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

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

MEMORANDUM OF DECISION

This decision addresses Green Crow Corporation's (Green Crow's) Motion to Alter the Environmental Board's June 14, 2006 decision (Decision) denying Green Crow's motion for summary decision. As set forth below, the Board denies Green Crow's motion.

I. DISCUSSION

Green Crow moves to alter, pursuant to EBR 31(A), asking the Board to reverse its decision denying summary judgment. In its motion, Green Crow requests a ruling that its permit conditions cannot apply to lands and activities below 2,500' in elevation, and asks the Board to issue an amended permit limiting the reach of the permit and its conditions to lands and activities at elevations above 2,500'. The Agency of Natural Resources (ANR) has filed a reply brief in support of Green Crow's motion.

A. Green Crow's Motion

1. Permissible Reach of Permit Conditions

Green Crow requests a ruling that conditions on a land use permit for logging above 2,500' cannot apply to lands and activities below 2,500'. In support of this motion Green Crow asserts that the "involved land" concept is irrelevant because jurisdiction was triggered by logging above 2,500'. This would not, however, change the Board's ruling. It is not the concept of involved land that is crucial here; rather, it is the fact that components and impacts of the development (logging above 2,500') necessarily extend to parts of the Project tract below 2,500'. In its motion, Green Crow concedes that such high-elevation logging requires the use of land at elevations below 2,500'. (Motion to Alter, at 5.) The mere fact that jurisdiction is triggered by logging above 2,500' does not shield project components and impacts from Act 250 review simply because they happen to be at lower elevations.

Green Crow contends that the Board's ruling will subject lower-elevation logging to Act 250 jurisdiction. This case is not about logging below 2,500'. It is about the permissibility of permit conditions on logging above 2,500'. It is well-established that "even exempt activities will trigger jurisdiction if they are part of a plan to develop." *Re: McLean Enterprises, Inc.*, Declaratory Ruling #428, Findings of Fact, Conclusions of Law, and Order, at 6 n.2 (Jul. 22, 2005)(citing *Re: Luce Hill Partnership*, #5L1055-EB, Findings of Fact, Conclusions of Law, and Order at 8 (Jul. 7, 1992)(logging to clear land in preparation for creating subdivision triggers Act 250 review); *Re: Capital Heights Associates and Snowfall, Inc.*, Declaratory Ruling #167, Findings, Conclusions and Order at 3 (Mar. 27, 1985)(holding that low-

elevation logging was not commenced in preparation for development, but noting that "the cutting of trees and construction of logging roads may constitute 'commencement of construction' of a development, rather than for logging purposes."); *Re: Agency of Environmental Conservation*, Declaratory Ruling #83 (Oct. 13, 1977)(conversion of logging road to subdivision access road requires Act 250 review)); *see also, Re: Johnson Lumber Co.,* Declaratory Ruling #263, Findings of Fact, Conclusions of Law, and Order (Jul. 10, 1997)(noting that "the cutting of trees and construction of skidding roads may constitute the 'commencement of construction'" under certain circumstances, and that there "is no logging or forestry exemption from the definition of subdivision."). Otherwise, logging below 2,500' is not development and cannot trigger Act 250 jurisdiction. In this case, however, there is no question that the proposed high-elevation logging will trigger development jurisdiction. Therefore, the question is whether a permit for the proposed high-elevation logging project may apply to any Project components and impacts below 2,500'. Ultimately, this is a question of permissible permit conditions, not Act 250 "jurisdiction."

Act 250 allows only such permit conditions as are appropriate under the criteria and are an allowable exercise of the police power. Thus, permit conditions that do not relate to the Project's Act 250 impacts are impermissible. *In re Denio*, 158 Vt. 230, 239-241 (1992)(citing *In re Quechee Lakes Corp.*, 154 Vt. 543, 550 n.4 (1990)). Whether the challenged conditions are, in fact, reasonable and permissible cannot be determined on the facts in the record. It may be that the permit conditions Green Crow challenges in this appeal are unreasonable as applied to lands and activities below 2,500' in elevation. The Board might, then, invalidate the challenged conditions, or limit their applicability to elevations above 2,500'. Further proceedings are necessary to make this determination, however. Therefore, these merits issues must be set for hearing.

In its motion Green Crow asserts that landowners will be reluctant to allow logging development because "all future use" of their land below 2,500' will be subject to Act 250 jurisdiction. (Motion, at 5 - 6.) However, all future use is not subject to Act 250 amendment jurisdiction – whether the land is above or below 2,500' -- because permits for logging are temporary. *See,* 10 V.S.A. § 6090(b)(1)(permits for certain activities, including logging above 2,500 feet, are of limited duration); *In re Huntley,* 2004 VT 115, 177 Vt. 596 (2004)(mem.)(holding that Act 250 jurisdiction lifts when permit expires). Act 250 jurisdiction expires with the permit. Green Crow may also request that the Commission limit the scope of the permitted development pursuant to *Re: Stonybrook Condominium Associates, Inc.*, Declaratory Ruling #385, Findings of Fact, Conclusions of Law, and Order (May 18, 2001); *see also*, Act 250 Rule 34 (requiring permit amendment for material change to the permitted development or subdivision).

