

1 H.448

2 Introduced by Representative Cheney of Norwich

3 Referred to Committee on

4 Date:

5 Subject: Natural resources; conservation and development; land use; Act 250;
6 primary agricultural soils

7 Statement of purpose of bill as introduced: This bill proposes revisions to the
8 provisions of 10 V.S.A. chapter 151 (Act 250) that govern mitigating the
9 conversion of primary agricultural soils.

10 An act relating to Act 250 and primary agricultural soils

11 It is hereby enacted by the General Assembly of the State of Vermont:

12 ~~Sec. 1. 10 V.S.A. § 6093 is amended to read:~~

13 ~~§ 6093. MITIGATION OF PRIMARY AGRICULTURAL SOILS~~

14 ~~(a) Mitigation for loss of primary agricultural soils. Suitable Subject to the~~
15 ~~district commission's approval, an applicant shall provide suitable mitigation~~
16 ~~for the conversion of primary agricultural soils necessary to satisfy subdivision~~
17 ~~6086(a)(9)(B)(iv) of this title shall depend on where the project tract is located.~~
18 ~~through one of the following means:~~

19 ~~(1) Project located in growth center. If the project tract is located in a~~
20 ~~designated growth center, an applicant who complies with subdivision~~

1 ~~6086(a)(9)(B)(iv) of this title shall deposit Off site mitigation fee. The deposit~~
2 ~~of an offsite mitigation fee into the Vermont housing and conservation trust~~
3 ~~fund Housing and Conservation Trust Fund established under section 312 of~~
4 ~~this title for the purpose of preserving primary agricultural soils of equal or~~
5 ~~greater value with the highest priority given to preserving prime agricultural~~
6 ~~soils as defined by the U.S. Department of Agriculture. Any required ~~offsite~~~~
7 ~~off-site mitigation fee shall be derived by:~~

8 (A) determining the number of acres of primary agricultural soils
9 affected by the proposed development or subdivision;

10 (B) multiplying the number of affected acres of primary agricultural
11 soils by a factor resulting in a ratio established as follows:

12 (i) for development or subdivision within a designated growth
13 center, the ratio shall be 1:1;

14 (ii) for development or subdivision outside a designated growth
15 center, the factor shall be based on the quality of the affected primary
16 agricultural soils and other factors that the Secretary of Agriculture, Food and
17 Markets may consider relevant, including the soil's location, accessibility, tract
18 size, existing agricultural operations, water sources, drainage, slope, the
19 presence of ledge or protected wetlands, the infrastructure of the existing farm
20 or municipality in which the soils are located; and the N.R.C.S. rating system

1 ~~for Vermont soils. This factor shall result in a ratio of no less than 2:1, but no~~
2 ~~more than 3:1, protected acres to acres of impacted primary agricultural soils;~~

3 (iii) for residential construction that has a density of at least eight
4 units of housing per acre, of which at least eight units per acre or at least
5 40 percent of the units, on average, in the entire development or subdivision,
6 whichever is greater, meets the definition of affordable housing established in
7 this chapter, no mitigation shall be required. However, all affordable housing
8 units shall be subject to housing subsidy covenants, as defined in 27 V.S.A.

9 § 610, that preserve their affordability for a period of 99 years or longer. ~~For~~
10 ~~purposes of~~ In this section, housing that is rented shall be considered
11 affordable housing when its inhabitants have a gross annual household income
12 that does not exceed 60 percent of the county median income or 60 percent of
13 the standard metropolitan statistical area income if the municipality is located
14 in such an area;

15 (C) multiplying the resulting product by a "price-per-acre" value,
16 which shall be based on the amount that the ~~secretary of agriculture, food and~~
17 ~~markets~~ Secretary of Agriculture, Food and Markets has determined to be the
18 recent, per-acre cost to acquire conservation easements for primary agricultural
19 soils in the same geographic region as the proposed development or
20 subdivision.

