VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: GHL Construction, Inc. and PAK Construction, Inc. — Land Use Permit Application #2S1124-EB, Declaratory Ruling #396

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This consolidated appeal and declaratory ruling proceeding concerns whether a parcel of land that was subdivided and sold off the project tract is subject to jurisdiction pursuant to 10 V.S.A. §§ 6001-6092 (Act 250). As set forth below, the Board concludes that the parcel in question is subject to Act 250 jurisdiction.

I. PROCEDURAL SUMMARY

On November 9, 2000, GHL Construction, Inc. (GHL) and PAK Construction, Inc. (PAK) (collectively referred to as GHL/PAK) filed Land Use Permit Application # 2S1124 with the District # 2 Environmental Commission (Commission) seeking a permit for a stone quarry located off Todd Whitten Road in Chester, Vermont (the Project).

On March 23, 2001, the Commission Coordinator (Coordinator) issued Jurisdictional Opinion #2-142 (JO), in which she determined that construction for quarrying operations commenced in 1996 when the quarry was part of a tract approximately 125 acres in size. The 125-acre tract included 39.89 acres now owned by John and Mary Skawinski (the Skawinskis), as well as the 85± acres owned by GHL/PAK.

On March 26, 2001 the Commission issued Findings of Fact, Conclusions of Law, and Order (Decision) denying the land use permit application.

On April 23, 2001, GHL/PAK filed an appeal with the Vermont Environmental Board (Board) from the Decision alleging that the Commission erred in concluding that the 39.89-acre parcel conveyed to the Skawinskis was subject to Act 250 jurisdiction.[1] The appeal was filed pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rules (EBR) 6 and 40.

Also on April 23, 2001, GHL/PAK filed a Petition for Declaratory Ruling with the Board, appealing the JO. Specifically, GHL/PAK challenges the Coordinator's determination that the 39.89-acre tract of land now owned by the Skawinskis is subject to Act 250 jurisdiction.

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[1] This appeal does not challenge the merits of the Commission's Decision, except to the extent that the Commission relied on the Coordinator's jurisdictional determination regarding the Skawinski parcel.

On May 25, 2001, Board Chair Marcy Harding convened a Prehearing Conference.

On May 29, 2001, the Chair issued a Prehearing Conference Report and Order (PHCRO). Among other things, the PHCRO identified party status as a preliminary issue.

On June 28, 2001, the Board deliberated on the preliminary issues of party status. By Memorandum of Decision dated July 5, 2001, the Board granted Tomasso Brothers, Inc. party status. Chair Harding issued a Scheduling Order on the same date.

On September 26, 2001, the Board convened a public hearing in this matter. The Board heard evidence from GHL/PAK and the Agency of Natural Resources (ANR), and conducted a site visit. After hearing testimony from the parties' witnesses, the Board recessed briefly to deliberate on whether to call any other witnesses. The Board reconvened and took testimony from one other witness, Linda Matteson, Assistant District Coordinator for the Commission. After recessing the hearing, the Board deliberated, and deliberated again on October 17, November 7, and December 19, 2001.

Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned. The matter is now ready for final decision.

II. ISSUE

Whether the 39.89-acre parcel currently owned by John and Mary Skawinski is subject to jurisdiction pursuant to Act 250.

III. FINDINGS OF FACT[2]

[2] To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. *See, Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

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1. GHL, a construction company owned by Gertrud Holl, currently owns approximately 85 acres of land located on Todd Whitten Road (a town road) in Chester, Vermont.

2. PAK is a Vermont Corporation and construction company, wholly owned by Peter Holl (Mr. Holl), the son of Gertrud Holl. PAK was to be the operator of the proposed quarry on the GHL property.

3. PAK has no ownership interest in GHL's Chester property nor does Peter Holl have any direct ownership interest in or control interest in GHL.

4. In November 1995, Mr. Holl purchased from James G. Kitchens 165 acres of heavily wooded land straddling Todd Whitten Road, with approximately 40 acres on the east side of Todd Whitten Road and the remaining 125 acres on the west side of Todd Whitten Road. This land is all at an elevation less than 2,500 feet above sea level.

5. At the time of this purchase, Mr. Holl was a principal of C&C Excavating, Inc. (C&C Excavating), which engaged primarily in the logging business. Mr. Holl's then-wife, Stacey Holl, his mother, Gertrud Holl, and his two sons, also held ownership interests in C&C Excavating.

6. Mr. Holl purchased the Kitchens property for its large stands of timber; he intended to cut and sell timber from the property. He was not aware that the property had potential for quarrying stone.