Green Crow's permit, for example, is effective for a four-year period. If Green Crow changes the permitted high-elevation logging project during that time in a way that could have significant environmental impact, a permit amendment would be required. Act 250 Rule 34(A). It is true that this could include changes to the permitted project that occur below 2,500' in elevation, if they have the potential for significant environmental impact. But this is only an issue if Green Crow makes such changes during the four-year period, because Act 250 jurisdiction ends when the permit expires.

There are various thresholds for Act 250 jurisdiction other than elevation and acreage; for instance, a certain number of lots in a subdivision, a certain number of housing units, or a certain height of communication tower. The fact that Act 250 jurisdiction is not based on acreage of involved land does not mean that permit conditions cannot attach to aspects or impacts of the project on the project tract that go beyond what triggered jurisdiction. A 10-unit housing project does not avoid Act 250 review of the first nine units just because they would not themselves require a permit. Likewise, if a housing project has a quarter-acre footprint on a half-acre tract, permit conditions could be applied beyond the ten units that triggered jurisdiction, provided that the conditions comply with 10 V.S.A. § 6086(c). In fact, permit conditions may apply to activities or impacts that are not on the project tract. *See, e.g., Re: Developer's Diversified Realty Corp.,* Declaratory Ruling #364, Memorandum of Decision (Sept. 10, 1998)(condition requiring that applicant upgrade off-site road intersection); *Re: Taft Corners Assocs., Inc.,* 160 Vt. 583 (1993)(condition requiring construction of improvements to off-site roadway).

The purpose of permit conditions is to address a project's impacts under the criteria. The various jurisdictional thresholds, on the other hand, reflect the Legislature's determination of what types of projects should be subject to Act 250 review in the first instance. It is important to note this distinction between Act 250 jurisdiction – whether a permit is required – and the Commission's authority to impose reasonable permit conditions under Section 6086(c) once that jurisdiction is triggered. Where Act 250 review is required, permit conditions may be attached to address impacts of the project on or beyond the project tract. Limiting the physical reach of permit conditions in each case based on how jurisdiction was triggered would lead to inconsistent results and possibly make it more difficult for some projects -- such as housing or high-elevation logging projects – to obtain an Act 250 permit. There is no good reason to limit the physical reach of conditions at the 2,500' elevation line as a matter of law.

Logging above 2,500', like any high-elevation development, will generally require the use of land at lower elevations. However, project components and impacts are not immune from Act 250 review or Act 250 permit conditions merely because they occur below 2,500'. Environmental review and permissible permit conditions do not necessarily end at the 2,500' elevation line, for instance, on a road leading to a high-elevation home, or stormwater runoff from a high-elevation

industrial project. This would subvert the purpose of the Act, to "protect and conserve the lands and the environment of the state and to insure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests." Findings and Declaration of Intent, 1969, No. 250 (Adj. Sess.) § 1 (eff. Apr. 4, 1970).

Accordingly, the Board declines to alter the Decision.

2. Requested Permit Amendment

Even if the Board granted summary judgment in favor of Green Crow, limiting the permit conditions to 2,500' and above, whether the Project would comply with Act 250 with such modified conditions would be a separate question. This question cannot be resolved on the undisputed facts. Accordingly, the Board must deny Green Crow's request for a permit amendment.

B. ANR's Reply Brief

In its reply brief, ANR asks the Board to uphold its decision in *Re: Department of Forests, Parks & Recreation*, #1R0488-EB, Findings of Fact, Conclusions of Law, and Order (Jan. 11, 1984). To this end, ANR argues that the statutory language exempting logging at elevations below 2,500' is clear. Again, there is no question that logging below 2,500' does not in itself constitute "development." But that is not the question in this appeal. This appeal presents a question concerning the permissible reach of permit conditions on logging at elevations above 2,500'. *See, Re: Van Buskirk,* Declaratory Ruling #302, Findings of Fact, Conclusions of Law, and Order at 8-9 (Aug. 15, 1995)(noting that the exemption for low-elevation logging "does not absolutely prohibit" Act 250 regulation of such logging through reasonable permit conditions to address environmental impacts of a subdivision or development).

