23. Criterion 9(C) (Productive forest soils)

I. Requirements for Issuance of Permit

The Criterion 9(C) reads:

> (C) Productive forest soils. A permit will be granted for the development or subdivision of productive forest 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 potential of those soils for commercial forestry; 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 productive forest 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 the potential of those productive forest soils through innovative land use design resulting in compact development patterns, so that the remaining forest soils on the project tract may contribute to a commercial forestry operation.

10 V.S.A. §6086(a)(9)(C).

II. Burden of proof

The applicant has the burden of proof under Criterion 9(C). 10 V.S.A. §6088(a); *Re: New England Land Associates*, #5W1046-EB-R (revised 1/7/92; previous version (Oct. 1, 1991); *Re: Landmark Development Corporation*, #4C0667-EB (Jan. 22, 1988).

III. Analysis

Definition of "productive forest soils"

The definition of "productive forest soils" in 10 V.S.A. §6001(8) has been amended:

> (8) "Productive forest soils" means those soils which are not primary agricultural soils but which have a reasonable potential for commercial forestry and which have not been developed. In order to qualify as

productive forest soils, the land containing such soils shall be of a size and location, relative to adjoining land uses, natural condition, and ownership patterns so that those soils will be capable of supporting or contributing to a commercial forestry operation. Land use on those soils may include commercial timber harvesting and specialized forest uses, such as maple sugar or Christmas tree production.

"Secondary agricultural soils" are no longer protected

S.142 removed the term mall references to "secondary agricultural soils" from Criterion 9(C) thereby no longer affording such soils Act 250 protection. Their prior protection, however, resulted in a proverbial "domino effect" and, ultimately, a funhouse of reflecting mirrors.

Under former Criterion 9(B)(ii), an applicant with primary agricultural soils on his project site was required to determine if his project could be moved to other "nonagricultural or secondary agricultural soils." Similarly, present Criterion 9(B) requires that one who wishes to develop primary agricultural soils must 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 or subdivision." Thus, projects were pushed off primary agricultural soils and on to, in some cases, "secondary agricultural soils." But then, an applicant would be pushed off those secondary. Unfortunately, due to what must have been a drafting error, he would be pushed on to *other* "secondary agricultural soils" as former subcriterion (ii) required that he demonstrate that that he owned "no nonforest or secondary agricultural soils …..reasonable suited to the purpose" of the project.

Clearly, the former subcriterion (ii) made no logical sense. Why would the development of other secondary agricultural soils owned by the applicant be preferable to the development of such soils on the original project site? And once he decided to move to the other site, would Criterion 9(C) then have required him to move his project off the secondary soils on that site? Sounds like a developer's purgatory of mirrors reflecting into infinity…

Other 2006 amendments to Criterion 9(C) are similar to those to 9(B)

1. The 2006 amendments repealed the "significant reduction" test. Now, "*any* reduction" in the potential of the forest soils for commercial forestry will trigger the need for compliance with Criterion 9(C);

2. Subcriterion (i) was amended to repeal the "reasonable return on the fair market value of the land" evaluation.

3. New subcriterion (ii) remains similar to the former subcriterion (ii), except that it does not apply to applications for projects located in a designated growth center. See Criterion 9(B) materials.

4. As is the case with subcriterion (ii) of the new Criterion 9(B), the language of new subcriterion (iii) of Criterion 9(C) (10 V.S.A. §6086(a)(9)(C)(ii)) has been changed by the 2006 amendments, but its thrust remains the same. Subcriterion (iii) now 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 the potential of those productive forest soils through innovative land use design resulting in compact development patterns, so that the remaining forest soils on the project tract may contribute to a commercial forestry operation.

The purpose of this subcriterion is to minimize fragmentation of productive forest 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 forest soils.

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