

Zero Sum Game: The Debate Over Off-Site Agricultural Mitigation Measures

Joshua Safran*

I. INTRODUCTION

Current national development trends are expanding existing urban areas outward rather than upward. Across the country, low-density communities are spreading into open space areas historically devoted to agricultural uses. It is estimated that every year about 1.2 million acres of American farmland are converted into developed uses.¹ This translates into a loss of approximately two acres of agricultural land per minute.² Whatever the precise rate of loss, the pace of farmland conversion is quantitatively significant. The negative consequences of such loss and the corresponding importance of maintaining agricultural uses is an important issue to different people for different reasons.

Some emphasize the great practical benefits of agricultural operations, both as a source of food and fiber and as an integral part of the American economy.³ Others champion the more intangible benefits of agriculture such as the important cultural role it plays in the American way of life.⁴ Others stress the utility of farmland not necessarily for the agricultural uses it allows, but for its function as a sanctuary of undeveloped open space. Open space is said to provide both tangible benefits, such as serving as a buffer against urban sprawl and the pollution associated with it, as well as more intangible spiritual values associated with the aesthetic beauty of open views.⁵

* Joshua Safran is a senior associate attorney specializing in land use, real estate, and local government law in the Walnut Creek, California office of Bingham McCutchen LLP. This work is dedicated to the memory of Aviel Atash - for his loss there is no mitigation.

1. See FARMLAND INFORMATION CENTER, REVISED 1997 NATIONAL RESOURCES INVENTORY: CHANGES IN LAND COVER/USE (Jan. 2003).

2. See American Farmland Trust, *Farming On The Edge*, available at http://www.farmland.org/farmingontheedge/major_findings.htm (last visited Jan. 25, 2005).

3. CAL. PUB. RES. CODE § 10201 (West 1996 & Supp. 2004); CAL. GOV'T CODE §§ 51201, 51220; KATHRYN L. LIPTON, ET AL., U.S. DEPT. OF AGRIC. THE FOOD AND FIBER SYSTEM: CONTRIBUTING TO THE U.S. AND WORLD ECONOMIES, AGRICULTURE INFORMATION BULLETIN NO. 742 (1998).

4. See, e.g., *Worth County Friends of Agriculture v. Worth County*, 688 N.W.2d 257, 259-60 (2004) (indicating that the presence of agriculture in Iowa impacts "the world beyond" and is "woven into the very fabric" of the state); Sean F. Nolon & Cozata Solloway, *Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State*, 17 Pace L. Rev. 591 (1997).

5. See, e.g., *Sod Farm Associates v. Springfield Township Planning Board*, 298 N.J. Super. 84, 90 (1995) (discussing New Jersey's State Development and Redevelopment Plan which prevents sprawl through preservation of large contiguous masses of farmland); *Shea Homes Limited Partnership*

To stem the tide of agricultural land conversion, state and local governments are employing a number of strategies which range from outright mandatory prohibitions on development, such as traditional zoning restrictions, to incentive based programs that encourage the continuation of traditional agricultural practices, such as voluntary agricultural district programs.⁶ Some jurisdictions use a variety of other methods, including comprehensive land planning, conservation easements, and the purchase or transfer of development rights.⁷ As discussed below, Vermont and California address the loss of agricultural land through state-wide comprehensive land planning procedures. These procedures allow for the development of certain agricultural lands in exchange for off-site mitigation. Such mitigation usually involves the permanent preservation of existing farmland, which is in some proximity to the land being developed, through conservation easements or deeds of development rights.

Off-site mitigation programs provide benefits to both developers and agricultural preservation advocates. Such mitigation ideally allows farmland under the greatest development pressure, where long-term agricultural uses are least viable, to be developed as part of a comprehensive pattern of contiguous development. Simultaneously, this mitigation strategy provides for the permanent protection of viable agricultural lands that would otherwise be in the path of development in the future, creating a permanent buffer between developed areas and large areas of farmland. However, this trade-off of current development for future preservation is the subject of ongoing controversy in both Vermont and California, where the debate over the wisdom and effectiveness of such mitigation measures will likely continue long into the future. At the heart of the debate is whether the loss of a finite and unique resource such as agricultural land can be mitigated.

As discussed below, Vermont's off-site agricultural mitigation program is not expressly authorized by statute, but was established in a 1991 administrative decision recognizing the need to provide flexibility to the development process. Under the mitigation program, developers and

v. County of Alameda, 110 Cal. App. 4th 1246, 1256 (2003). *See e.g.*, *Sierra Club v. City of Hayward*, 28 Cal.3d 840, 863 (1981) (referring to agricultural lands as a "welcome scenic respite from the cluttered urban landscape.").

6. *See* Elisa Paster, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 *Nat. Resources J.* 283 (2004). *See generally* Joshua Safran, *Contracting for Preservation: An Overview of State Agricultural District Programs*, Vol. 27, No. 7 *ZONING AND PLAN. L. REP.* (July/Aug. 2004) (discussing a comprehensive overview of agricultural district programs in America).

7. *See generally* ROBERT H. FREILICH, *FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS* (Am. Bar Ass'n, 1999).

landowners are generally permitted to develop agricultural lands in exchange for paying an amount deemed sufficient to preserve two acres of primary agricultural soils, in roughly the same area for each acre developed. While such arrangements are largely negotiated on an *ad hoc* basis, lands to be developed are generally those deemed unlikely to be used for agricultural production in the future and physically isolated from other farm units.

Opposition to Vermont's program led to another administrative decision a decade later. This decision altered the face of off-site agricultural mitigation in the state by tightening requirements for onsite mitigation and the satisfaction of other findings. While off-site mitigation is still an available option to developers and landowners in Vermont, it is now much more difficult to develop agricultural lands because off-site agricultural mitigation may only be used as a "last resort."

Unlike Vermont, California has not yet made up its mind about the fundamental question of whether the permanent preservation of off-site agricultural lands actually mitigates the loss of farmland. Litigants, the courts, State agencies, and the Office of the Attorney General are split on the mitigation issue. Because the three key legal decisions on the issue in California are unpublished or depublished and may not be cited as legal precedent or relied on by a court or party in any action or proceeding, the status of off-site agricultural mitigation measures in California is far from clear. Until the California Legislature or the California courts take affirmative action in this arena, the threshold question of whether the loss of agricultural land can be mitigated will remain unanswered.

California's unsettled approach to off-site agricultural mitigation is due, at least in part, to the nature of land use planning in the State. The legal basis for all land use regulation in both Vermont and California is the State's police power to protect the public health, safety, and welfare of its residents.⁸ In Vermont, the State Legislature and State governmental bodies exercise the police power and generally dictate, implement, and oversee the land use policies and procedures for the State.⁹ In contrast, land use regulations in California are not an exercise of authority delegated by the State Legislature, but are a manifestation of the police powers conferred on

8. See *Berman v. Parker*, 348 U.S. 26, 32-33 (1954); *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 861 (1980); *State v. Quattropani*, 133 A. 352, 353 (1926).

9. See 10 VT. STAT. ANN. § 6086(c) [hereinafter Act 250]; *Re: Clarence and Norma Hurteau*, # 6F0369-EB, Memorandum of Decision (March 25, 1988); State of Vermont Environmental Board, Act 250—A Guide to Vermont's Land Use Law, State of Vermont Environmental Board (Nov. 2000) at 2.

cities and counties by the California Constitution.¹⁰ For example, in California, state zoning, planning, and environmental review requirements are not intended as specific grants of authority by the Legislature, but are minimum standards to be observed within the local planning practice and process.¹¹ As a consequence, although the California Legislature has passed legislation allowing for the preservation of off-site agricultural lands in the development process, the real power to require such a practice rests largely in the broad local police power of each jurisdiction. Hence, without a specific mandate from the State or a ruling by the courts, the off-site mitigation question in California will be decided jurisdiction by jurisdiction.

