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Subject: Reconsidered Jurisdictional Opinion #JO 3-190; Conversion of N/F Gove Hill Camp and Conference Center/American Baptist Church Facility (“the grandfathered facility”) to Short Term Wilderness Therapy Facility, Thetford, Vermont

Dear Mr. Shems:

I write in response to your request dated August 19, 2016, for a reconsideration of a Jurisdictional Opinion, as provided for in 10 V.S.A. § 6007. You represent a number of neighboring property owners to the proposed “Confluence” facility. Nate Stearns, Esq. represents Confluence. The background of the Act 250 jurisdictional review of this matter is concisely recounted in Mr. Stearns’ letter dated October 28, 2016 which, for the sake of brevity, will not be recounted in detail here. The historical uses of the facility are concisely recounted by the Town of Thetford Development Review Board in its Findings and Decision on application for Conditional Use Review.¹ In summary, the proposed new use of the heretofore grandfathered facility was previously found by District Coordinator Stephanie Gile to constitute a non-substantial change to the subject facility (“the Gile opinions”).² While questions have been raised re: whether or not your request for reconsideration is time-barred, I conclude based upon the record, that the service and publication requirements to make the Gile opinion legally final were not employed by the requestor and the current petitioners have a right to seek reconsideration.³ As noted by Mr. Stearns, the matter was assigned to me due to workload considerations in the District #2 office. My opinion follows.

¹ See Exhibit 005. “The American Baptist Church previously used the property for between 250 and 270 days per year to host therapeutic retreats, as a conference center and as an events venue. Groups that used the property included Alcoholics Anonymous and various twelve step recovery programs and mental health retreats, as well as church groups and summer camps for inner city youth. Retreats consisted of up to 60 participants to plus operational staff. Even though the programs were on site between 250 and 275 days per year, the Church used the property as a year round facility.” (citing testimony of Rev. Dale Edwards). See also, Affidavit of Rev. Dale Edwards, Exhibit 007.

² The Gile opinions consisted of a Project Review Sheet and a subsequent letter. Exhibits 001 and 003.

³ 10 V.S.A. § 6007 provides petitioners with a more rigorous process to achieve universal finality with respect to Act 250 jurisdictional opinions. This process involves actual service to all adjoiners and those with a known interest, as well as publication of notice in a newspaper of record. This process was not employed in this case. Moreover, Mr. Shems avers that Ms. Giles’ earlier opinions were improvidently issued – based upon incomplete or inaccurate information.

I. Summary of Opinion

In summary (and for reasons outlined in more detail below), it is my opinion that Confluence has propounded evidence sufficient to conclude that the facility was operated and maintained at *pre-existing levels* of 48 participants between March 1 and November 30 and up to 36 participants between December 1 and February 28 of each year, as approved by the Thetford Development Review Board. Confluence has not, however, propounded evidence sufficient to support a conclusion that the facility can be operated at those levels without triggering Act 250 jurisdiction as a substantial change, due to Water Supply and Wastewater limitations referenced below. I conclude, therefore, that the proposed development, if operated at the limited levels described in the Water Supply and Wastewater Permit,⁴ does not constitute a “substantial change” to “pre-existing development”⁵ and therefore does not presently require an Act 250 Land Use Permit. 10 V.S.A. § 6001 et seq. (Act 250). An increase in the water supply and/or wastewater systems to serve residents and staff at levels above those permitted in the current WW permit will require evaluation of the design features of those enlarged systems to determine whether or not they introduce the potential for significant new adverse impacts under the relevant Act 250 criteria.

II. Burden of Proof

The legal question in this case can be summarized as follows: To what extent, if any, does the proposed conversion of the grandfathered facility⁶ constitute a “substantial change”⁷ to that development? The legal burden of proof that a development is exempt (or “grandfathered”) is upon the landowner or prospective owners seeking the exemption.⁸ In this case, those parties are the American Baptist Churches of Vermont and New Hampshire, and Confluence Behavioral Health, LLC. While these parties are burdened with meeting the requirement for production of evidence sufficient to establish a *prima facie* case for the exemption, the burden of persuasion ultimately shifts to the other side with respect to providing evidence sufficient to prove that the development does not qualify for the exemption.⁹

⁴ See Exhibit 008 approving use by a maximum of 18 people overnight and use by 6 full time day staffers.

⁵ As those terms are defined in Act 250 Rules 2 (c)(8) and (c)(7).

⁶ Defined in pertinent part in Act 250 Rule 2(C)(8) as: “*Pre-existing development*” means any development in existence on June 1, 1970 and any development which was commenced before June 1, 1970 and completed by March 1, 1971. It appears undisputed in this case that the grandfathered facility was constructed and operated in significant part prior to 1966, and other additional development of the facility occurred before June 1, 1970. Exhibit 007 Edwards Affidavit.

⁷ Defined in pertinent part in Act 250 Rule 2(C)(7) as “any cognizable change to a pre-existing development which may result in significant adverse impact with respect to any on the criteria specified in 10 V.S.A. § 6086(a)(1) through (a) (10).

