

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Ch. 151

Re: Town of Barre Millstone Hill West Bike Path

Declaratory Ruling #440

Memorandum of Decision

This proceeding involves a Petition (Petition) for a Declaratory Ruling (DR) filed with the Environmental Board (Board), by the Town of Barre, Vermont (Barre) from a Project Review Sheet (PRS) which asserts jurisdiction pursuant to 10 V.S.A. Ch. 151 (Act 250) over the proposed construction of the Millstone Hill West Bike Path in Barre (Project).

I. Procedural History

On September 7, 2004, in response to an August 26, 2004 request for a Jurisdictional Opinion, the District #5 Environmental Commission Assistant Coordinator (Assistant Coordinator) issued the PRS.

On October 6, 2004, Barre requested reconsideration of the PRS. On October 19, 2004, the Assistant Coordinator issued a brief letter reaffirming the PRS.

On November 5, 2004, pursuant to 10 V.S.A. § 6007(c) and Environmental Board Rule (EBR) 3, Barre filed the Petition, appealing the PRS and October 19, 2004 letter. Barre contends that the Project does not require an Act 250 permit.

With its Petition, Barre also filed a motion for summary decision pursuant to EBR 23.

On December 10, 2004, following a December 7, 2004 Prehearing Conference, Board Chair Patricia Moulton Powden issued a Prehearing Conference Report and Order.

The Board deliberated on December 22, 2004.

II. Discussion

Facts

The only facts that have been presented to the Board in this case come from Barre's summary judgment motion.

1. Barre seeks to construct a bike path of 7,100 feet that is ten feet wide with two foot wide grass shoulders.

2. The total size of the Project is 8.3 acres.

3. The Project crosses three parcels of land that are presently subject to Act 250 Land Use Permits.

Legal analysis

"Involved land"

The question in this Declaratory Ruling is whether the bike path is subject to Act 250 jurisdiction as a "development." The relevant statute is found at 10 V.S.A. §6001(3)(A)(v):

"Development" means:

The construction of improvements on a tract of land involving more than 10 acres that is to be used for municipal, county or state purposes. In computing the amount of land involved, land shall be included that is incidental to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings.

EBR 2(A)(1)(d) defines "development" to include:

The construction of improvements for state, county or municipal purposes, on a tract or tracts of land *involving the physical alteration of more than ten acres of land*. The computation of land to be considered shall include the land which is incidental to the use such as lawns, parking lots, driveways, leach fields, and accessory buildings. In the case where a state, county or municipal project is to be completed in stages according to a plan, or it is evident under the circumstances that a project is incidental to or a part of a larger undertaking, *all land to be physically altered in the entire project* shall be included for the purposes of determining jurisdiction.

Other relevant Environmental Board Rules (EBR) concern the definitions of "state, county or municipal purposes" and ""involved land." They read:

"State, county or municipal purposes" means projects which are undertaken by or for the state, county or municipality and which are to be used by the state, county, municipality, or members of the general public.

EBR 2(E).

"Involved land" includes:

(2) Those portions of any tract or tracts of land to be physically altered and upon which construction of improvements will occur for state, county, or municipal purposes including land which is incidental to the use such as lawns, parking lots, driveways, leach fields, and accessory buildings, bearing some relationship to the land which is actually used in the construction of improvements, such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship. In the case where a state, county or municipal project is to be completed in stages according to a plan, or it is evident under the circumstances that the project is incidental to or a part of a larger undertaking, all land involved in the entire project shall be included for the purposes of determining jurisdiction.

EBR 2(F).

The Board has specifically held that "involved land" in state, county and municipal development projects means *only land that is physically disturbed by the project.*" *Town of Williston Road Improvements*, Declaratory Ruling #381, Findings of Fact, Conclusions of Law, and Order at 7 (Jan. 13, 2000) (emphasis added).

Thus, pursuant to EBR (E) and (F) the Project's "involved land" is only 8.3 acres, and jurisdiction does not attach to the Project under those provisions of the statute and rules. 10 V.S.A. §6001(3)(A)(v) and EBR 2(A)(1)(d)

Material or substantial change to existing Land Use Permits

When a municipal, county or state project includes elements which cross lands which are subject to Act 250 permits issued to other persons, those other permits may need to be amended if such government project's use of such lands triggers review under EBR 2(G) and (P) as a material or substantial change. In *Re: Green Mountain Power Corporation and Town of Wilmington*, Declaratory Ruling #405, Findings of Fact, Conclusions of Law, and Order (Sep. 19, 2002), the Board held that an amendment was required for a material change to an existing Land Use Permit when that change was caused by the use of such permitted land by a municipal project. *Id.* at 8. Thus, if the bike path constitutes a material or substantial change to the existing permitted projects which the bike path will cross, amendments to those permits will be required. EBR 34.

The Board does not, however, have sufficient information to determine whether such changes may exist, under the present Record.

III. Order

1. There is no 10 V.S.A. Ch. 151 jurisdiction to those portions of the Project that do not cross lands already subject to Land Use Permits issued pursuant to Ch. 151.

2. The Chair shall issue a Scheduling Order setting filing and hearing dates on the question of whether the Project constitutes a material or substantial change to existing Land Use Permits issued pursuant to 10 V.S.A. Ch. 151.

Dated at Montpelier, Vermont this 3rd day of January 2005.

ENVIRONMENTAL BOARD

/s/ Patricia Moulton Powden

Patricia Moulton Powden, Chair

George Holland

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