II. OFF-SITE AGRICULTURAL MITIGATION IN VERMONT

A. Overview of Title 10, Sections 6001-8221 of the Vermont Statutes Annotated, Commonly Known as Act 250

Vermont's primary agricultural land protection laws are contained in the Land Use and Development Law, title 10, sections §§ 6001-8221 of the Vermont Statutes Annotated, commonly known as Act 250. In 1970, Act 250 was passed in response to a rapid and largely unregulated development boom.¹² In passing Act 250, the Vermont Legislature declared that it was necessary "to regulate and control the utilization and usages of lands and the environment" and to ensure that "the only usages which will be permitted are not unduly detrimental to the environment, will promote the general welfare through orderly growth and development and are suitable to the demands and needs of the people of this state."¹³

Act 250 establishes a comprehensive state-wide land use permitting system that requires developers and landowners to obtain public agency approvals prior to developing or subdividing certain real property.¹⁴ To

10. See CAL. CONST. art. XI, § 7; *DeVita v. County of Napa*, 9 Cal. 4th 763, 782 (1995); DANIEL J. CURTIN, JR. & CECILY T. TALBERT, *CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW* 2 (24th ed. 2004)

11. *Id.* at chs. 1-4, 6 (providing a comprehensive and authoritative overview and practice guide to land use planning law in California).

12. See State Land Use and Development Plans (Act 250), VT. STAT. ANN. tit. 10, §§ 6089, 6102 (1997 & Supp. 2004).

13. See *id.* at 6 (quoting Findings and Declaration of Intent Vermont's Land Use and Development Law Title 10, Chapter 151).

14. See CINDY CORLETT ARGENTINE, *VERMONT ACT 250 HANDBOOK* ch. 1 (1998) (providing an excellent guide for the practical navigation of Act 250). See Michelle Henrie, *Large Development*

obtain a permit, developers and landowners must apply to a local District Environmental Commission and undergo a public hearing process. During the public hearing process, the probable environmental impacts of the proposed project are evaluated by the Commission.¹⁵ This public review and evaluation process is designed to “protect the environment; balance development with local, regional and state issues; and to provide a forum for neighbors, municipalities and other interest groups to voice their concerns.”¹⁶

The Commission has discretion to approve, conditionally approve, or deny a permit application based on a review of the significant environmental, aesthetic, and/or community impacts associated with the proposed project.¹⁷ Specifically, the Commission must base its review and decision on a set of ten criteria established by Act 250. The criteria focus on the project’s projected impacts on air and water quality, water supplies, traffic, educational and municipal services, and historic and natural resources, including scenic beauty and necessary wildlife habitat.¹⁸

Any party with standing may appeal Commission decisions to the State Environmental Court.¹⁹ Prior to January 31, 2005, appeals of Commission decisions were heard by an administrative State Environmental Board.²⁰ The main body of current Act 250 jurisprudence results from formal, precedential decisions issued by the Environmental Board.²¹ The Environmental Court considers issues on appeal *de novo* and its decisions may be appealed directly to the Vermont Supreme Court for judicial review, but only by certain limited statutory parties.²²

Meets Vermont’s Act 250: Does Phasing Make a Monster or Tame It?, 23 VT. L. REV. 393 (1998) (for a discussion of other aspects of Act 250 being currently debated); Robert F. Gruenig, *Killington Mountain and Act 250: An Eco-Legal Perspective*, 26 VT. L. REV. 543 (2002).

15. See Act 250 §§ 6081, 6083, 6085, 6086.

16. Argentine, *supra* note 14, at 1.

17. See Act 250 § 6086(c). As a matter of law, conditions are limited as they must be valid exercises of the state’s police power and they must be designed to prevent or mitigate impacts under Act 250’s criteria. When permits are granted they are typically subject to conditions covering a broad range of issues. Argentine, *supra* note 14, at 57.

18. See Act 250 § 6086(a). Projects must also conform to local and regional land-use plans. *Id.*

19. See Act 250 §§ 6085, 6089, 8504(a).

20. See Act of the Vermont General Assembly No. 115, §§ 7, 58 (May 13, 2004) (abolishing State Environmental Board and granting appellate jurisdiction of Commission decisions to the State Environmental Court).

21. See generally Vermont Environmental Board, Board Decisions, available at <http://www.state.vt.us/envboard/decisions.htm> (last visited Mar. 15, 2005).

22. See Act 250 §§ 8504(h), 8505. The Supreme Court did not review Environmental Board decisions *de novo* and the facts established by the Board were deemed to be conclusive where supported by substantial evidence. See, e.g., *In re Wal-Mart Stores, Inc.*, 702 A.2d. 397, 400-401 (1997) (noting that the Supreme Court gave “deference to the Environmental Board’s interpretation of Act 250.”). It is

While there are nominally only ten criteria for the Commission to consider, some criteria have discrete subparts that stand alone in terms of their substantive requirements and treatment within Act 250 jurisprudence. Criteria 9(B) and 9(C) focus specifically on the proposed project's likely impacts to agricultural lands.²³ Criterion 9(B) focuses on "primary agricultural soils," requiring that the project applicant demonstrate that the project will not "significantly reduce the agricultural potential" of such soils.²⁴ Where agricultural potential of the subject land will likely be subject to significant reduction, the applicant must demonstrate that four additional subcriteria are satisfied, namely that:

- (i). The applicant can only realize a "reasonable return" on the fair market value of his or her land through uses which will significantly reduce agricultural potential;²⁵
- (ii). The applicant does not own or control other lands which are "reasonably suited" for the proposed project;²⁶
- (iii). The project has been planned to minimize impacts on agricultural soils;²⁷ and
- (iv). The project will not "significantly interfere with or jeopardize" the continuation of adjoining agricultural uses or reduce the potential of adjoining agricultural lands.²⁸

expected that the Supreme Court will afford similar deference to Environmental Court decisions.

23. See Act 250 §§ 6086(a)(9)(B) & (C).

24. See *Argentine*, *supra* note 14, at 189-190. Agricultural soils are "primary" when they have a potential for growing food and forage crops, are sufficiently well drained to allow sowing and harvesting with mechanized equipment, are well supplied with plant nutrients or highly responsive to the use of fertilizer, and have few limitations for cultivation or limitations which may be easily overcome. In order to qualify as primary agricultural soils, the average slope of the land containing such soils may not exceed 15 percent, and such land must be of a size capable of supporting or contributing to an economic agricultural operation. See Act 250 § 6001(15). The reduction in the potential of such soils is "significant" when the soils are paved, built upon, or divided into parcels too small to contribute to an economic agricultural operation.

25. See Act 250 §§ 6086(a)(9)(B)(i); *Re: Thomas W. Bryant and John P. Skinner*, No. 4C0795-EB, Findings of Fact, Conclusions of Law, and Order at 26, 28-29 (Vt. Envtl. Bd. Jun. 26, 1991). Applicants must demonstrate that there is no land use through which they can secure a reasonable rate of return on their investment which does not significantly reduce agricultural potential. See *Re: Marvin T. Gurman*, No. 3W0424-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Vt. Envtl. Bd. Jun. 10, 1985); *Re: Richard and Napoleon LaBrecque*, No. 6G0217-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Vt. Envtl. Bd. Nov. 17, 1980).

26. See Act 250 §§ 6086(a)(9)(B)(ii).

27. See Act 250 §§ 6086(a)(9)(B)(iii). Projects designed to minimize impacts generally utilize "clustered" housing plans. See, e.g., *Re: Nile and Julie Dupstadt and John and Deborah Alden*, # 4C1013 (Corrected)-EB, Findings of Fact, Conclusions of Law, and Order at 39-40 (Apr. 30, 1999); *Steven L. Reynolds and Harold and Eleanor Cadreact*, No. 4C1117-EB, Findings of Fact, Conclusions of Law, and Order 11-19 (Vt. Envtl. Bd. May 27, 2004).