1 ~~(2) Project located outside designated growth center. If the project tract~~
2 ~~is not located in a designated growth center, mitigation shall be provided on~~
3 ~~site in order to preserve primary agricultural soils for present and future~~
4 ~~agricultural use, with special emphasis on preserving prime agricultural soils.~~
5 ~~Preservation of primary agricultural soils shall be accomplished through~~
6 ~~innovative land use design resulting in compact development patterns which~~
7 ~~will maintain a sufficient acreage of primary agricultural soils on the project~~
8 ~~tract capable of supporting or contributing to an economic or commercial~~
9 ~~agricultural operation and shall be enforceable by permit conditions issued by~~
10 ~~the district commission. Onsite mitigation. The preservation of primary~~
11 ~~agricultural soils on the site of the proposed development or subdivision. The~~
12 ~~number of acres of primary agricultural soils to be preserved shall be~~
13 ~~derived by:~~
14 ~~(A) determining the number of acres of primary agricultural soils~~
15 ~~affected by the proposed development or subdivision; and~~
16 ~~(B) multiplying the number of affected acres of primary agricultural~~
17 ~~soils by a factor based on the quality of those primary agricultural soils; and~~
18 ~~other factors as that the secretary of agriculture, food and markets Secretary of~~
19 ~~Agriculture, Food and Markets may ~~deem~~ consider relevant, including the~~
20 ~~soil's location; accessibility; tract size; existing agricultural operations;~~
21 ~~water sources; drainage; slope; the presence of ledge or protected wetlands;~~

1 ~~the infrastructure of the existing farm or municipality in which the soils are~~
2 located; and the N.R.C.S. rating system for Vermont soils. This factor shall
3 result in a ratio of no less than 2:1, but no more than 3:1, protected acres to
4 acres of impacted primary agricultural soils.

5 (3) ~~Mitigation flexibility.~~

6 (A) ~~Notwithstanding the provisions of subdivision (1) of this~~
7 ~~subsection pertaining to a development or subdivision on primary agricultural~~
8 ~~soils within a designated growth center, the district commission may, in~~
9 ~~appropriate circumstances, require onsite mitigation with special emphasis on~~
10 ~~preserving prime agricultural soils if that action is deemed consistent with the~~
11 ~~agricultural elements of local and regional plans and the goals of 24 V.S.A.~~
12 ~~§ 4302. In this situation, the approved plans must designate specific soils that~~
13 ~~shall be preserved inside growth centers. For projects located within a~~
14 ~~designated growth center, all factors used to calculate suitable mitigation~~
15 ~~acreage or fees, or some combination of these measures, shall be as specified~~
16 ~~in this subsection, subject to a ratio of 1:1.~~

17 (B) ~~Notwithstanding the provisions of subdivision (2) of this~~
18 ~~subsection pertaining to a development or subdivision on primary agricultural~~
19 ~~soils outside a designated growth center, the district commission may, in~~
20 ~~appropriate circumstances, approve off site mitigation or some combination of~~
21 ~~onsite and off site mitigation if that action is deemed consistent with the~~

1 ~~agricultural elements of local and regional plans and the goals of 24 V.S.A.~~
2 ~~§ 4302. For projects located outside a designated growth center, all factors~~
3 ~~used to calculate suitable mitigation acreage or fees, or some combination of~~
4 ~~these measures, shall be as specified in this subsection, subject to a ratio of no~~
5 ~~less than 2:1, but no more than 3:1. Combined mitigation. The payment of an~~
6 ~~off-site mitigation fee under subdivision (a)(1) of this section combined with~~
7 ~~the preservation of the remaining primary agricultural soils on the site of the~~
8 ~~proposed development or subdivision under subdivision (a)(2) of this section.~~
9 ~~For the purpose of calculating the amount of the offsite-application fee and the~~
10 ~~acreage to be preserved onsite, an applicant may propose and the district~~
11 ~~commission may approve an allocation of the acreage of affected primary~~
12 ~~agricultural soils between subdivisions (a)(1) and (a)(2) of this section.~~

13 * * *

14 (b) Factors to be considered. In approving mitigation under this section,
15 the district commission shall consider each of the following:

16 (1) whether the tract of land containing primary agricultural soils:

17 (A) has recently been in active production or rotation or has limited
18 ability to contribute to an economic or commercial agricultural operation and
19 whether the Secretary of Agriculture, Food and Markets has determined that
20 devoting the tract to agricultural uses is impractical based on its size or
21 relationship to other land uses;

1 ~~(B) is surrounded by or adjacent to compact development with~~
2 supporting infrastructure and the project's design will contribute to an existing
3 pattern of compact development; or

4 ~~(C) is within a larger area that contains a mixture of uses, including~~
5 commercial and industrial uses and a significant residential component, that is
6 supported by municipal infrastructure;

7 (2) whether payment of an off-site mitigation fee, or requiring a
8 combination of onsite and off-site mitigation, will best further the preservation
9 of primary agricultural soils for present and future agricultural use, with
10 special emphasis on preserving prime agricultural soils.