7. In 1995 and 1996, Mr. Holl and C&C Excavating commenced logging on a 40-acre portion of the property on the east side of Todd Whitten Road.

8. On April 18, 1996, Mr. Holl conveyed the 40-acre portion of the property on the east side of Todd Whitten Road to John Bowen. Pursuant to a Timber Landing Agreement, Mr. Holl and C&C Excavating continued to use a part of the Bowen parcel for a timber landing so that they could begin cutting timber on the west side of Todd Whitten Road. Mr. Holl and C&C Excavating used this timber landing until October 1996.

9. Between May and August 1996, Mr. Holl improved an existing road from Todd Whitten Road westerly onto his 125-acre parcel so that he could continue logging this parcel. He also constructed a log landing on the 125-acre parcel.

10. On or before April 1996, neither Mr. Holl nor C&C Excavating conducted any quarrying on this property.

11. In the Summer of 1996, Mr. Holl discovered a ravine on his 125-acre parcel, just to the north of the log landing; the ravine contained numerous outcroppings and slabs of mica schist stone.

12. In 1996 or 1997 Mr. Holl and C&C Excavating extended the road from the log landing to the ravine where very few trees were growing. Very little logging actually occurred in the ravine.

13. Beginning in late 1996 and early 1997, Mr. Holl and C&C Excavating began removing stone that lay on the ground in and around the area of the ravine. At that time Mr. Holl and C&C Excavating conducted no excavating at the site and no stone was removed from any of the outcroppings. Most of the stone was found on top of the ground.

14. Excavation of stone in the ravine area did not occur until the fall of 1997, when Mr. Holl brought an excavator onto his land to cut stone from some of the outcroppings. The stone did not peel off the outcroppings as easily as Mr. Holl had hoped.

15. Mr. Holl removed approximately 12 truckloads of stone from his 125-acre parcel.

16. At the time Mr. Holl began removing stone from the ravine area, the road leading to the quarry from the 39.89-acre parcel which Mr. Holl later sold to the Skawinskis, and the log landing had been completed.

17. Mr. Holl used the stone which he excavated from his 125-acre parcel primarily at a building on Clinton Street in Springfield, and at his home. Approximately seven truckloads of stone were used at the Clinton Street building, for steps and for a retaining wall to hold up a clay bank that was falling down. The bigger blocks were used for the retaining wall. Mr. Holl also used stone from the quarry for a chimney and walkways at his home, a wall in front of his house, and around his swimming pool.

18. The building on Clinton Street was owned by Mr. Holl's company, C&C Excavating, Inc. It housed the company's offices and rented space to the State of Vermont and to Stacey Holl for use as a tanning parlor.

19. Mr. Holl used three different types of stone at the building on Clinton Street, to display the different types that were available from his quarry for stone sales in the future.

20. Stone removal continued at Mr. Holl's 125-acre parcel until October 1997 when Mr. Holl invited Ms. Matteson and District 3 Environmental Commission Coordinator, Julia Schmitz, to visit the quarry site.

21. At this October 1997 site visit, Ms. Matteson informed Mr. Holl that an Act 250 permit was required for the commercial quarrying operation on the property. She further instructed Mr. Holl to cease and desist operations, to clean up the quarry operation, and to file for an Act 250 Permit. Mr. Holl agreed at that time to submit a permit application. At the October 1997 site visit, Mr. Holl may have mentioned something to Ms. Matteson about selling or having agreed to sell the 39.89-acre parcel to the Skawinskis.

22. In late 1997 and early 1998, Ms. Matteson did not know the size of the parcel on which the excavation of the stone had occurred.

23. Before October 1997, all stone and logs removed from the project tract were transported down the road access across what is now the Skawinski parcel.

24. In late 1997, Mr. Holl began to build another road from Todd Whitten Road onto the 85-acre portion of the 125-acre parcel (which he would own after he sold the 39.89-acre parcel to the Skawinskis), because the existing access road was on the land he intended to sell to the Skawinskis.

25. By the fall of 1997, Mr. Holl and C&C Excavating had completed logging on approximately 39.89 acres of his 125-acre parcel and were in the process of making an agreement to sell the 39.89 acres to John and Mary Skawinski. In the fall of 1997, Mr. Holl reached an oral agreement with the Skawinskis to sell them the 39.89-acre parcel.

26. After October 1997, neither Mr. Holl nor C&C Excavating conducted any further activity on the 85-acre parcel which Mr. Holl intended to retain after the sale of

the 39.89-acre parcel to the Skawinskis, except for some cleaning up around the new log landing, the construction of the new road, and cleaning of water bars along the road to the new log landing to prevent erosion on Todd Whitten Road.