28. See Act 250 §§ 6086(a)(9)(B)(iv). This subcriterion also examines impacts on adjoining forestry uses.

Criterion 9(C) focuses on “secondary agricultural soils,” requiring the project applicant to demonstrate that the project will not “significantly reduce the agricultural potential” of such soils or of adjacent primary agricultural soils for commercial agriculture.²⁹ As under Criterion 9(B), where the agricultural potential of the soils involved will likely be significantly reduced, the applicant must satisfy additional subcriteria, demonstrating that:

- (i). The applicant can only realize a “reasonable return” on the fair market value of his or her land through uses which will significantly reduce agricultural potential;
- (ii). The applicant does not own or control other lands which are “reasonably suited” for the proposed project; and
- (iii). The project has been planned to minimize impacts on agricultural soils.³⁰

Despite their nominal designation as separate criteria, 9(B) and 9(C) are usually reviewed concurrently at Commission hearings and the method of analysis employed by the Board has been generally the same for both criteria.³¹ The central issue of preservation of agricultural land expressed in both criteria is one of great importance under Vermont law. For example, the State Legislature has declared that:

[p]roducts of the land . . . as well as the beauty of our landscape are principal natural resources of the state. Preservation of the agricultural and forest productivity of the land, and the economic viability of agricultural units . . . and protection of the beauty of the landscape are matters of public good. Uses which threaten or significantly inhibit these resources should be permitted only when the public interest is clearly benefited thereby.³²

In light of this declaration by the Legislature, it is no surprise that the requirements of Criteria 9(B) and 9(C) are lengthier and more involved than almost any of the other criteria.³³

29. Criterion 9(C) also examines impacts to forestry. See Act 250 § 6086(a)(9)(C).

30. See Act 250 §§ 6086(a)(9)(C)(i), (ii) & (iii).

31. See, e.g., *Re: Thomas W. Bryant and John P. Skinner*, No. 4C0795-EB, Findings of Fact, Conclusions of Law, and Order at 23-29 (Vt. Env'tl. Bd. June 26, 1991). It is anticipated that the Environmental Court will employ the same method of analysis for both criteria.

32. See VT. STAT. ANN. tit. 10, § 6042 (2004).

33. Argentina, *supra* note 14, at 185-86.

B. Establishment of Off-Site Agricultural Mitigation Under Act 250

On its face, Act 250 makes no provision for off-site agricultural mitigation, nor does it allow a project likely to significantly reduce agricultural potential to move forward without satisfying all of the subcriteria. However, in *Re: J. Philip Gerbode*, #6F0357-EB, Findings of Fact, Conclusions of Law, and Order (Mar. 26, 1991), the Environmental Board found that a project applicant had satisfied the requirements of 9(B) despite significant reductions in the agricultural potential of the land and a failure to demonstrate compliance with the subcriteria where he had entered into a Mitigation Agreement with the State of Vermont Department of Agriculture, Food and Markets (“DAG”) which required the applicant to pay a fee to the Vermont Housing Conservation Board (“VHCB”) for the permanent preservation of off-site soils elsewhere in the same town.³⁴ The proposed project involved the subdivision of a 150-acre tract of land currently used for crop production into a technology park composed of sixteen commercial and industrial lots with internal roadways and municipal water and wastewater services in the Town of St. Albans, Vermont.³⁵ The District Commission concluded that the project application did not comply with Criteria 9(B), and the applicant filed an appeal with the Board and sought a mitigation agreement with the Department.³⁶ Under the terms of the mitigation agreement subsequently presented to the Board, the applicant was to pay the VHCB an amount deemed sufficient to preserve two acres of primary agricultural soils in St. Albans for each of the 150 acres developed.³⁷ The Selectmen of the Town endorsed the mitigation agreement.³⁸

The Board stated that in previous Criteria 9(B) cases, the Board’s analysis regarding reduction in agricultural soils was limited to the project site, i.e., the land actually proposed for development.³⁹ The Board took the novel approach in the *Gerbode* case, however, of directing its inquiry into the net loss of agricultural soils on separate, non-contiguous lands, concluding that the proposed technology park would not significantly reduce the agricultural potential of the soils because, in the aggregate of the project site and land identified in the mitigation agreement, only one-third of the total amount of combined agricultural soils would be developed,

34. *In re: J. Philip Gerbode*, No. 6F0357R-EB, 1991 WL 87026, at 3, 4, 9, 14 (Vt. Env’tl. Bd. Mar. 26, 1991).

35. *Id.* at 1, 3.

36. *Id.* at 1, 4.

37. *Id.* at 4.

38. *Id.* at 5.

39. *Id.* at 9.

while two-thirds of the agricultural potential would be permanently preserved.⁴⁰ Although the 150-acre project site was then under cultivation and had been historically used as a dairy farm, the Board based its decision, at least in part, on the conclusion that the subject land was not likely to be used for agricultural production “in the future.”⁴¹ The project site was in an area designated as commercial/industrial by the Town; was close to the railroad, an Interstate interchange, and commercial and industrial development; and was physically isolated from other farm units.⁴² The Board’s inquiry did not proceed to assess compliance with the subcriteria, presumably because it found, in the first instance, that no significant reductions in the agricultural potential of the aggregated lands as a whole would occur.

C. Off-Site Agricultural Mitigation Under *Gerbode*

Recognizing that there is no statute, regulation, or other express legislative authority which allows for mitigation agreements within the context of Criterion 9(B), subsequent cases characterized the *Gerbode* decision as “establishing,” or giving birth to, primary agricultural soils mitigation agreements in Vermont.⁴³ Subsequent cases have described the Board’s holding in *Gerbode* as based on recognition that “there would be instances where satisfaction of the strict requirements of Criterion 9(B) was not feasible.”⁴⁴ Practically, an alternative to the four subcriteria was created in *Gerbode*, whereby applicants could “side-step” the requirements of the subcriteria.⁴⁵ Mitigation agreements became a third means by which applicants could pass Criterion 9(B) muster, instead of complying with the subcriteria, or demonstrating that no significant reduction in agricultural potential was likely.⁴⁶ Beginning with the *Gerbode* decision and until a subsequent change in the law, the “Board and . . . District Commissions . . . allowed applicants in particular cases to use mitigation agreements to fully

40. *Id.*

41. *Id.* at 3, 9.

42. *Id.* at 9.

43. *Allen Brook Investments, LLC and Raymond Beaudry*, No. 4C1110-EB, 2004 WL 226387, at 13 (Vt. Env’tl. Bd. Jan. 27, 2004); *see also Southwestern Vermont Health Care Corporation*, No. 8B0537-EB, 2001 WL 190438, at 17 (Vt. Env’tl. Bd. Feb. 22, 2001) [hereinafter SVHC] (noting that the Mitigation Program arises out of the Environmental Boards decision in *Gerbode*).

44. *Id.* at 7.

45. *See John A. Russell Corporation*, No. 1R0849-EB, 2004 WL 226387, at 58 (Vt. Env’tl. Bd. Jul. 10, 2001); *Ingleside Equity Group*, Declaratory Ruling #397, 2001 WL 933661, at 12 (Vt. Env’tl. Bd. Aug. 15, 2001); *The Van Sicklen Limited Partnership*, No. 4C1013R-EB, 2002 WL 31856147, at 4 (Vt. Env’tl. Bd. May 16, 2002).

