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

Re: Green Crow Corporation Land Use Permit #3R0903-EB

MEMORANDUM OF DECISION

Green Crow Corporation (Green Crow) appeals from Land Use Permit #3R0903 (Permit) and accompanying Findings of Fact, Conclusions of Law, and Order (Decision), which authorize the harvest of timber on 184 acres of 508 acres above 2,500 feet in elevation, on a 1,281-acre tract of land located off Route 100 in Granville, Vermont (Project). Green Crow has moved for summary decision, arguing that the Permit and its conditions cannot apply to lands on the Project tract located below the elevation of 2,500 feet. As set forth below, the Board denies Green Crow's motion and orders that the remaining merits issues be set for hearing.

I. PROCEDURAL SUMMARY

The Vermont Supreme Court remanded this matter to the Board on January 6, 2006, ruling that the Board has subject-matter jurisdiction to rule on this legal question in the context of a permit appeal. *In re Green Crow Corp.*, 2006 VT 14 (Jan. 6, 2006). The Board heard oral argument and deliberated on March 21, 2006. Deliberations resumed on May 23, 2006.

II. ISSUES

The issues on appeal are as follows:

1. Whether the Project complies with Criterion 1 without Condition 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, or 16 of the Permit.

2. Whether the Project complies with Criterion 1(A) without Condition 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, or 16 of the Permit.

3. Whether the Project complies with Criterion 1(E) without Condition 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, or 16 of the Permit.

4. Whether the Project complies with Criterion 4 without Condition 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, or 16 of the Permit.

5. Whether the Project complies with Criterion 8(A) without Condition 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, or 16 of the Permit.

6. Whether the Project complies with Criterion 9(K) without Condition 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, or 16 of the Permit.

7. Whether the Permit and its conditions apply to lands identified in Book 34, Page 209 of the land records of the town of Granville, Vermont, that are located below the elevation of 2,500 feet.

Green Crow has sought summary decision on Issue #7, the question of applicability of permit conditions to lands below 2,500' in elevation.

III. DISCUSSION

Green Crow moves for summary decision pursuant to Environmental Board Rule 23, seeking a ruling that the Permit and its conditions cannot apply to lands below 2,500 feet in elevation. Rule 23 authorizes the Board to grant summary decision if "there is no genuine issue as to any material fact and . . . any party is entitled to a decision as a matter of law." EBR 23(D). Although the facts are not in dispute, the Board must deny this motion because Green Crow is not entitled to decision as a matter of law.

A. Logging Below 2,500' in Elevation

Green Crow argues that the Permit cannot apply to involved land below 2,500' in elevation because logging below 2,500' is exempt from Act 250.[1] Act 250 defines "development" to exclude logging improvements below 2,500' in elevation. 10 V.S.A. § 6001(3)(D)(i). Because Act 250 requires a permit for any "development" or "subdivision," 10 V.S.A. § 6081(a), this definition serves as one set of triggers for original Act 250 jurisdiction. *See also,* 10 V.S.A. § 6001(19)(defining "subdivision"). Thus, logging below 2,500' in elevation is exempt insofar as it cannot trigger original Act 250 jurisdiction.

However, this case does not involve a question of original Act 250 jurisdiction – there is no dispute that the Project involves logging at elevations above 2,500'. (Green Crow's Statement of Facts at 1). It is clear, therefore, that the Project constitutes a "development," 10 V.S.A. § 6001(3)(A), and triggers Act 250 jurisdiction (i.e. requires an Act 250 permit). 10 V.S.A. § 6081(a); *In re Huntley,* 2004 VT 115 ¶ 6 (2004)(mem.)("Under Act 250, commencing development triggers jurisdiction and the obligation to obtain a permit."). The question here is whether an Act 250 permit can apply to land and activities below 2,500' in elevation, when jurisdiction has been triggered by development above 2,500'.

B. Authority to Attach Permit Conditions

Once Act 250 jurisdiction is triggered as it has been here, it attaches to the entire tract or tracts of involved land. *See, Re: Charles and Barbara Bickford,* #5W1186-EB, Findings of Fact, Conclusions of Law, and Order at 26 n.1 (May 22, 1995); *Re: David Enman,* Declaratory Ruling 326, Findings of Fact, Conclusions of

[1] (Green Crow's Motion at 1.) Green Crow also asks that the Board issue an amended land use permit specifically limited to elevations above 2,500'. (*Id.*) Because the first part of Green Crow's motion is denied, the Board does not reach the second request.

Law, and Order at 14 n. 4 (Dec. 23, 1996); *see also, Re: Stonybrook Condominium Owners Association*, Declaratory Ruling #385, Findings of Fact, Conclusions of Law, and Order at 14-17 (May 18, 2001)(holding generally that the "permitted project" is the entire tract or tracts of involved land). This is not to say that Act 250 has unlimited authority over that involved land once a permit is required. Permit conditions must be reasonable and may only apply to impacts and components of the permitted development. 10 V.S.A. § 6086(c)(a "permit may contain such requirements and conditions as are allowable proper exercise of the police power and which are appropriate" with respect to the criteria); *see also*, *In re Stokes Communication Corp.*, 164 Vt. 30, 38 (1995)("the Board may impose reasonable permit conditions within the limits of its police power to ensure that projects comply with the statutory criteria")(citing *In re Denio,* 158 Vt. 230, 239-40 (1992); *In re Quechee Lakes Corp.,*154 Vt. 543, 550 n.4 (1990)); *OMYA v. Town of Middlebury*, 171 Vt. 532, 533 (2000)(affirming permit condition limiting truck traffic with a "real and substantial relationship to public welfare")).