11 (c) Easements required for protected lands. All primary agricultural soils
12 preserved for commercial or economic agricultural use by the Vermont
13 ~~housing and conservation board~~ Housing and Conservation Board pursuant to
14 this section shall be protected by permanent conservation easements (grant of
15 development rights and conservation restrictions) conveyed to a qualified
16 holder, as defined in section 821 of this title, with the ability to monitor and
17 enforce easements in perpetuity. Off-site mitigation fees may be used by the
18 Vermont ~~housing and conservation board~~ Housing and Conservation Board
19 and shall be used by the Agency of Agriculture, Food and Markets to pay
20 reasonable staff or transaction costs, or both, of the ~~board and agency of~~
21 ~~agriculture, food, and markets~~ Board and Agency related to preserve the

1 ~~preservation of primary agricultural soils or to implement the implementation~~
2 ~~of section 6086(a)(9)(B) or 6093 of this title.~~

3 Sec. 2. EFFECTIVE DATE

4 ~~This act shall take effect on July 1, 2013.~~

Sec. 1. 10 V.S.A. § 6093 is amended to read:

§ 6093. MITIGATION OF PRIMARY AGRICULTURAL SOILS

(a) Mitigation for loss of primary agricultural soils. ~~Suitable~~ Subject to the District Commission's approval, an applicant shall provide suitable mitigation for the conversion of primary agricultural soils necessary to satisfy subdivision 6086(a)(9)(B)(iv) of this title ~~shall depend on where the project tract is located.~~ through one of the following means:

(1) ~~Project located in growth center.~~ If the project tract is located in a designated growth center, an applicant who complies with subdivision 6086(a)(9)(B)(iv) of this title shall deposit Off-site mitigation fee. The deposit of an ~~offsite~~ off-site mitigation fee into the Vermont ~~housing and conservation trust fund~~ Housing and Conservation Trust Fund established under section 312 of this title for the purpose of preserving primary agricultural soils of equal or greater value with the highest priority given to preserving prime agricultural soils as defined by the U.S. Department of Agriculture. Any required ~~offsite~~ off-site mitigation fee shall be derived by:

(A) ~~determining~~ Determining the number of acres of primary agricultural soils affected by the proposed development or subdivision;

(B) ~~multiplying~~ Multiplying the number of affected acres of primary agricultural soils by a factor resulting in a ratio established as follows:

(i) ~~for~~ For development or subdivision within ~~a designated growth center,~~ each of the following areas designated under 24 V.S.A. chapter 76A, the ratio shall be 1:1; a downtown development district, a new town center designated on or before January 1, 2014, a designated growth center, and a neighborhood development area associated with a designated downtown development district.

(ii) For development or subdivision outside a designated area listed in subdivision (1)(B)(i) of this subsection, the factor shall be based on the quality of the affected primary agricultural soils and other information that the Secretary of Agriculture, Food and Markets may consider 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 NRCS rating system for Vermont soils. This factor shall result in a ratio of no less than 2:1, but no more than 3:1, protected acres to acres of impacted primary agricultural soils.

~~(iii) For~~ For residential construction that has a density of at least eight units of housing per acre, of which at least eight units per acre or at least 40 percent of the units, on average, in the entire development or subdivision, whichever is greater, meets the definition of affordable housing established in this chapter, no mitigation shall be required. However, all affordable housing units shall be subject to housing subsidy covenants, as defined in 27 V.S.A. § 610, that preserve their affordability for a period of 99 years or longer. ~~For purposes of~~ In this section, housing that is rented shall be considered affordable housing when its inhabitants have a gross annual household income that does not exceed 60 percent of the county median income or 60 percent of the standard metropolitan statistical area income if the municipality is located in such an area.