27. On or about January 13, 1998, Ms. Matteson gave further notice to Mr. Holl to file for an Act 250 Permit. This letter states, in relevant part, that "we observed the area where you removed stone for commercial use and determined that an Act 250 permit is required for the operation." This letter did not describe the acreage of the involved land.

28. Shortly after that time, Mr. Holl hired Alan Regier to begin the Act 250 permit process for a quarry operation.

29. Mr. Holl and the Skawinskis entered into a written Purchase & Sale Agreement in February 1998. By Warranty Deed dated March 23, 1998, Mr. Holl sold the 39.89-acre parcel to John and Mary Skawinski.

30. Some time in late May 1998, Ms. Matteson phoned Mr. Regier to say that Mr. Holl's Act 250 application should cover the entire 125-acre parcel. This phone call prompted Mr. Regier to meet with Ms. Matteson.

31. On June 9, 1998 Mr. Regier met with Ms. Matteson to discuss issues that were of importance to the permit process. Mr. Regier wanted to be sure that Ms. Matteson agreed that the 85-acre parcel (which Mr. Holl owned after the sale of the 39.89-acre parcel) was the only involved land for the Act 250 Permit.

32. Mr. Regier prepared a written agenda for that meeting which indicates the following issues for discussion:

    1. EXTENT OF LAND INVOLVED. 85 ACRES.
    2. EXTENT OF ROAD. ROAD TO NEW LOG LANDING CONSTRUCTED IN FALL OF 1997.
    3. ACCOMADATIONS [sic] FOR PHILIP HALTON, NEIGHBOR WHO IS LEGALLY BLIND.

33. At the meeting, Mr. Regier explained to Ms. Matteson that Mr. Holl had sold the 39.89-acre parcel to the Skawinskis before he had started the Act 250 application process.

34. There is no evidence that Mr. Regier informed Ms. Matteson that Mr. Holl had sold the 39.89-acre parcel to the Skawinskis after he had commenced the extraction of the rocks from his land in 1997.

35. At the meeting, Mr. Regier also explained that the 39.89-acre parcel which had been sold to the Skawinskis had not been involved in the quarrying.

36. Based on this information, Ms. Matteson informed Mr. Regier that Mr. Holl needed to obtain an Act 250 permit for the 85-acre parcel where the quarry was to be located.

37. Mr. Regier did not show Ms. Matteson any exhibit or site plan indicating the configuration of Mr. Holl's land either before or after the sale of the 39.89-acre parcel to the Skawinskis.

38. In July 1998, Mr. Regier began to pursue an Act 250 Permit for Mr. Holl's quarry project.

39. On October 5, 1998, nearly one year after the site visit, no permit application had been received for the quarrying operation. Ms. Matteson issued a Project Review Sheet (PRS) and a Notice of Alleged Violation (NOAV).

40. The PRS stated, in relevant part, that:

> Based on information provided by *Peter Holl* received on _____ a project was reviewed on a tract/~~tracts~~ of land of *86 ±* acres, located on *Wyman Falls Rd.* .

41. The PRS also stated that there had been new road construction since the October 1997 site visit, and concluded that, "Act 250 permit was and is required for stone removal. Construction of improvements for commercial purpose requires an Act 250 permit."

42. The Act 250 section of the PRS also includes the following statement:

> ACT 250: THIS IS A JURISDICTIONAL OPINION BASED UPON AVAILABLE INFORMATION. ANY NOTIFIED PARTY OR INTERESTED PERSON AFFECTED BY THE OUTCOME MAY APPEAL TO THE ENVIRONMENTAL

> BOARD (ACT 250) WITHIN 30 DAYS OF THE ISSUANCE OF THIS OPINION (10 V.S.A. SEC. 6007(C)).

43. The PRS was served upon Mr. Holl.

44. No appeal of the PRS was taken to the Environmental Board pursuant to 10 V.S.A. § 6007(c).

45. The NOAV, also issued on October 5, 1998, directed Mr. Holl to "cease all construction on the property including tree cutting, stone removal and road construction," to "cease wildlife habitat destruction," and to "submit a completed Act 250 permit application before October 19, 1998."

46. Under the heading, "Description of Alleged Violation," the NOAV states that:

> Extraction of earth resources on more than ten acres in a ten-acre town requires an Act 250 permit. The tract of land is 85 acres and is located on Wyman Falls Road in the Town of Chester. Commencement of construction of commercial stone quarrying operations. Respondent has removed trees, destroyed wildlife habitat, and constructed a road without a permit.