Whether the challenged permit conditions bear a real and substantial relationship to the Project's impacts under the criteria on appeal, however, goes beyond the scope of Green Crow's motion and cannot be decided on the undisputed facts. Although some or all of those conditions may ultimately be invalidated, the Board cannot rule as a matter of law that no permit condition may ever apply to involved land at elevations below 2,500', merely because logging activities are taking place there. Roads and other infrastructure built to serve the development, for instance, clearly constitute part of that development, even though they may be at lower elevations. Likewise, impacts of the development may extend to lower elevations. Once jurisdiction has been triggered, the appropriate question is the extent of the Project's Act 250 impacts, not their elevation.

C. Environmental Board Precedent

In support of its argument, Green Crow relies upon *Re: Department of Forests, Parks & Recreation*, #1R0488-EB, Findings of Fact, Conclusions of Law, and Order at 8 (Jan. 11, 1984)(cited in Green Crow's Motion at 5-6). In *Forests & Parks*, the Board rejected the town's request to "impose uniform restrictions on all cutting by the Department adjacent to the trail, both above and below 2,500' in elevation," on the grounds that logging below 2,500' was "exempt" from Act 250's definition of "development." *Id.* at 8. However, the Board did not discuss or analyze the issue in that decision. In fact, it described the project under review (the construction of a temporary access road and firewood cutting) as being "all above 2500 feet in elevation, on an approximately 10 acre tract." *Id.* at 1. Although the Board later noted that the "project site is a portion of a 68 acre thinning operation" in a particular area of that state forest, *id.* at 3, indicating that the project did involve land below 2,500' in elevation, the decision did not discuss the elevation issue in detail and did not provide any further analysis. The part of the *Forests & Parks* decision cited by Green Crow has not been cited or relied upon by the Board since

that case was decided in 1984. To the extent that this part of the *Forests & Parks* decision remains in force, the Board overrules it today.

Other Board decisions Green Crow cites do not support its motion. (Green Crow's Motion at 7.) In *Atlantic Cellular*, the Board held that repairs made on a logging road below 2,500' in elevation did not constitute "construction of improvements" sufficient to trigger Act 250 jurisdiction. *Re: Atlantic Cellular Co., L.P.*, Declaratory Ruling #340, Findings of Fact, Conclusions of Law, and Order at 9-11 (Jul. 1, 1997). This is not the same as holding that Act 250 cannot regulate activities on involved land that would not trigger jurisdiction in themselves. The other two cases, *Johnson Lumber* and *Capital Heights,* involved questions of whether logging and clearing were intended to facilitate further development – in which case jurisdiction applied – or whether the logging was simply logging for logging's sake. *Re: Johnson Lumber Co.,* Declaratory Ruling #263, Findings of Fact, Conclusions of Law, and Order at 10-13 (Mar. 27, 1987); *Re: Capital Heights Assocs.*, Declaratory Ruling #167, Findings of Fact, Conclusions of Law, and Order at 4-5 (Mar. 27, 1987).

In *Capital Heights,* the Board concluded that Act 250 jurisdiction had not been triggered by the logging, but that it would be triggered if the land were ever developed or subdivided. *Capital Heights,* Findings, Conclusions and Order at 4-5. In *Johnson Lumber,* the Board reached the opposite conclusion on different facts. *Johnson Lumber,* Findings, Conclusions and Order at 10-13.

Green Crow also cites *Van Buskirk*, which applied the logging exemption and held that logging below 2,500' does not constitute "development." *Re: Van Buskirk*, Declaratory Ruling #302, Findings of Fact, Conclusions of Law, and Order at 8 -9 (Aug. 15, 1995). The relevant part of *Van Buskirk* did not involve any logging above 2,500'. However, the Board did note in that decision that the logging exemption did not preclude Act 250 from regulating logging activities where there is a development or subdivision requiring a permit, and such permit conditions are necessary to address impacts under Act 250. *Van Buskirk*, Findings, Conclusions and Order at 8-9. This reasoning is persuasive here because there is a development requiring a permit.

D. Conclusion

Like low-elevation logging, farming is exempt from the definition of development. In the case of farming, however, the Legislature has established an exception to the general rule that, once triggered, Act 250 jurisdiction attaches to all involved land. 10 V.S.A. § 6001(3)(E). Where a development occurs on land used primarily for farming, the statute restricts Act 250 regulatory authority to "only those portions of the parcel or the tract that support the development," and prohibits conditions "on other portions of the parcel or tract of land which do not support the development and that restrict or conflict with accepted agricultural practices adopted

by the secretary of agriculture, food and markets." *Id.* There is no such statutory limit of Act 250 regulatory authority over land at elevations below 2,500' when development occurs above 2,500' on the same tract.

This case is not about regulating logging at elevations below 2,500'. The Board acknowledges the exemption from jurisdiction for logging below 2,500', but it does not apply here. Instead, this case addresses the simple question of whether appropriate permit conditions can be imposed on involved land below 2,500' to address the impacts of the Project. The fact that otherwise exempt activities may be occurring at those elevations is irrelevant, and serves only to confuse the analysis. The purpose of any reasonable permit condition would not be to regulate logging below 2,500', but to address impacts of the development. *See*, 10 V.S.A. § 6086(c).

Whether the permit conditions Green Crow challenges in this appeal meet the requirements of Section 6086(c) cannot be decided on the undisputed facts. Accordingly, Green Crow's motion is denied, and the merits issues shall be set for hearing.

IV. ORDER

1. Petitioner's Motion for Summary Decision on Merits Issue #7 is DENIED.

2. The Chair shall set this matter for hearing.

DATED at Montpelier, Vermont this 14th day of June, 2006.

ENVIRONMENTAL BOARD

_/s/Patricia Moulton Powden____
Patricia Moulton Powden, Chair
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