(C) ~~multiplying~~ Multiplying the resulting product by a “price-per-acre” value, which shall be based on the amount that the ~~secretary of agriculture, food and markets~~ 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.

~~(2) Project located outside designated growth center. If the project tract is not located in a designated growth center, mitigation shall be provided on site in order to preserve primary agricultural soils for present and future~~

~~agricultural use, with special emphasis on preserving prime agricultural soils. Preservation of primary agricultural soils shall be accomplished through 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 and shall be enforceable by permit conditions issued by the district commission.~~ On-site mitigation. The preservation of primary agricultural soils on the site of the proposed development or subdivision. The number of acres of primary agricultural soils to be preserved shall be derived by:

(A) ~~determining~~ Determining the number of acres of primary agricultural soils affected by the proposed development or subdivision; ~~and~~

(B) ~~multiplying~~ Multiplying the number of affected acres of primary agricultural soils by a factor based on the quality of those primary agricultural soils; ~~and other factors as information that the secretary of agriculture, food and markets~~ Secretary of Agriculture, Food and Markets may deem consider 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.~~ NRCS rating system for Vermont soils. This factor shall result in a ratio of no less than 2:1,

but no more than 3:1, protected acres to acres of impacted primary agricultural soils, except for development in a designated area listed in subdivision (1)(B)(i) of this subsection, in which case the ratio shall be 1:1.

(3) Mitigation flexibility.

~~*(A) Notwithstanding the provisions of subdivision (1) of this subsection pertaining to a development or subdivision on primary agricultural soils within a designated growth center, the district commission may, in appropriate circumstances, require onsite mitigation with special emphasis on preserving prime agricultural soils if that action is deemed consistent with the agricultural elements of local and regional plans and the goals of 24 V.S.A. § 4302. In this situation, the approved plans must designate specific soils that shall be preserved inside growth centers. For projects located within a designated growth center, all factors used to calculate suitable mitigation acreage or fees, or some combination of these measures, shall be as specified in this subsection, subject to a ratio of 1:1.*~~

~~*(B) Notwithstanding the provisions of subdivision (2) of this subsection pertaining to a development or subdivision on primary agricultural soils outside a designated growth center, the district commission may, in appropriate circumstances, approve off-site mitigation or some combination of onsite and off site mitigation if that action is deemed consistent with the agricultural elements of local and regional plans and the goals of 24 V.S.A.*~~

~~§ 4302. For projects located outside a designated growth center, all factors used to calculate suitable mitigation acreage or fees, or some combination of these measures, shall be as specified in this subsection, subject to a ratio of no less than 2:1, but no more than 3:1. Combined mitigation. The payment of an off-site mitigation fee under subdivision (a)(1) of this section combined with the preservation of the remaining primary agricultural soils on the site of the proposed development or subdivision under subdivision (a)(2) of this section. For the purpose of calculating the amount of the off-site-mitigation fee and the acreage to be preserved on-site, an applicant may propose and the District Commission may approve an allocation of the acreage of affected primary agricultural soils between subdivisions (1) and (2) of this subsection (a).~~

* * *

~~(b) Requirements and factors. This subsection sets out requirements for and factors to be considered in determining suitable mitigation under this section. Suitable mitigation; outside designated areas. This subsection sets out requirements for and factors to be considered in determining suitable mitigation for development or subdivision of primary agricultural soils outside a designated area listed in subdivision (a)(1)(B)(i) of this section.~~

~~(1) Findings. In determining suitable mitigation, the District Commission shall consider and make findings on each requirement and factor described in subdivisions (2) through (4) of this subsection.~~

(2) General.

(A) Mitigation for the conversion of primary agricultural soils shall comply with 24 V.S.A. § 2791(13)(A) (smart growth principles; historic development patterns) and (E) (agricultural and forest industries).

(B) The determination of suitable mitigation shall be consistent with the agricultural elements of the applicable local and regional plans and the goals of 24 V.S.A. § 4302.

(3) Mitigation entirely on-site. The District Commission shall give preference to mitigation that is entirely on-site if the Commission finds that:

(A) the project tract supports an agricultural operation or has been in active production or rotation within the last five years; or

(B) the primary agricultural soils on the project tract consist predominantly of NRCS agricultural value groups 1–5; or

(C) after considering the recommendation, if any, of the Secretary of Agriculture, Food and Markets, the project tract has site-specific characteristics that warrant on-site mitigation.