47. Ms. Matteson does not know where the acreage reference in the NOAV came from, but the PRS indicates that it came from Mr. Holl.

48. Ms. Matteson did not conduct any independent investigation of the acreage of involved land.

49. At the time the PRS and NOAV were issued, as well as at the times of the October 1997 site visit, the January 1998 letter, and the June 1998 meeting with Mr. Regier, Ms. Matteson intended that Mr. Holl rely on her statement that an Act 250 permit was required, and she intended that Mr. Holl file an Act 250 permit application.

50. There is no evidence that Ms. Matteson was aware, at either the time of the June 9, 1998 meeting between Mr. Regier and Ms. Matteson or at the time that Ms. Matteson issued the PRS and the NOAV in October 1998, of when the sale of the 39.89-acre parcel by Mr. Holl to the Skawinskis had occurred.

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51. In December 1998, Mr. Holl transferred the 85-acre parcel to GHL, but title to the property was not fully resolved until an April 24, 2000 Family Court Order which awarded Mr. Holl the 85-acre parcel free and clear of any interest of his ex-wife, Stacey Holl.

52. In the summer of 2000, GHL/PAK hired Mr. Regier to begin again the permit application process and to submit an Act 250 permit application for the quarry on the 85-acre parcel. The application was filed with the Commission on October 20, 2000.

53. In filing the application only on the 85-acre parcel, Mr. Regier relied on Ms. Matteson's June 9, 1998 statements and on Ms. Matteson's NOAV and PRS.

54. On October 24, 2000, April Hensel, the Coordinator for the Commission, wrote Mr. Regier requesting additional information and fee to complete application, and stated in part that: "The letter from Forrest Hammond indicates that the present owner recently subdivided the property and began construction of a new road. Please provide information on the subdivision, and when construction commenced on the new road."

55. By letter dated November 8, 2000, Mr. Regier informed Ms. Hensel in part that: "39.89 acres was sold to J. & M. Skawinski on March 23, 1998. The date of the Subdivision survey is Dec. 12, 1997. The only road construction done on the 85-acre GHL Construction Inc. property was the road to the log landing for logging and cleanup of the property in the fall of 1997. . . ." The letter does not indicate that this information previously had been disclosed to Ms. Matteson or anyone else at the commission office.

56. GHL/PAK spent time and money in the Act 250 application process and related proceedings.

57. On March 23, 2001, Ms. Hensel issued the JO in which she determined that construction for quarrying operations commenced in 1996 when the quarry was part of a 125-acre tract, comprised of the 39.89-acre parcel owned by the Skawinskis and the 85 acres now owned by GHL.

58. On March 26, 2001, the Commission issued Findings of Fact, Conclusions of Law and an Order denying the Land Use Permit Application, relying in part upon the JO.

IV. CONCLUSIONS OF LAW

The issue in this consolidated declaratory ruling and appeal is whether the 39.89-acre Skawinski parcel is subject to Act 250 jurisdiction. The parcel was part of the tract upon which the quarry is located until March 1998, when Peter Holl subdivided and sold the parcel to the Skawinskis. Mr. Holl then sold the remaining 85-acre parcel, including the quarry, to GHL, one of the Applicants herein.

A. Jurisdiction

Act 250 prohibits the commencement of development without a permit. 10 V.S.A. § 6081(a). "Development" means, in relevant part, "the construction of improvements for commercial or industrial purposes." 10 V.S.A. § 6001(3). Commencement of quarrying for commercial or industrial purposes, and commencement of construction in preparation for such quarrying, trigger Act 250 jurisdiction because they constitute development. *See, e.g., Re: Charles and Barbara Bickford*, #5W1186-EB, Findings, Conclusions and Order (May 22, 1995)(affirming application of permit condition to entire tract of land as it existed when quarrying commenced); *Re: U.S. Quarried Slate Products, Inc.*, Declaratory Rulings #279 and #283, Findings, Conclusions and Order (Oct. 1, 1993)(commencement of quarry preparations including building a drainage ditch, cutting trees and preparing access road to quarry, triggered Act 250 jurisdiction over quarry). Therefore, Act 250 jurisdiction attached to the quarry in question at the time quarrying activity or preparation therefore commenced on the quarry in question.