46. *See Allen Brook Investments, LLC and Raymond Beaudry*, 2004 WL 226387, at 7.

compensate for the negative effects under Criterion 9(B) of their projects and thereby satisfy the criterion.”⁴⁷ By entering into an agricultural mitigation agreement with DAG and agreeing to pay for the preservation of other, off-site primary agricultural soils, an applicant could, in effect “mitigate a project’s way into compliance with the criterion.”⁴⁸

Following the *Gerbode* decision, “once a mitigation agreement had been signed by [the applicant and DAG], the Board generally accepted the agreement without further inquiry” into compliance with Criterion 9(B).⁴⁹ The Board’s deference to DAG’s discretion in setting the terms of mitigation agreements became controversial as did DAG’s informal approach to mitigating the conversion of agricultural lands.⁵⁰ DAG’s management of the mitigation process and the administration and spending of mitigation funds were undertaken on a relatively *ad hoc* basis after the *Gerbode* decision.⁵¹ No formal process, rules, or procedures were established by DAG for the terms, implementation, or enforcement of mitigation agreements.⁵²

While DAG’s policy was to use funds collected under mitigation agreements to fund agricultural projects in the same Act 250 District as the lands to be developed, it did not necessarily dedicate funds to permanently preserve agricultural soils in the same municipality or county.⁵³ Similarly, no assurance was provided that the funds would serve to “protect soils of comparable quality or quantity to those [being] developed.”⁵⁴

As a matter of policy, DAG would generally only enter into a mitigation agreement (a)(i) if the agricultural land proposed for development was within an area designated for development under an approved municipal plan; or (a)(ii) if project designs minimizing the reduction in the agricultural potential of the soils had been considered and an onsite cluster development would not have resulted in the conservation of agricultural land with the ability to contribute to commercial agricultural enterprise; and (b)(i) if the development of the project site would not jeopardize the continuance of farming on nearby land (i.e. subcriterion iv); or (b)(ii) if the lands to be developed were in an area under conversion or likely to be converted to uses incompatible with farming or which would

47. See *John A. Russell Corporation*, 2004 WL 226387, at 57.

48. See *Ingleside Equity Group*, 2001 WL 933661, at 12; *Allen Brook Investments, LLC and Raymond Beaudry*, 2004 WL 226387, at 7.

49. See *John A. Russell Corporation*, 2004 WL 226387, at 57–58.

50. *SVHC*, 2001 WL 190438, at 16–17 (Feb. 22, 2001).

51. *Id.* at 17 (noting that “DAG attempts to follow the guidelines set out in Act 250.”).

52. *Id.*

53. *Id.*

54. *Id.*

not support farming.⁵⁵ However, DAG did not always apply these policy considerations when determining whether off-site mitigation was appropriate for a project.⁵⁶

In addition, while DAG required that developers contribute a calculated “price per acre” sufficient to permanently preserve two acres of land for each acre developed, its price per acre did not reflect the actual cost of purchasing or protecting any particular acre or group of acres of farmland in the same county.⁵⁷ The price per acre for primary agricultural soils was based on a county-average of the value of agricultural lands, “many of which [were] not under development pressure and [were] therefore less expensive” than lands in the path of development.⁵⁸ Consequently, the price per acre for primary agricultural soils was actually less than the fair market value for lands under development pressure.⁵⁹

D. Vermont’s Current Approach to Off-Site Agricultural Mitigation

Criticism of the *Gerbode* decision and controversy surrounding DAG’s subsequent administration of the mitigation fee program came to a head in *Re: Southwestern Vermont Health Care Corporation* (“SVHC”), #8B0537-EB, Findings of Fact, Conclusions of Law, and Order (Feb. 22, 2001), which altered the face of off-site agricultural mitigation in Vermont. In *SVHC*, the applicant filed a land use permit application with the Commission seeking authorization to construct a non-profit retirement facility with sixty-six assisted living units and fifteen duplex cottages for independent living on 51.5 acres.⁶⁰ The District Commission denied the project application and SVHC filed an appeal with the Board alleging, in part, that the Commission erred in its conclusions concerning Criterion 9(B) and its mitigation agreement with DAG.⁶¹ In addition to the statutory parties, SVHC and DAG, the Board granted party status to several project opponents, including neighboring landowners and a countywide conservation district which filed a cross-appeal with the Board challenging the Board’s authority to order off-site mitigation under Criterion 9(B).⁶²

The project opponents attacked the validity of DAG’s mitigation

55. *Id.* at 17–18.

56. *See id.* at 18 (noting that DAG did not examine the Bennington Town Plan when it decided to enter into a mitigation agreement with the applicant).

57. *Id.* at 18.

58. *Id.*

59. *Id.*

60. *Id.* at 1.

61. *Id.* at 1.

62. *Id.* at 2.

program in general and its application to the subject mitigation agreement, arguing that where the requirements of Criterion 9(B) and its subcriteria are not met, Act 250 requires denial of the land use permit.⁶³ The opponents argued that because there is no express language within Criterion 9(B) allowing protection of lands outside of the development site as a means by which to satisfy the criterion, mitigation agreements are unauthorized under the law.⁶⁴ The opponents also argued that while “the Environmental Board has broad authority to tailor conditions within an Act 250 permit,” it does not have the inherent authority to impose conditions, such as the use of a mitigation agreement, that are contrary to the express criteria of Act 250.⁶⁵ In addition, the opponents contended that if off-site mitigation was to be employed, it should be effectuated through concrete guidelines, and that without such established standards, the use of mitigation agreements should be found invalid.⁶⁶ In this vein, the opponents asserted that the State’s process for determining what agricultural land would be protected through a mitigation agreement took place “in a vacuum,” with no information about the types of land to be protected, the quantity of land involved, the monetary value associated therewith, or whether lands with comparable soil types were located close enough to a proposed project’s location such that off-site mitigation would really work.⁶⁷ Because of the informal nature of the process, the opponents argued, DAG’s mitigation program allowed lands subject to development pressure to be developed while protecting lands which, because of their location, might never be developed anyway.⁶⁸

The Board rejected the opponents’ arguments regarding the validity of mitigation agreements and the Board’s power to authorize their use, but conceded that the existing mitigation program was flawed. The Board held that authorizing off-site mitigation agreements was within the Board’s police power and that “Act 250 provides the Board with broad authority to tailor permit conditions in order to ensure that proposed projects will comply with [Act 250’s] ten criteria.”⁶⁹ The Vermont Legislature expressly provided the Board with discretion to apply the requirements of Act 250 to unforeseen circumstances.⁷⁰ Citing subcriterion (iii)’s language encouraging onsite agricultural mitigation techniques, the Board stated that

63. *Id.* at 38.

64. *Id.*

65. *Id.* at 39.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 40.

70. *Id.* at 42; *See also* Vincent v. Vt. State Ret. Bd., 148 Vt. 531, 535 (1987); Vt. Home Mortgage Credit Agency v. Montpelier Nat’l Bank, 128 Vt. 272, 278 (1970).

“the use of off-site mitigation to protect specifically targeted agricultural lands can be equally consistent with the legislative intent to protect ‘economically viable agricultural units.’”⁷¹ The Board held that “[a] narrow reading of criterion 9(B), resulting in the onsite preservation of a portion of agricultural soils on a project site, may not sufficiently preserve the economic viability of the agricultural soils involved;” and may, in the long run, fail to carry out the Legislature’s goals “by attempting to preserve farmland which will ultimately be overwhelmed and fragmented by development at the expense of protecting large[r] parcels of land which are more amenable to preservation.”⁷² “Instead, the public’s interest may be better served by a decision which approves the development of a project site in exchange for other economically viable agricultural lands of comparable quality.”⁷³ Regarding its authority to implement mitigation agreements, the Board concluded that an off-site mitigation program “provides both DAG and the Board a reasonable means of achieving the Legislature’s goal to preserve viable agricultural lands through an informed planning process.”⁷⁴

However, upon further consideration of the issues raised by the opponents, the Board stated that closer evaluation of the validity of mitigation agreements on an individual basis was warranted as part of the planning process.⁷⁵ The Legislature’s consideration of the protection of primary agricultural soils in Vermont as a matter of great importance constituted a “clear signal” to the Board that it should “tread very carefully” when approving any procedure including mitigation agreements which could have the effect of reducing the potential of Vermont’s primary soils.⁷⁶ To this end, the Board emphasized that going forward, mitigation agreements should be used only as a last resort: only after an applicant has “seriously attempted, but failed,” to meet the subcriteria.⁷⁷ The Board cautioned that if efforts to reduce the impacts of a project are not even attempted, then “mitigation agreements will be seen as no more than a cost of doing business.”⁷⁸

The Board held that before a mitigation agreement would be accepted by the Board in the future, “an applicant must also design its project to meet subcriteria (ii) and (iii)” to the extent reasonably feasible.⁷⁹ Thus, for

71. *SVHC*, 2001 WL 190438, at 42.