⁸ *W. Joseph Gagnon*, DR #173 (11/22/87); *Lincoln Haynes Gravel Pit*, DR #192 (FCO at 8) (9/25/87), *aff'd*, *In re L.W. Haynes, Inc.*, 150 Vt. 572 (1988). “Petitioner claiming to be a pre-existing development failed to meet its burden of proof with respect to the level of pre-June 1, 1970 business activity such that development was not exempt from Act 250 under 10 V.S.A. 6081(b) and EBR 2(O).” *Commercial Airfield, Cornwall, Vermont*, DR #368 (01/28/99).

⁹ “[W]ith respect to whether a development is a pre-existing development, the person claiming the exemption has both the burdens of production and persuasion.” *Re: Champlain Construction Co.*, Declaratory Ruling #214, Memorandum of Decision at 2-4 (October 2, 1990). “The person claiming the exemption also has the burden to produce information concerning the scope of the pre-1970 operation and the post-1970 operation sufficient for the Board to determine whether a substantial change has occurred. However, the burden of persuasion with respect to substantial change lies with those who contend that a permit is required.” *Id.* “Permittees who might contest jurisdiction prior to the issuance of

III. Facts and Documents

In reaching the conclusion outlined in Section I above, I relied upon various facts as recited in the letter and documents forwarded from Attorney Nate Stearns in his substantial filing dated October 28, 2016 (“the letter”). (Exhibits 027 – 027s). That filing contained a number of Exhibits which are incorporated by reference herein, and which are enumerated on the Exhibit List attached to this opinion. Mr. Stearns supplemented those filings in his letter dated January 13, 2017. (Exhibit 030) As noted above and as cited on the Exhibit List, I also made reference to a prior Project Review Sheet and Letter issued by District Coordinator Giles. (Exhibit 001). In addition to the filings made by Mr. Stearns, counterarguments and alternative facts or interpretations of facts have been provided by Attorney Shems in his letters dated August 19, 2016, and December 12, 2016, as further supplemented by his Memorandum dated January 20, 2017, which are incorporated by reference herein. (Exhibits 20, 28, 29)

I conducted a site visit on Thursday, February 2, 2017. Both Mr. Stearns and Mr. Shems attended the visit. During the course of the site visit, I observed facilities and structures that were in reasonably good repair, with no sign the facilities had been abandoned for a significant period of time (15-17 years, as discussed below).

For clarity in the record, I will summarize my understanding of the relevant facts as follows: The grandfathered facility was originally constructed and operated as a conference center, camping area and religious retreat facility starting with the American Baptist Church’s acquisition of the property in 1966. Between 1966 and June 1 of 1970, the Church hosted conventions and the like involving 158 attendees in 1968.¹⁰ The facility, as operated over the years and as presently configured, consisted of a main house, commercial grade kitchen, two cabins, camping sites for at least 40 campers, additional tents and tent platforms, a primitive camping area, a recreation field, and a three-and-a-half-acre pond. While it was disputed, the facility continued in use for a variety of functions including religious retreats, Alcoholics Anonymous conventions or meetings, and college groups in more or less continuous use until January 1, 2014.¹¹

present permit would have the burden of production and persuasion with respect to both pre-existing development and post-1970 development at the project tract.” *Pike Industries*, #1R0807-EB, FCO at 2 n. 1(6/25/98) [EB #693]; *Casella Waste Management, Inc.*, DR #244 (2/7/92); *Champlain Construction Co.*, DR #214M (10/2/90). “To maintain exemption, a gravel pit owner must not only demonstrate that the gravel pit was in existence as of June 1, 1970, but also prove what the pre-existing annual rate of extraction was.” *John Gross Sand and Gravel*, DR #280 (7/28/93).

¹⁰ See “Gove Hill is the Place to Be” by John R. Burbank, Exhibit 027m, page12.

¹¹ Accordingly, I conclude that the grandfathered facility was not legally abandoned by non-use for a significant period of time. Cf. *U.S. Quarried Slate and Genier Slate, Declaratory Rulings 279 and 283, Vermont Environmental Board (July, 1993)*. <http://www.nrb.state.vt.us/lup/decisions/1993/dr279-fco.pdf>.

IV. The Fundamental Questions and Analysis

a. The Threshold Abandonment Question

Mr. Shems places particular emphasis upon the concept that the pre-existing uses of the facility were legally abandoned, consistent with known statutory provisions contained in the municipal law provisions of Title 24. If the pre-existing facility were indeed found to have been legally abandoned pursuant to Act 250 case law in Title 10, then the substantial change question would be rendered moot and I wouldn't reach the question of substantial change. The new facility would trigger Act 250 jurisdiction. But I find that Act 250 abandonment by non-use is not the case here. Mr. Stearns argues, and I agree, that there is no statutory or rule basis for abandonment by non-use of a *constructed project*.¹² Instead, we're left with Act 250 case law which has addressed the question of how long a pre-existing (grandfathered) development must remain unused before it may be considered to have lost its grandfathered (exempt) status from Act 250 jurisdiction. Mr. Stearns correctly argues that, for Act 250 purposes, a grandfathered development must remain essentially unused for a significant period - on the order of 15 to 17 years.¹³ In any case, the period of non-use must be substantial. In this case, I conclude that the facility has been unused for less than three years and I find that to be insufficient to conclude that the facility has lost its exemption on the basis of abandonment by non-use.