Act 250 jurisdiction attaches to "the entire tract or tracts" upon which development occurs, EBR 2(F)(1)(defining "involved land"), and the Vermont Supreme Court has stated that jurisdiction attaches "immediately prior to the time construction commences." *In re Vermont Gas Systems*, 150 Vt. 34, 38-39 (1988). Once Act 250 jurisdiction does attach to a tract of land, it cannot be voided or undone by later events. *Bickford*, Findings, Conclusions and Order at 25 (citing *Re: John Rusin*, #8B0393-EB, Findings, Conclusions and Order at 5 (1993), *aff'd, In Re John Rusin*, 162 Vt 185 (1994); *Wildcat Construction Co., Inc.*, #6F0283-1-EB, Findings of Fact, Conclusions of Law and Order (1991), *aff'd, In re Wildcat Construction*, 160 Vt. 631 (1993)(mem.);

Re: City of Barre Sludge Management Program, Declaratory Ruling #284, Findings of Fact, Conclusions of Law and Order (1994); Re: Richard Farnham, Declaratory Ruling #250, Findings of Fact, Conclusions of Law, and Order (1992); Re: *Stevens and Gyles*, Declaratory Ruling #240, Findings of Fact, Conclusions of Law, and Order (1992)). The question, then, is whether Act 250 jurisdiction attached before or after March 23, 1998, when the 39.89-acre parcel was sold to the Skawinskis.

Between 1996 and 1997, Mr. Holl and his company at the time, C&C Excavating, Inc., improved a logging road by extending it to the quarry, and removed approximately 12 truckloads of stone from the quarry. Of this, Mr. Holl used approximately seven truckloads for steps and for a retaining wall at a building owned by his company. The building housed his company's offices and rented space to the State of Vermont and to Stacey Holl for use as a tanning parlor. Therefore, this building was used for commercial purposes.

While this is a relatively small amount of stone for a commercial quarrying operation, the record is clear that extraction operations ceased in 1997 only because Linda Matteson instructed Mr. Holl to do so during her site visit. The Board also finds it significant that Mr. Holl used three different types of stone at his company's building as a display for future sales from the quarry, evincing a clear plan to use more stone for commercial purposes.

In addition, the extension of the road from the log landing to the quarry constitutes commencement of construction, which occurred before sale of the Skawinski parcel. The improvement or use of logging roads is generally exempt from Act 250 jurisdiction,[3] but even exempt activities will trigger jurisdiction if they are part of a plan to develop. *Re: Capital Heights Associates and Snowfall, Inc.*, Declaratory Ruling #167, Findings, Conclusions and Order at 3 (Mar. 27, 1985); *see also, Re: Agency of Environmental Conservation*, Declaratory Ruling #83 (Oct. 13, 1977)(conversion of logging road to subdivision access road requires Act 250 review). The logging road in this case was extended beyond the log landing to the quarry ravine

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[3] Logging and forestry activities below 2500 feet in elevation are generally exempt from Act 250. *See* 10 V.S.A. § 6001(3)(defining "development" to exempt forestry and logging below 2500'); EBR 2(A)(2)(defining "development"); *see also, Re: Johnson Lumber Co.,* Declaratory Ruling #263 (Jul. 10, 1997) ("development" does not include construction for logging or forestry purposes below the elevation of 2500 feet).

itself, an area in which few trees could be logged, as part of a plan to quarry stone for commercial purposes. *Cf., Re: Johnson Lumber Co.,* Declaratory Ruling #263, Findings, Conclusions and Order at 10 (Jul. 10, 1997)(clear cut made at forester's recommendation and skidding road do not trigger jurisdiction where they were made solely for logging and forestry purposes and were not commenced in preparation for applicant's subdivision).

Before the Skawinski parcel was sold, Peter Holl had begun developing the quarry for commercial purposes, through tangible physical steps such as extending the road to the quarry, removing several truckloads of stone for commercial use at his company's building, and putting three different types of stone from the quarry on display there for future sales. Despite the small amount of stone actually removed for commercial use before Mr. Holl was instructed to cease quarrying operations until he obtained a permit, Act 250 jurisdiction attached to the entire tract. Based on the foregoing findings, the Board concludes that jurisdiction attached to the entire 125-acre tract before Mr. Holl subdivided and sold the 39.89 parcel to the Skawinskis.

B. Equitable Estoppel

GHL/PAK argues that the doctrine of equitable estoppel should bar "the State" from finding jurisdiction over the Skawinski parcel, as the Coordinator did in the JO, the Commission did in the Decision by relying on the JO, and the Board does here based on its *de novo* proceedings.[4] GHL/PAK claims it relied upon statements made by Assistant Coordinator Linda Matteson that a permit was required only for Holl's 85-acre parcel, despite the fact that development had commenced when the parcel was 125 acres in size, and that it was harmed by relying on these representations. The statements or representations GHL/PAK claims it (or its predecessor-in-interest, Peter Holl) relied upon to its detriment are: statements Ms. Matteson made during the June 1998 meeting with Mr. Regier, the statement in the October 1998 PRS, and the statement in the October 1998 NOAV.