72. *Id.* at 42–43.

73. *Id.* at 42.

74. *Id.* at 43.

75. *Id.* at 44.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

example, if an applicant owns or controls other lands which would be suitable for the project but chooses not to use those lands or if the project could be planned to minimize the reduction of the potential of the primary agricultural soils, but the applicant chooses not to implement such a plan “the Board [could] not accept a mitigation agreement in lieu of meeting the subcriteria.”⁸⁰

In addition, the Board reinforced the practice of DAG not to enter into mitigation agreements unless the project meets subcriterion (iv); thus, the Board formally required that all projects avoid significantly interfering with or jeopardizing adjoining agricultural uses.⁸¹ Finally, the Board required “assurances that funds donated under a mitigation agreement will 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.”⁸²

Applying its holding to the mitigation agreement at issue, the Board held that the agreement was too vague and uncertain to be accepted. Significantly, the project site was the largest parcel of primary agricultural land to ever participate in the off-site mitigation program, and the Board held that the mitigation agreement was flawed when reviewed under the heightened scrutiny deserved.⁸³ The agreement was deficient because the mitigation fee amount was derived by using countywide average costs for farmland and did not provide assurances that soils of a comparable quality to those lost by the project would actually be protected.⁸⁴ Upon application of the individual subcriteria to the project, the Board concluded that although it complied with subcriteria (ii) and (iv), it did not satisfy subcriteria (i) and (iii), and therefore the agreement did not conform with Criterion 9(B).⁸⁵

Subsequent Board decisions have recognized that the *SVHC* decision established a “new test” considerably limiting the acceptability of mitigation agreements in Vermont.⁸⁶ Under the new standards for mitigation agreements, the Board has consistently treated them as a “last resort” and has made it more difficult to satisfy Criterion 9(B) by entering

80. *Id.* at 44, 59 n.6.

81. *Id.* at 44, 51.

82. *Id.* at 44.

83. *Id.* at 45.

84. *Id.*

85. *Id.* at 53.

86. See, e.g., *Re: The Van Sicklen Limited Partnership*, No. 4C1013R-EB, 2002 WL 31856147 at 5 (rejecting a project opponent’s argument that the *SVHC* decision was a clarification of the *Gerbode* decision); *Allen Brook Investments, LLC and Raymond Beaudry*, 2004 WL 226387 at 13.

into them.⁸⁷

In response to the *SVHC* decision, DAG has promulgated detailed criteria and adopted formal procedures for the implementation and administration of mitigation agreements.⁸⁸ As of November 30, 2002, mitigation agreements have led to the purchase of conservation easements on 22 farms containing a total of 5,183 acres of land.⁸⁹

III. OFF-SITE AGRICULTURAL MITIGATION IN CALIFORNIA

A. Overview of Title 14 of the California Public Resources Code, Sections 21000 California Environmental Quality Act (“CEQA”)

Like Vermont, California requires most major development projects to undergo a public environmental review process in order to assess the potentially significant impacts associated with the proposed project. The California Environmental Quality Act, California Public Resources Code §§ 21000-21006 is one of California’s most important environmental laws.⁹⁰ CEQA was passed in 1970 in response “to a general and growing awareness and acceptance of the importance of the natural environment in the lives of [California] citizens, and the vital necessity of its protection and preservation.”⁹¹ The fundamental purpose of CEQA is to “develop and

87. See, e.g., *Allen Brook Investments, LLC and Raymond Beaudry*, 2004 WL 226387 (permit for in-fill project between existing commercial and residential uses denied although project was subject to a mitigation agreement and designated as Medium Density Residential by the Town of Williston’s Plan and Zoning Ordinance because the applicant made no effort to design the development to avoid onsite reduction of primary agricultural soils); *John A. Russell Corporation*, 2004 WL 226387 (denying a mitigation agreement approved by DAG); *Ingleside Equity Group*, 2001 WL 933661; *Re: The Van Sicklen Limited Partnership*, 2002 WL 31856147 at 33.

88. See Vermont Department of Agriculture, Food and Markets Act 250 Off-Site Mitigation Procedure for Criteria 9(B) (Jan. 1, 2002).

89. See Act 250 Off-Site Mitigation: Criterion 9(B) and Mitigation Agreements—How Mitigation Funds are Used to Protect Vermont Farmland Forever, Vermont Department of Agriculture, Food and Markets & Vermont Housing and Conservation Board at 2 (Jan. 31, 2003).

90. See CAL. CODE REG. tit. 14, §§ 15000-15387 (CEQA GUIDELINES), Appendix G § II. While CEQA is not California’s main agricultural protection law, it is the arena in which impacts of the conversion of agricultural lands are debated and litigated. California’s primary farmland preservation law is the California Land Conservation Act of 1965, CAL. GOV’T CODE §§ 51200 *et seq.*, commonly known as the Williamson Act, is a voluntary program. The Williamson Act sets forth a framework for placing restrictions on agricultural lands in exchange for tax breaks and other incentives and is based on traditional contract law whereby landowners *voluntarily* place their lands within locally designated agricultural preserves. See *County of Marin v. Assessment Appeals Board*, 64 Cal.App.3d 319, 325-326 (1976) (holding that Williamson Act contracts are to be interpreted like any other form of contract to achieve its objectives and to give each party the benefit of its bargain). Impacts on lands subject to Williamson Act contracts are analyzed as part of the CEQA process.

91. See *County of Inyo v. Yorty*, 32 Cal.App. 3d 795, 802 (1973).

maintain a high-quality environment now and in the future, and take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state” by regulating development so that “major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.”⁹²

CEQA requires formal environmental review prior to public agency decisions to carry out, authorize, or approve projects that could have adverse effects on the environment.⁹³ CEQA is primarily a procedural requirement in that it does not regulate project implementation through substantive regulatory standards, or prohibitions.⁹⁴ Instead of prohibiting public agencies from approving projects with adverse environmental impacts, CEQA requires only that the agencies inform themselves about the environmental effects of their proposed actions, carefully consider all relevant information before they act, give the public an opportunity to comment on the environmental issues, and avoid or reduce potential harm to the environment when that is feasible.⁹⁵

To this end, after performing an initial study to identify any potential environmental impacts of a project, the public agency approving the project, the lead agency, must generally prepare an Environmental Impact Report (“EIR”) if it finds that any of the identified impacts may be “significant.”⁹⁶ The general purpose of the EIR is to provide state and local agencies and the general public with detailed information on the potentially significant

92. California Public Resources Code (CEQA) §§ 21000(g), 21001(a), (West 2005). See *Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247, 252 (1972) (CEQA described by the California Supreme Court as a “milestone” in the campaign for “maintenance of a quality environment for the people of this state”); see also *Napa Valley Wine Train, Inc. v. Public Utilities Commission*, 50 Cal.3d 370, 376 (1990) (acknowledging the importance of CEQA’s purpose).

93. See CEQA § 21002.1; CEQA GUIDELINES §§ 15002-15003.

94. See STEPHEN L. KOSTKA & MICHAEL H. ZISCHKE, *PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT* (CEB 2004), at § 1.1, and generally for an excellent guide to the CEQA process.