b. Substantial Change

In this case, Mr. Stearns has propounded substantial and compelling evidence of the prior use of the facility for relatively large groups of up to 248 attendees. The existing facility, located on 120 acres, contains a 9205 square foot main building, with 9 bedrooms and 19 finished rooms, and attached and detached garages, an ADA compliant cabin with plumbing, a primitive cabin with plumbing, two primitive cabins, a 200 square foot pavilion and a 115 square foot pavilion.¹⁴ The historical uses included therapeutic uses by citizens challenged with spiritual or addictive issues or goals (*viz.* religious retreat, use by members of Alcoholics Anonymous). In its detailed decision, the Thetford Development Review Board (DRB) found that "[t]he intensity of the proposed use is consistent with, and possibly less intensive than, the intensity of the previous use of the property as a center for therapeutic retreats." Exhibit 005. While up to 48 participants and up to 36 staff are proposed to occupy the site at one time or the other, the nature of the proposed program will send up to half the participants in any of four groups off the site for adventure challenges during any given week and operations during the winter months will be downscaled to 36 maximum participants. The average occupancy of participants and staff is anticipated to be 48 participants and an average of 25 staff during summer months. The anticipated stay for any given participant is in the 9 to 12 week timeframe. No additional new construction is proposed. As documented in the findings of the Thetford Development Review Board, the Confluence facility, as applied for, is not anticipated to place an undue burden on

¹² Act 250 Rule 38 provides a procedure by which a permitted project may be deemed abandoned if never constructed.

¹³ *U.S. Quarried Slate and Genier Slate, supra.*

¹⁴ See Thetford Development Review Board Decision for additional on-site descriptive information. Exhibit 005.

municipal police or fire services, nor to introduce undue adverse aesthetic impacts over and above any occasioned by the historical use of the facility. Exhibit 005.

While I conclude that the facility has propounded evidence sufficient to support continued operation in the manner described by Confluence in most proposed operational features, I further conclude that Confluence has failed to meet the burden of production of evidence regarding Water Supply and Wastewater requirements to lawfully function at those proposed operational levels ("WW Permit"). Namely, when American Baptist Churches of Vermont applied for and obtained WW permit WW-3-10922 on June 6, 2016, the existing water supply and wastewater disposal systems were found sufficient to presently provide services for "a maximum of 18 people to stay overnight and 6 fulltime employees." Exhibit 008. It appears to be undisputed that certain modifications or enlargements of those systems would be required in order to continue to operate at levels historically documented herein. The evidence necessary to determine whether or not any such enlarged systems would constitute a substantial change has not, to date, been provided. In the event that Confluence should, in the future, seek to achieve a determination that it may operate at the historical levels described herein, it will be obligated to present a compelling argument that any modification or enlargement of its water supply and wastewater systems do not constitute a substantial change. That determination is fact-dependent and can only be addressed with the specific design parameters available to both the Regional Engineer and the District Coordinator.

V. Conclusion

By a preponderance of the evidence, I conclude that the owner/operator has, in this case, propounded reasonably reliable evidence that the use of the "Confluence" therapeutic treatment facility for treatment and staffing of up to 18 overnight residents and staff, and 6 full time employees, in the manner and in the location described above and as limited by the terms and conditions of the current WW permit, does not constitute a substantial change to the pre-existing Gove Hill Camp and Conference Center/American Baptist Church Facility.

Accordingly, no Act 250 Land Use Permit is required to convert the facility to the uses and at the levels defined above.

VI. Reconsideration or Appeal

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(A). A request for reconsideration by the district coordinator, pursuant to Act 250 Rule 3(B), must be sent to the district coordinator at the above address within 30 days of the mailing of this opinion.

Effective July 1, 2013, no appeal may be taken from a jurisdictional opinion or coordinator's decision on reconsideration without reconsideration by the Natural Resources Board. Requests for reconsideration by the Board must be submitted to the Board within 30 days of the mailing of this decision or a coordinator's decision on reconsideration in accordance with Act 250 Rule 3(C). The mailing address is: Natural Resources Board, Dewey Building, National Life Drive, Montpelier, VT 05620-3201. For additional information see Act 250 Rule 3(C) [<http://www.nrb.state.vt.us/lup/publications/rules/2015rules.pdf>].

Sincerely,

/s/ William T. Burke
William T. Burke
District Coordinator

Attached: Exhibit List
Certificate of Service

CERTIFICATE OF SERVICE

I, Joyce Fagan, hereby certify that I sent a copy of the foregoing Jurisdictional Opinion #JO 3-190, on February 15, 2017, by U.S. Mail, postage prepaid, to the following individuals without email addresses and by email to the individuals with email addresses listed.

Note any recipient may change his/her preferred method of receiving notices and other documents by contacting the District Office staff at the mailing address or email below. If you have elected to receive notices and other documents by email, it is your responsibility to notify our office of any email address changes.

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Dated at Rutland, VT, this 15th day of
February, 2017.

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