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[4] The Board does not reach the issue of whether equitable estoppel could apply to preclude a district coordinator from reconsidering a PRS because the Board finds that GHL/PAK has failed to prove the basic elements of estoppel. *See, Re: EGZ Associates*, Declaratory Ruling #354 (Aug. 20, 1998)(reconsideration of jurisdictional determination may be appropriate where there has been a failure to disclose material facts).

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1. Estoppel Elements

Estoppel against the government is "rare and [is] to be invoked only in extraordinary circumstances," *In re Green Peaks Estates*, 154 Vt. 363, 370-71 (1990)(quoting *In re McDonald's Corp.*, 146 Vt. 380, 383 (1985)), where "the injustice that would result [otherwise] is of sufficient magnitude to justify any effect upon public interest or policy that would result from raising estoppel," *Stevens v. Department of Social Welfare*, 159 Vt. 408, 419 (1992)(quoted in *Workers' Compensation Division v. Hodgdon*, 171 Vt. __759 A2d. 73, 75 (Jul. 19, 2000)(mem.)). Therefore, in addition to proving each element of equitable estoppel, GHL/PAK must show that substantial injustice would result if the Board applied Act 250 jurisdiction to the Skawinski parcel.

The elements of equitable estoppel are as follows:

1. the party to be estopped knew the facts;

2. the party to be estopped must intend that his or her conduct be acted upon, or the acts must be such that the party asserting the estoppel has a right to believe it is so intended;

3. the party asserting estoppel must be ignorant of the true facts; and

4. the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped.

Stevens 159 Vt. at 419 (1992)); *accord, In re Barlow*, 160 Vt. 513, 523 (1993)(citing *In re McDonald's Corp*., 146 Vt. 380, 384 (1985)); *Burlington Firefighters' Ass'n v. City of Burlington*, 149 Vt. 293, 298 - 300 (1988); *Town of Bennington v. Hanson-Walbridge Funeral Home, Inc*., 139 Vt. 288 (1981); *Re: Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, #1R391-6-EB, Findings, Conclusions and Order at 11-12 (Sept. 17, 1996), *aff'd in part, rev'd in part, In re White*, Nos. 1998-390 & 1998-391 (Jun. 20, 2001).

As the party asserting equitable estoppel, GHL/PAK has the burden of proving each of these elements. *Fisher v. Poole*, 142 Vt. 162, 168 (1982)(the party “who invokes the doctrine of equitable estoppel has the burden of establishing each of its constituent elements")(cited in *Re: H.S. Development, Inc.*, #70002-10B-EB, Findings, Conclusions and Order at 16 (Mar. 1, 1996)). The Board reviews each in turn.

(a) Did Ms. Matteson know the facts?

The first element GHL/PAK must prove is that Ms. Matteson knew the facts at the time of her statements. Specifically, in June and October 1998 did Ms. Matteson know that Mr. Holl commenced construction on the quarry, extending the road and removing stone for commercial purposes, while he still owned the 39.89 acres? Or did she think that the 39.89-acre parcel had been sold to the Skawinskis *before* the first development activity had occurred? If the latter, she might have opined the Skawinski parcel was not subject to jurisdiction because it had been sold before development had commenced. GHL/PAK must first prove that Ms. Matteson knew the true sequence of events, or estoppel cannot lie.

Ms. Matteson relied at least initially on statements made by Mr. Holl as to the acreage of his parcel, and conducted no independent inquiry to determine the acreage of the project tract. During the June 1998 meeting Mr. Regier told Ms. Matteson that Peter Holl had sold the 39.89-acre parcel to the Skawinskis *before he had started the Act 250 application process.* This, however, does not constitute full disclosure of the relevant facts. The extent of Act 250 jurisdiction does not turn on the amount of land Mr. Holl owned at the time he started the application process, since he already had commenced construction and operation of the quarry. The key question is what Mr. Holl owned at the time jurisdiction was triggered. For purposes of the estoppel analysis, the question is whether Ms. Matteson knew what Mr. Holl owned at that time, when she spoke with Mr. Regier, and when she issued the PRS and the NOAV.