95. See, e.g., CEQA § 21002.1; *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal.3d 376, 393 (1988) (holding that CEQA does not require agencies to select the alternative course most protective of the environmental status quo; CEQA does not and cannot guarantee that the agency’s decisions will always be those that favor environmental considerations); *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 564 (1990) (holding that courts may not pass upon the correctness of an EIR’s conclusions but merely on its sufficiency as an informative document).

96. See CEQA § 21068 (1996, Supp. 2005). Guidelines, §15382, expands on the statute and defines “significant effect on the environment” as “a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, mineral, flora, fauna, ambient noise, and objects of historic and aesthetic significance.” An effect on the environment need not be “momentous” or “important” to meet the CEQA test for significance. The term “significant” covers a broad spectrum ranging from “not trivial” through “appreciable” to “important” and even “momentous.” See, e.g., *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 83 (1974).

environmental effects which the proposed project is likely to have, to list ways which the significant environmental effects may be minimized through mitigation, and to indicate alternatives to the project.⁹⁷ CEQA's implementing regulations, 14 C.C.R. §§ 15000-15387 (the "Guidelines"), set forth a set of sixteen broad environmental factors that may be potentially affected by a project.⁹⁸

Potential impacts to "agricultural resources" must be studied as part of the environmental review process under CEQA.⁹⁹ The term "agricultural resources" generally refers to agricultural land or agricultural uses.¹⁰⁰ Impacts to agricultural resources include the conversion of agricultural land to non-agricultural uses and conflicts with existing zoning for agricultural use or a Williamson Act contract.¹⁰¹ Where impacts to agricultural resources are found to be significant, any feasible mitigation measures that would avoid or substantially lessen such environmental effects must be adopted.¹⁰² Specifically, mitigation under CEQA includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action;
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment;
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and
- (e) Compensating for the impact by replacing or providing substitute resources or environments.¹⁰³

97. See CEQA §§ 21002.1, 21061; CEQA GUIDELINES § 15003.

98. See CEQA GUIDELINES, Appendix G. The 16 factors are Aesthetics, Agriculture Resources, Air Quality, Biological Resources, Cultural Resources, Geology/Soils, Hazards & Hazardous Materials, Hydrology/Water Quality, Land Use/Planning, Mineral Resources, Noise, Population/Housing, Public Services, Recreation, Transportation/Traffic, and Utilities/Service Systems.

99. See CEQA GUIDELINES, Appendix G § II.

100. See CEQA §§ 21095, 21060.1; CEQA GUIDELINES, Appendix G § II.

101. See CEQA GUIDELINES, Appendix G; CEQA GUIDELINES, Appendix G § II *supra* note 96, *supra* re Williamson Act contracts. While impacts to "farmland," generally must be assessed, environmental review must also look specifically at the conversion of Prime Farmland, Unique Farmland, or Farmland of Statewide Importance, as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Resources Agency.

102. See CEQA §§ 21002, 21002.1; CEQA GUIDELINES § 15091. In determining whether impacts to agricultural resources are significant environmental effects, lead agencies *may* refer to the California Agricultural Land Evaluation and Site Assessment Model (1997) prepared by the California Department of Conservation as an optional model to use in assessing impacts on agriculture and farmland. See also CEQA § 21095.

103. See CEQA GUIDELINES § 15370. This definition of the term "mitigation" adopts the definition contained in the federal National Environmental Policy Act ("NEPA") regulations. The

Mitigation measures need not be adopted, however, where specific economic, social, technological, or other considerations make infeasible the mitigation measures identified in the EIR process.¹⁰⁴ In addition, where implementation of the mitigation measures proposed are within the responsibility and jurisdiction of another public agency and not the lead agency, the project may be approved if the lead agency simply makes findings that the proposed mitigation measures have been or “can and should be” adopted by the other agency.¹⁰⁵

B. The Debate Over Off-Site Agricultural Mitigation Under CEQA

CEQA does not provide for the specific type of mitigation measures that can or should be adopted to mitigate significant impacts on agricultural resources, leaving the determination of how best to mitigate such impacts to the discretion of local agencies. Unlike Vermont, where Act 250 jurisprudence has established off-site agricultural mitigation measures as common practice, California has not yet made up its mind. CEQA litigants and the courts are still engaged in a debate over the fundamental question of whether significant impacts to agricultural resources can be or are mitigated through the permanent preservation of off-site agricultural lands. Ironically, because CEQA does not require mitigation where mitigation is deemed infeasible, project proponents in California often argue that agricultural lands are a finite resource which, once lost, are irreplaceable. Under this logic, any loss of agricultural lands is unmitigable through the long-term preservation of off-site agricultural land because development still results in a net loss of agricultural lands in the State. Conversely, project opponents in California often argue that agricultural lands are not a finite resource and that the conversion of agricultural lands may be mitigated to a level less than significant or even that conversion of non-agricultural lands to agricultural uses is a feasible way of offsetting any net decrease.

Unfortunately for all stakeholders involved, the three key CEQA decisions addressing this debate are unpublished or depublished and may not be cited as legal precedent or relied on by a court or party in any action or proceeding.¹⁰⁶ This has left the state of the law in this area in

federal definition is used so that this term will have identical meanings under NEPA and CEQA for projects which are subject to both Acts.

104. See CEQA GUIDELINES §§ 15091, 15093.

105. CEQA, §§ 21002, 21002.1; .See CEQA GUIDELINES §§ 15091, 15093; CEQA, §§ 21002, 21002.1.

106. Under California Rule of Court 976, opinions of a Court of Appeal are not published unless

considerable disarray, particularly because the decisions represent a split in California's appellate districts, entail conflicting approaches by different state agencies, and were litigated under contradictory theories raised by the Office of the Attorney General.

1. County of Santa Cruz

The issue of off-site mitigation for impacts to agricultural resources was first addressed by the California Court of Appeal in *County of Santa Cruz v. City of San Jose*, where Santa Cruz County and environmental groups challenged the sufficiency of an EIR for a large-scale campus industrial development in the City of San Jose.¹⁰⁷ The project entailed the conversion of 688 acres of farmland and open space into an industrial research park in which 269 acres would be devoted to open space and flood control improvements including a flood detention basin.¹⁰⁸ The use proposed by the project conformed with the City's adopted general plan.¹⁰⁹ The EIR provided that the loss of farmland and other open space due to the construction of the project could not be mitigated.¹¹⁰

The project opponents argued that the EIR's treatment of impacts to agricultural lands and open space was inadequate and that the City should have required the project applicant to purchase conservation easements or other off-site agricultural land to offset the loss, and thus, mitigate the impact.¹¹¹ The City responded by arguing that the loss of farmland and open space could not be "feasibly mitigated" because the land converted by the project to industrial use could not be replaced and was, in any event, designated by the general plan for industrial use.¹¹² The opponents responded that because the City did not even consider the purchase of other agricultural lands or easements, it was unknown whether this would have been a feasible mitigation measure. In the view of the project opponents, it

a majority of the three-Justice panel rendering the decision affirmatively certifies the case for publication. Cases for which no certification is obtained are referred to as "unpublished." Under Rule 979, the California Supreme Court may order a published Court of Appeal decision "depublished" without reason and without expressing an opinion of the Supreme Court "of the correctness of the result reached by the decision." The Court of Appeal may also depublish its own published decision on its own motion. Under Rule 977, unpublished and depublished cases may not be cited or relied on by a court or a party in any other action or proceeding.

107. *County of Santa Cruz v. City of San Jose*, No. H023956, WL 1596613, at 2. This case was unpublished under Rule 976 and under Rule 977 may not be cited or relied on by a court or a party in any other action or proceeding.

108. *Id.* at 2, 30.

109. *Id.* at 2.

110. *Id.* at 29.

