 15 = 25
- PAS to be Mitigated by Off-Site Mitigation Fee = 10

- 10 Acres of PAS X Cost Per Acre of Acquiring Conservation Easements in Area = Off-Site Mitigation Fee

Sample calculation for all off-site mitigation for projects located outside of designated growth centers:

- Total Number of Acres of PAS = **30**

Based on the proposed site plan, the Commission determines that although only 15 acres of PAS will be directly impacted, the remaining 15 acres will be fragmented, and will no longer be able to contribute to an economic or commercial agricultural operation.

- Acres of PAS to be Directly Impacted = 15
- Acres of PAS to be Indirectly Impacted = 15

10 Acres of Prime Soils X 2.5 (mitigation ratio) = 25
20 Acres of Statewide Soils X 2 (mitigation ratio) = 40

- Mitigation Acres Required 65

- 65 Acres of PAS X Cost Per Acre of Acquiring Conservation Easements in Area = Off-Site Mitigation Fee

d. Project Located Within Designated Growth Center: If the project is located within a designated growth center, the applicant must provide suitable mitigation pursuant to 10 V.S.A. Section 6093, thus satisfying subcriterion (iv). The default mitigation is off-site; ratio is 1:1; exception for affordable housing as defined in 10 V.S.A. Section 6093(a)(1)(B)(ii) and 27 V.S.A. Section 610.

If AAFM has not already done so, it must provide the Commission with "the recent, per-acre cost to acquire conservation easements for primary agricultural soils in the same geographic region as the proposed development or subdivision." The Commission then determines the appropriate mitigation fee and drafts a permit condition requiring the applicant to pay this fee to VHCB. At its discretion, the Commission may

instead request that AAFM draft a mitigation agreement; the permit is issued after the mitigation agreement is signed.

Sample Calculation for Off-Site Mitigation:

- Total Number of Acres of PAS = 20

- Acres of PAS to be Directly Impacted = **15**
- Acres of PAS to be Indirectly Impacted = 5
- Acres of PAS to be Mitigated = **20**

- 20 Acres of PAS X Cost Per Acre of Acquiring Conservation Easements in Area = Off-Site Mitigation Fee

If the applicant requests that the Commission allow for mitigation flexibility, the Commission must find that the following appropriate circumstances exist:

A. the proposed mitigation flexibility must be consistent with the agricultural elements of local and regional plans and the goals of 10 V.S.A. § 4302; and

B. the local and regional plans must designate the specific soils within the designated growth center to be preserved on the project site.

Sample calculation for combination of on-site mitigation within growth center:

- Total Number of Acres of PAS = 20

- Acres of PAS to be Directly Impacted = 10
- Acres of PAS to be Indirectly Impacted = 5
- Acres of PAS to be Mitigated = 15

- 15 acres of PAS to be protected on-site by permit condition

APPENDIX D

Some musings on the repeal of the "significant reduction" test

Note: you do not have to read this to understand the 2006 law.

The 2006 amendment of Criterion 9(B) which replaced the words "significant reduction" with the words "any reduction" should have no real impact on the way that Commissions should address the Criterion.

For twenty years, it was a common practice for a Commission to find that, if a project would destroy less than one-third of the primary agricultural soils on the project tract, then there was no "significant reduction" of primary agricultural soils, and Criterion 9(B) was satisfied. But *there was no authority for this practice.* Although the Board has indirectly held that the loss of one-third of primary agricultural soils on site *is* a significant reduction of agricultural potential of those soils, *Re: Southwestern Vermont Health Care Corp*., #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 38 (Feb. 22, 2001), *there is no case that holds that a loss of less than one-third of the primary agricultural soils acres is not a significant reduction of a site's Primary Agricultural Soils.*

The "one-third test" probably grew out of *Re: J. Philip Gerbode*, #6F0357R-EB, Findings of Fact, Conclusions of Law, and Order (Mar. 26, 1991), the first Board case to address off-site mitigation. In *Gerbode*, the Board found that, because the applicant was going to protect 300 acres of primary agricultural soils through conservation easements (while developing the 150 acres on the project tract), this would not cause a "significant reduction" of the primary agricultural soils on the project tract. The Board wrote:

> There is no dispute that this site contains approximately150 acres of primary agricultural soils, as defined at 10 V.S.A. § 6001(15). The question the Board must address is whether the agricultural potential of the soils will be significantly reduced if the Applicant agrees to pay a fee that will result in the permanent preservation of two acres of land for every one developed.

> In previous cases concerning primary agricultural soils, the Board has considered the specific characteristics of the site in determining whether the agricultural potential of the soils will be significantly reduced. *See, e.g., Re: Edwin and Avis Smith,* #6F0391-EB, Findings of Fact and Conclusions of Law (May 11, 1989); Re: Flanders Lumber Company, #4C0695-EB-1, Findings of Fact and Conclusions of Law #4CO695-EB-1 (Apr. 18, 1988); *Re: Spear Street Associates*, #4C0489-I-EB, Findings of Fact and Conclusions of Law (May 15, 1982).
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> ***
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> In this case, the Board concludes that the proposed Technology Park will not significantly reduce the agricultural potential of the soils because, in combination with the soils that will be preserved in accordance with the Mitigation Agreement, only l/3 of the total amount of agricultural soils will be developed, while 2/3 of the agricultural potential will be permanently preserved.

Gerbode at 8 – 9. Thus, *Gerbode* is likely the origin of the so-called "one-third test," which was misunderstood for many years to mean that the destruction of less than one-third of the Primary Agricultural Soils on the site meant that Criterion 9(B) was satisfied. But *Gerbode* clearly holds that *it is the mitigation of the remaining two-thirds of the Primary Agricultural Soils* that makes the loss of one-third of the Primary Agricultural Soils not "significant." In other words, the key aspect of the one-third test was that it was based on a finding that there would be mitigation of the remaining two-thirds of the Primary Agricultural Soils on the site.

The use of the concept of "significant reduction" was the hook on which the Board was able to legitimize and justify the entire mitigation program. In effect, applying the *Gerbode* standard, the Board said to applicants, "If you mitigate, we will find that there has been no 'significant reduction' of the soils, and therefore Criterion 9(B) is satisfied without your having to go through the four subcriteria." It is significant, however, that nowhere does the Board say that the development of less than one-third of the primary agricultural soils on the project tract means that Criterion 9(B) is not triggered. Indeed, the Board could not even begin to discus mitigation unless it had first placed the project within the context of Criterion 9(B).

In any event, the "one-third test" no longer exists. The 2006 amendments to 10 V.S.A. §6086(a)(9)(B) now require that "any reduction" in the viability of a site's Primary Agricultural Soils must be addressed.

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