The record does not show that the relevant facts ever were disclosed to Ms. Matteson. *See, Re: Catamount Slate, Inc.*, Declaratory Ruling #389, Memorandum of Decision at 11 (Jul. 27, 2001)("a Jurisdictional Opinion is only as good as the facts upon which it is based"). The doctrine of equitable estoppel will not be invoked in favor of a party "whose own omissions or inadvertence contributed to the problem." *Town of Bennington v. Hanson-Walbridge Funeral Home, Inc.*, 139 Vt. 288 (1981)(quoted in *Re: Nelson Lyford*, Declaratory Ruling No. 341, Findings, Conclusions and Order at 16 (Dec. 24, 1997)(holding that failure to disclose material facts to district coordinator constitute failure to act in good faith and preclude application of equitable estoppel); *see also*, *Vermont Agency of Natural Resources v. Godnick*, 162 Vt. 588, 593 (1994). It is axiomatic that one who seeks equitable relief must have "clean hands." *Vermont Acc. Ins. Co. v. Fletcher*, 87 Vt. 394 (1914). The Board notes that the circumstances in this case provided ample opportunity for miscommunication and misunderstanding, and reaches no conclusions with respect to good faith.

Because GHL/PAK has failed to prove the first element of equitable estoppel, its claim must fail. *See, e.g., Re: Investors' Corporation of Vermont*, Declaratory Ruling #249 (Dec. 31, 1991)(equitable estoppel does not apply against the Board where the district environmental coordinator issued a project review sheet which stated that an Act 250 permit was not required for a subdivision, where petitioner failed to establish that the district coordinator knew that the project was intended to be a commercial subdivision at the time she issued the project review sheet).

(b) Did Ms. Matteson intend that her statements concerning the acreage of involved land be acted upon by Mr. Holl?

Even if Ms. Matteson had known the relevant facts and erroneously stated that the Skawinski parcel was not subject to Act 250 jurisdiction, GHL/PAK's estoppel claim would fail because it has failed to prove the second element of equitable estoppel: that Ms. Matteson intended for Mr. Holl to act in reliance on her statements concerning the acreage of involved land.

There is no question that Ms. Matteson intended that Mr. Holl rely upon her statement that a permit was required, and that she intended him to file an Act 250 permit application. As a general rule, district coordinators intend that PRSs will be relied upon. A PRS is a jurisdictional opinion. *See* 10 V.S.A. § 6007(c). Where a PRS concludes that an Act 250 permit is required, it is reasonable to infer that the issuing coordinator intended the subject of the PRS to file an Act 250 permit application. Such is the case here. Ms. Matteson had intended for Mr. Holl to rely upon her statement that a permit was required for the quarry since her site visit in 1997, and Mr. Holl had agreed at that time to file an application. When the application did not follow, she repeated her statement that an Act 250 permit was required in her letter of January 1998, and again in her meeting with Mr. Regier in June 1998, before issuing the PRS and the NOAV. But these are not the statements GHL/PAK challenges in its estoppel claim.

GHL/PAK's estoppel argument concerns the acreage of involved land, not the fact that an application was required for the quarry. In particular, GHL/PAK challenges the statements made in the PRS, NOAV, and June 1998 meeting to the effect that the Project is on 85 acres of involved land. While it is clear that Ms. Matteson intended for Mr. Holl to rely on the statements that an Act 250 permit was required, there is insufficient proof that Ms. Matteson intended Mr. Holl to rely on the statements that the project tract was 85 rather than 125 acres in size. As stated above, a jurisdictional opinion is only as good as the facts upon which it is based. *See, Catamount Slate*,

Memorandum of Decision at 11. Moreover, GHL/PAK had to file an application regardless of the acreage of involved land. GHL/PAK has failed to meet its burden of proof.

(c) Was Mr. Holl ignorant of the true facts?

The third element GHL/PAK must prove is that Mr. Holl was ignorant of the true facts at the time Ms. Matteson made the statements in June and October 1998. "'True facts' in estoppel are facts known to the party being estopped but unknown to the party asserting estoppel." *Gravel and Shea v. White Current Corp*., 170 Vt. 628, 630 (Apr. 30, 2000)(mem.)(quoting *Ragosta v. Wilder,* 156 Vt. 390, 395, 592 A.2d 367, 370(1991)). In other words, this element requires that Ms. Matteson knew something Mr. Holl did not. As the Vermont Supreme Court noted in *White Current* and *Ragosta*, equitable estoppel applies only where there are facts known to the party to be estopped that are not known to the party claiming estoppel. However, this is not the case here.