111. *Id.*

112. *Id.*

was “environmentally unconscionable” for the City to adopt a policy that allowed for destruction of prime agricultural land without any attempt to mitigate this effect.¹¹³

The EIR for the project concluded that the loss of agricultural lands could not be mitigated by adopting the measures suggested by the opponents. The EIR explained its conclusion as follows:

There is a finite amount of land that is suitable for agricultural use. The purchase of fee title or of agricultural conservation easements over other agricultural parcels off-site would not avoid, reduce or compensate for the impact of converting land on the site to campus industrial use because it would not offset the loss of agricultural land caused by the Project—i.e., there would still be a net reduction in the total amount of land suitable for agricultural use that is available for such use. At most, the suggested measures would prevent the conversion of other agricultural lands as a result of other hypothetical future projects on any parcels that were purchased or had a conservation easement placed on them.¹¹⁴

The EIR noted that because 269 acres of the 688-acre site would be preserved as open space, the loss of land was smaller than what was envisioned in the general plan. The City recognized that the impacts on agricultural lands could not be mitigated but concluded that they were acceptable in light of the significant benefits related to the development of the site in accordance with the goals of the general plan.¹¹⁵ In ruling for the City, the court held that while CEQA authorizes the type of off-site mitigation proposed by the opponents and that other jurisdictions may have policies requiring purchases of easements or open space to offset the loss of agricultural land to development, CEQA does not require the adoption of such measures in every case.¹¹⁶ The court stated that the City did not have any policies providing for offsetting purchases but did have a policy that land designated for development in its general plan should be developed in accordance with that plan. The plan included consideration of land use, housing, conservation, and open space issues. This was reflected in the long-term goals, objectives, and policies relating to the appropriate balance between development of housing, industrial, commercial and other uses on the one hand, and the preservation of agricultural land and open space on

113. *Id.* at 30.

114. *Id.*

115. *Id.*

116. *Id.* at 31.

the other. The court concluded by holding that the EIR's explanation was sufficient and adequately supported the City's findings regarding the feasibility of mitigating the loss of open space and agricultural lands.¹¹⁷

2. Kangaroo Rat

The next case to rule on the off-site agricultural mitigation issue was *Friends of the Kangaroo Rat v. California Department of Corrections*,¹¹⁸ where project opponents challenged the legal sufficiency of a subsequent EIR ("SEIR")¹¹⁹ certified by the California Department of Corrections ("CDC") for a prison construction project in Kern County.¹²⁰ The SEIR stated that "the project would convert 480 acres of farmland to an institutional use," representing a significant impact to agricultural resources that could not be mitigated because no mitigation was available to reduce the impact.¹²¹ During environmental review of the project, the project opponents commented that this conclusion was not supported by any evidence in the record and was not based on any analysis or discussion. The opponents stated that the SEIR should have examined "the possibility that the impact of this conversion could be reduced by creating agricultural easements over important farmlands [off-site] in the vicinity of the project site."¹²² CDC responded to the opponents' comments as follows:

117. *Id.*

118. *Kangaroo Rat v. California Department of Corrections*, 4 Cal. Rptr. 3d 558, 560 (Cal. Dist. Ct. App. 2003). After rendering its decision in the case and considering the inconsistent position taken by the California Department of Conservation and the contradictory position taken by the California Office of Attorney General in the pending case of *South County Citizens for Responsible Growth v. City of Elk Grove*, the court certified the decision for partial publication. See generally *South County Citizens for Responsible Growth v. City of Elk Grove*, No. C042302, 2004 WL 219789, at *1 (Cal. Dist. Ct. App. Feb. 5, 2004) (indicating the decision was subsequently modified on Sept. 17, 2003 and then ordered depublished without explanation by the California Supreme Court on Feb. 18, 2004).

119. CAL. CODE REG. tit. 14 § 15162 (2005). When an EIR has been certified for a project and certain changes to the project or its circumstances occur or new information becomes available, a subsequent EIR must be prepared to examine the impacts associated with such changes or information. *Id.*

120. *Kangaroo Rat*, *supra* note 118, at 560. The *Kangaroo Rat* case was preceded by a related published decision in *Protect Our Water v. County of Merced*, involving an EIR which concluded that "the project [at issue] would create a significant unavoidable impact on agriculture by converting approximately 421 acres of agricultural land to a gravel mining and reclamation operation," but stated that there were no feasible measures that would fully mitigate for the loss of productive prime agricultural soils. *Protect Our Water v. County of Merced*, 110 Cal. App. 4th 362, 366 (2003). However, the court of appeal did not rule on this issue, instead holding the EIR inadequate under CEQA because it failed to prepare an adequate and complete administrative record as required under the law. *Id.* at 373-74.

121. *Id.* at 564.

122. *Id.*

The [SEIR] does not discuss mitigation for the conversion of Important Farmland to non-agricultural uses because there is no known mitigation for this impact. The State CEQA Guidelines require that an EIR discuss feasible measures that would avoid or substantially reduce a project's significant environmental effects. They also require that if mitigation exists that is considered infeasible, the infeasibility be discussed. The State CEQA Guidelines, however, do not require that a lead agency present evidence of the non-existence of mitigation The same commenter proffered previously . . . that this impact was not mitigated, but provided no suggested mitigation As we can only infer the suggestion here, CDC would pay the owner of existing agricultural land to continue to farm the land. This would not mitigate the loss of farmland; it would not create new farmland or compensate for the loss of farmland that has already occurred. The only other options would be to acquire for conversion to agricultural use (1) land that is presently undeveloped and not in agricultural use but that could be suitable for cultivation as Important Farmland (i.e., fallow land) or (2) land that is already developed. Based on field visits and a review of [the area Habitat Conservation Plan], it can be concluded that fallow agricultural land or natural open space land is likely to contain natural habitat that may potentially be used by special-status wildlife species . . . ; converting such land to agricultural use to mitigate a land use impact could therefore entail introducing disturbance (agricultural operations) into potential habitat, which would result in impacts on these species. This is not environmentally beneficial. Converting land developed with residential, commercial, or industrial uses to Important Farmland is infeasible for obvious reasons.¹²³

In ruling for the CDC, the court held that the creation of an off-site agricultural easement would not constitute "mitigation" under CEQA.¹²⁴ The court stated that the suggested agricultural easement would presumably not create any new farmland where no farmland presently exists. "Thus, an agricultural easement would not compensate for a loss of farmland 'by replacing or providing substitute resources or environments.'"¹²⁵ At best, the court reasoned, such an easement might prevent the future conversion of some as yet unidentified parcel of farmland to a nonagricultural use. The court concluded that although the opponents might deem this future

123. *Id.* at 565.

124. *Id.* at 566.

125. *Id.* at 567 (quoting CAL. CODE REG. tit. 14 § 15370 (2004)).

preservation function to be a desirable result, the desire for such a result did not turn the proposed action into mitigation of the project's impacts on agricultural resources.¹²⁶

3. South County Citizens

In *South County Citizens for Responsible Growth v. City of Elk Grove*, the California Office of the Attorney General on behalf of the California Department of Conservation, took a totally contrary position to its stance in *Kangaroo Rat*, arguing that CEQA does require consideration of off-site mitigation for the loss of agricultural land.¹²⁷ At issue in this case was the development of approximately 295 acres of open space and farmland in the City of Elk Grove.¹²⁸ The City's general plan designated the project site for potential urban development by 2010 and the City approved the construction of extensive commercial uses, including a regional shopping mall, and some 280 residential units.¹²⁹ The "EIR identified the conversion of farmland as a significant environmental effect" of the project but "concluded that there [was] no feasible mitigation measure available to offset the loss of farmland."¹³⁰ It reasoned that "while preservation of other existing farmland or the payment of fees for the purchase of conservation easements would help to limit future losses, such measures would not reduce the specific loss of farmland converted to urban use through the project," and that it was impossible to create or manufacture more viable farmland.¹³¹

During the public comment period on the EIR, a number of commentators suggested that the loss of farmland could be mitigated by adopting a Sacramento County policy that for every acre developed, "the applicant would preserve .63 acres of agricultural land within the area or would contribute 950 dollars into a fund for the purchase of conservation easements or similar instruments."¹³² Although it contacted a number of State and local agencies for information on agricultural conservation programs, City staff continued to recommend against the imposition of a

126. *Id.*

127. See *South County Citizens for Responsible Growth v. City of Elk Grove*, No. C042302, 2004 WL 219789, at heading (Cal. Dist. Ct. App. Feb. 5, 2004) (noting that this case was unpublished under Rule 976 and under Rule 977; therefore, it may not be cited or relied on by a court or a party in any other action or proceeding).