(4) Off-site or combined mitigation. The District Commission shall give preference to off-site mitigation, either alone or combined with on-site mitigation, if the Commission finds that:

(A) payment of an off-site mitigation fee, or requiring a combination of on-site and off-site mitigation, will best further the preservation of primary agricultural soils for present and future agricultural use with special emphasis on protecting prime agricultural soils;

(B) the applicant has demonstrated that the development or subdivision maximizes the efficient use and development potential or allowable density of the project tract; and

(C) one of the following applies:

(i) After considering the recommendation, if any, of the Secretary of Agriculture, Food and Markets, devoting the tract to agricultural uses is impractical based on its size or relationship to other land uses or site-specific characteristics, and the applicant demonstrates that the development or subdivision maximizes the efficient use and development potential or allowable density of the project tract; or

(ii) the project tract:

(I) is surrounded by or adjacent to high density development with supporting infrastructure and the project will contribute to the existing compact development patterns in the area; or

(II) is within an area that contains a mixture of uses, including commercial and industrial, and a significant residential component, supported by municipal water, wastewater, and roadway infrastructure.

(c) Suitable mitigation; designated areas. For development or subdivision of primary agricultural soils inside a designated area listed in subdivision (a)(1)(B)(i) of this section, the applicant shall choose a mitigation option that conforms to subdivision (a)(1) (off-site mitigation fee), (2) (on-site mitigation), or (3) (combined mitigation) of this section.

(c) (d) Easements required for protected lands. All primary agricultural soils preserved for commercial or economic agricultural use by the Vermont ~~housing and conservation board~~ Housing and Conservation Board pursuant to this section shall be protected by permanent conservation easements (grant of development rights and conservation restrictions) conveyed to a qualified holder, as defined in section 821 of this title, with the ability to monitor and enforce easements in perpetuity. Off-site mitigation fees may be used by the Vermont ~~housing and conservation board~~ Housing and Conservation Board and shall be used by the Agency of Agriculture, Food and Markets to pay reasonable staff or transaction costs, or both, of the ~~board and agency of agriculture, food, and markets~~ Board and Agency related to preserve the preservation of primary agricultural soils or to ~~implement~~ the implementation of section 6086(a)(9)(B) or 6093 of this title.

Sec. 2. 10 V.S.A. § 6001(15) is amended to read:

(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. 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.) each of the following:~~

~~(A) An important farmland soils map unit that the Natural Resources Conservation Service of the U.S. Department of Agriculture (NRCS) has identified and determined to have a rating of prime, statewide, or local importance, unless the District Commission determines that the soils within the unit have lost their agricultural potential. In determining that soils within an important farmland soils map unit have lost their agricultural potential, the Commission shall consider:~~

(i) impacts to the soils relevant to the agricultural potential of the soil from previously constructed improvements;

(ii) the presence on the soils of a Class I or Class II wetland under chapter 37 of this title;

(iii) the existence of topographic or physical barriers that reduce the accessibility of the rated soils so as to cause their isolation and that cannot reasonably be overcome; and

(iv) other factors relevant to the agricultural potential of the soils, on a site-specific basis, as found by the Commission after considering the recommendation, if any, of the Secretary of Agriculture, Food and Markets.

(B) Soils on the project tract that the District Commission finds to be of agricultural importance, due to their present or recent use for agricultural activities and that have not been identified by the NRCS as important farmland soil map units.

Sec. 3. 10 V.S.A. § 6086(a)(9)(B) is amended to read:

(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:

(I) to minimize the reduction of agricultural potential of the primary agricultural soils through innovative land use design resulting that results 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; or

(II) to maximize the efficient use and development density of the project tract on which those soils are located, if the reduction in agricultural potential of the primary agricultural soils is to be mitigated entirely off-site pursuant to subdivision (iv) of this subdivision (9)(B); and

(iv) suitable mitigation will be provided for any reduction in the agricultural potential of the primary agricultural soils caused by the

development or subdivision, in accordance with section 6093 of this title and rules adopted by the Natural Resources Board.

Sec. 4. EFFECTIVE DATE

This act shall take effect on July 1, 2014.