Mr. Holl was personally involved in extending the road to the quarry, in the extraction of stone from the quarry, and in its use for commercial purposes. Mr. Holl also had personal knowledge of the subdivision and sale to the Skawinskis, and the relative timing of all these events. It may be that he did not know how Act 250 jurisdictional *law* applied to these facts; however, that is not the issue in estoppel. The question is whether Mr. Holl was ignorant of *facts* of which Ms. Matteson had knowledge. Not only was Mr. Holl personally aware of the material facts, he had at least some familiarity with the Act 250 process, having made inquiries at the district environmental commission office on various occasions about several other projects. Simply stated, Mr. Holl knew how much land he owned when he started quarrying. GHL/PAK has not proved the third element of estoppel.

(d) Did GHL/PAK rely on Ms. Matteson's statements to its detriment?

GHL/PAK also has failed to prove the fourth element of estoppel. It is far from clear how GHL/PAK was harmed by relying upon Ms. Matteson's statements about the size of the project tract. Mr. Holl already had sold the 39.89-acre parcel to the Skawinskis by the time the statements were made. With respect to filing a permit application, GHL/PAK had no choice: filing a permit application was required by law because development already had commenced.

Instead, GHL/PAK alleges that it spent time and money in reliance on Ms. Matteson's statements. It is not clear what reliance damages GHL/PAK may have incurred. GHL/PAK did spend some amount of time and money on the application

process, but, as stated above, it had to go through the application process regardless of the size of the project tract. What is missing is some evidence of how much of these costs could have been saved had GHL/PAK known that the Skawinski parcel was subject to jurisdiction. In other words, there is no evidence that any extra effort or money was spent in reliance on the statements that the project tract was 85 rather than 125 acres. GHL/PAK has failed to prove the fourth element of estoppel.

2. Estoppel Discussion

Even if GHL/PAK had met its burden of proof on each required element of equitable estoppel, which it has not, it must also show sufficient injustice to warrant application of equitable estoppel in the governmental context. As the Board recently stated in *Re: Liberty Transportation*, to apply the doctrine of equitable estoppel against a district coordinator, the Board must "find 'extraordinary circumstances' or resulting 'injustice.'" *Re: Liberty Transportation*, Declaratory Ruling #394, Findings, Conclusions and Order at 4 (Sept. 20, 2001)(citing *Burlington Firefighters Ass'n v. City of Burlington*, 149 Vt. 293, 298 (1998); *In re McDonald's Corp.*, 146 Vt. 380 (1985)). GHL/PAK had to apply for an Act 250 permit, regardless of the size of the project tract. It is difficult to see how any injustice to GHL/PAK occurred here, let alone any injustice significant enough to warrant disregarding application of Act 250 jurisdiction.

In fact, equitable estoppel generally has not been held to bar the Board from making any *de novo* determination. *See, Re: Liberty Transportation*, Findings, Conclusions and Order at 4*; Re: Central Vermont Public Service Corporation and New England Telephone & Telegraph d/b/a Bell Atlantic Telephone Company*, #2W1074-EB, Findings, Conclusions and Order at 4 (Jun. 29, 2000); *Re: Nelson Lyford*, Declaratory Ruling No. 341, Findings, Conclusions and Order (Dec. 24, 1997); *Re: Lawrence White*, Findings, Conclusions and Order at 11-12; *Re: H.S. Development*, #70002-10B-EB, Findings, Conclusions and Order at 16 (Mar. 1, 1996); *Re: Rock of Ages (Bethel White Quarry*), Declaratory Ruling #292, Findings, Conclusions and Order at 5 (Mar. 28, 1994).

Equitable estoppel is "based upon the grounds of public policy, fair dealing, good faith, and justice." *Dutch Hill Inn, Inc. v. Patten*, 131 Vt. 187, 193 (1973)(quoted in *Lyford*, Findings, Conclusions and Order at 15). It does not provide a means of avoiding Act 250 jurisdiction where the attachment of jurisdiction does not create manifest injustice.

III. ORDER

1. The 39.89-acre parcel owned by John and Mary Skawinski is subject to jurisdiction pursuant to Act 250.

2. Jurisdiction is returned to the District 2 Environmental Commission.

DATED at Montpelier, Vermont this 27th day of December, 2001.

ENVIRONMENTAL BOARD

/s/ Marcy Harding
Marcy Harding, Chair
John Drake
George Holland
Samuel Lloyd
Jean Richardson
Donald Sargent

Board member Alice Olenick participated in the hearing and initial deliberations in this matter, but was unable to participate in final deliberations.