128. *Id.* at 1.

129. *Id.* at 2.

130. *Id.* at 3.

131. *Id.*

132. *Id.* at 4.

conservation mitigation requirement for the project.¹³³ Staff “asserted that conversion of the land to urban use would result in permanent loss of [an agricultural] resource that could not be avoided, minimized, or rectified.”¹³⁴ Staff also “noted that to impose a mitigation measure under CEQA, there must be an essential nexus between the mitigation measure and a legitimate governmental interest, and the measure must be roughly proportional to the impacts of the proposed project.”¹³⁵ Staff concluded that because there had been no nexus study or ordinance in place requiring such mitigation, the imposition of such a requirement would not meet this test.¹³⁶

During the environmental review process, the applicants informed the City that they would be willing to pay a mitigation fee and the City adopted a development agreement which required the payment of such a mitigation fee. However, “the City found that [the] payment of the fee would not mitigate the impact of the project [on agricultural resources] below a level of significance.”¹³⁷ In ruling against the City, the court found that nothing in CEQA would support the view that a public agency was relieved of the duty to adopt a feasible mitigation measure which would substantially lessen the significant environmental effects of a project simply because those measures would not reduce the impact below a level of significance.¹³⁸ The Court also found that the applicants, “by agreeing to pay, and the City by agreeing to accept, mitigation fees tacitly agreed the loss of farmlands can be mitigated through the payment.”¹³⁹

With regard to the underlying issue of whether the loss of farmland can be mitigated under CEQA, the project applicants pointed to the *Kangaroo Rat* case and asserted that because a conservation easement would not create new farmland, it would not constitute mitigation for the conversion of existing farmland.¹⁴⁰ In reaching the opposite conclusion, the court, in a

133. *Id.*

134. *Id.*

135. *Id.* See CAL. CODE REG. tit. 14 § 15126.4(a)(4) (2005) (indicating the staff considered these CEQA guidelines); See also *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (reversing the Oregon Supreme Court’s decision concerning city exactions on commercial property); *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) (holding that the Commission could not impose a condition to approve a rebuilding permit requirement that owners provide lateral access to the public to pass and repass across property).

136. *South County*, 2004 WL 219789, at 4.

137. *Id.*

138. *Id.* at 5.

139. *Id.* The court also noted that the general plan did call “for mitigation of the loss of prime farmlands or lands with intensive agricultural investments” to provide protection of nearby farmland but that this policy did not apply to the project site because it was not prime farmland or subject to intensive agricultural investment. *Id.* at 3 n.5.

140. See *Id.* at 6 (noting project proponents relied upon the *Kangaroo Rat* case and the court considered it before it was ordered depublished).

2-1 decision, expressly disagreed with the Fifth Appellate District's holding in *Kangaroo Rat*.¹⁴¹ The court reviewed a number of legislative pronouncements including provisions of the Williamson Act, California's conservation easement law, the Agricultural Land Stewardship Program Act, and CEQA itself, and concluded that these legislative acts reflect that conversion of agricultural land to other uses has been a matter of significant concern to the Legislature for nearly four decades.¹⁴² The court concluded that the California Legislature recognizes that conversion of farmland to other uses, particularly urban use, "inevitably creates development pressures that have a profound impact on the ability of the public and private sectors to conserve other land for agricultural use" and regards conservation easements as an important and necessary means of combating the development pressures created by the conversion of farmland.¹⁴³

The court held that while it is obvious that off-site agricultural mitigation measures will not replace the converted land, they can diminish the development pressures created by the conversion of farmland and "can provide important assistance to the public and private sectors in preserving other farmland against the danger of the domino effect created by the project."¹⁴⁴ In this respect, the court held that off-site "conservation easements [fell] well within the concept of mitigation under CEQA" and that the EIR was deficient because it did not discuss the issue of conservation fees as a mitigation measure for the project.¹⁴⁵

In a dissenting opinion, one Justice stated that the reasoning of the *Kangaroo Rat* case was persuasive and that a conservation easement does not lessen the loss of agricultural land caused by this or other past and probable future projects.¹⁴⁶ Rather, agricultural land is "unique, and once it is developed with urban uses, it is lost permanently."¹⁴⁷ Emphasizing that off-site conservation easements do not constitute mitigation under CEQA, the Justice wrote that the only means of mitigating or lessening the impacts on agricultural resources is by not approving the project and called for the Legislature to address the conflict between its desire to preserve agricultural land under the CEQA process and the fact the loss of such land cannot be substantially lessened or mitigated when approving a project under

141. *Id.*

142. *Id.* at 6-7. See CAL. CODE REG. tit. 5, §§ 51200-51207 (2005); CAL. CIV. CODE § 815-816 (2005); CAL. PUB. RES. CODE §§ 10200-10277 (2005); CAL. PUB. RES. CODE §§ 21000-21006 (2005).

143. *South County*, 2004 WL 219789, at 7. See CAL. PUB. RES. CODE §§ 10201(b-d) (2005); CAL. CIV. CODE § 815 (2005).

144. *South County*, 2004 WL 219789, at 8.

145. *Id.*

146. *Id.* at 28-29.

147. *Id.* at 29.

CEQA.¹⁴⁸

Until the Legislature does act to clarify the law in this regard, or until the California Courts of Appeal publish some decisions in this arena, the status of off-site agricultural mitigation measures under CEQA is unclear.¹⁴⁹

IV. CONCLUSION

Unlike agricultural district programs and other voluntary farmland preservation systems, off-site agricultural mitigation requirements can have teeth. If developers or landowners want to convert agricultural lands to developed uses, onsite concessions to project design generally have to be made and funds and resources have to be expended to arrange for the permanent preservation of nearby agricultural lands off-site, whether through conservation easement, deeds of development rights, or some other mechanism. Unlike agricultural zoning ordinances which “lock-up” existing farmland, and which are often viewed as unfair or too subject to political caprice, off-site mitigation programs allow for some development to occur, depending on site-specific conditions and the developer or landowner’s willingness to compromise.

Ideally, off-site agricultural mitigation enables farmland subject to the greatest development pressure, where long-term agricultural uses are least viable, to be developed as part of a comprehensive pattern of contiguous development while simultaneously providing permanent protection for other viable farmland that might otherwise be in the path of future development. In practice, however, this balance between current development and future preservation is very difficult to maintain. After a decade of employing fairly loose mitigation standards, Vermont recently tightened its requirements and now permits off-site mitigation only as a “last resort.” California is still wrestling with the fundamental question of whether the loss of farmland can even be mitigated. Because farmland is a finite resource and because there is no bright line delineating too much development from too little, states like Vermont and California are likely to host heated debates over where to draw the line for years to come.

148. *Id.*

149. *Defend the Bay v. City of Irvine*, 119 Cal. App. 4th Supp. 1261, 1271-72 (2004). Recently, in this related published opinion, the court rejected the project opponents’ argument that an EIR was deficient for not adopting mitigation measures for the loss of agricultural land because the EIR “failed to consider the possibility of converting non-agricultural lands to agricultural use as a means of mitigating the present loss.” *Id.* at 1270.