ANR cites the *Vermont Egg Farms* case in support of its argument. *Re: Vermont Egg Farms, Inc.,* Declaratory Ruling #316, Findings of Fact, Conclusions of Law, and Order (Jun. 14, 1996). In *Vermont Egg Farms*, the Board held that no Act 250 permit was required for a large-scale farming operation, despite its potential for environmental impact, because it constituted exempt "farming." *Id.* at 6. In this appeal the undisputed facts are clear that the Project constitutes a "development" because it involves logging at elevations above 2,500'. If the proposed project did not involve such logging, it would not require a permit in the first instance, and the permissible reach of permit conditions would not be at issue.

ANR correctly points out that the concept of "involved land" as defined in EBR 2(F) does not apply in this case because jurisdiction was not triggered by a certain number of acres of involved land. However, this does not mean that permit conditions must necessarily be limited at the 2,500' elevation line. As discussed

above, it is not the physical extent of the jurisdictional aspect of any given project, or even the extent of the project tract itself, that limits the permissible reach of permit conditions. Permit conditions may apply to activities and impacts beyond the project tract. It remains to be determined, however, whether the conditions challenged in this case are reasonable pursuant to Section 6086(c).

In its brief ANR argues that the Board's decision will create "a direct disincentive" to forestry practice and forestland ownership by imposing Act 250 jurisdiction on lands below 2,500' in elevation. As set forth above, logging permits are for limited periods of time, and only material changes to the permitted development will require a permit amendment. Moreover, applicants can request that the district commission limit the scope of the permitted project pursuant to *Stonybrook.*

The Board appreciates ANR's expertise on forestry and logging practices, and shares ANR's view that sound forestry practices have "multiple benefits to society." The Legislature clearly intended to exempt logging at elevations below 2,500' from the list of projects that trigger Act 250 jurisdiction. However, the Legislature also intended that logging at elevations above 2,500' occur only with Act 250 approval. Once this Act 250 jurisdiction is required, the question is whether the logging project complies with the criteria. There is no sound policy reason to limit permit conditions at the 2,500' elevation line. To the contrary, limiting the physical reach of permit conditions on these projects may make it more difficult to obtain such logging permits by restricting the options available for Act 250 compliance.

II. ORDER

Petitioner's Motion to Alter is DENIED.

DATED at Montpelier, Vermont this 30th day of August, 2006.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden
Patricia Moulton Powden, Chair
Jill Broderick *
George Holland *
William Martinez *
John Merrill
Patricia Nowak *
Alice Olenick
Richard C. Pembroke, Sr.
Jean Richardson

* DISSENTING OPINION of Members Jill Broderick, George Holland, William Martinez and Patricia Nowak:

We respectfully dissent. The majority states that it can regulate logging activities below 2,500 feet because “components and impacts” of the logging activities above 2,500 feet extend to land below 2500 feet. The statute, however, does not extend Act 250 jurisdiction to all land on which development activities might have an impact. The statute allows Act 250 regulation only of “development.” With respect to logging activities “development” expressly does not include “the construction of improvements for. . . logging . . . purposes below the elevation of 2,500 feet.” 10 V.S.A. Section 6001(3)(d)(i). We believe this is a clear, “bright line” test that limits the Board’s authority to regulate logging activities to those that occur above 2,500 feet.

The majority states that the environmental impacts of logging above 2,500 feet are not shielded from Act 250 “simply because they happen to be at a lower elevation.” However, that is exactly why they are shielded. The different types of “development” under Act 250 have different limits.

For example, with respect to subdivisions, Act 250 jurisdiction is determined by the number of lots. This is not because there are no environmental impacts from a nine lot subdivision. It’s because the legislature set limits on the development activities Act 250 can regulate. With respect to logging, the limit is one of elevation. There are certainly environmental impacts from logging activities below 2,500 feet; the legislature, however, decided that those activities should be regulated by other means, such as the "Acceptable Management Practices for Maintaining Water Quality on Logging Jobs in Vermont" (AMP's) published by Forests, Parks and Recreation. Vt. Code R. 12 020 010 (1987).

The Board's decision holds that once jurisdiction has been triggered, the appropriate question is the extent of the Project's Act 250 impacts, not their elevation. This is not true. The correct statement is "once jurisdiction has been triggered, Act 250 can regulate the ‘development.’"

The "development" is what the statute says it is, and the statute very clearly makes elevation the determining factor for logging projects.

We believe that the Board’s holding in *Vermont Department of Forest, Parks and Recreation*, 1R0488-EB, is directly on point. The elevation of the proposed logging activities was the central jurisdictional issue; the logging operation involved 68 acres, 10 of which were above 2,500 feet. *Re: Vermont Dept. of Frests, Parks and Recreation,* #1R0488-EB, Findings of Fact, Conclusions of Law, and Order at 3, Finding 1 (Jan. 11, 1984). Although the logging operation involved 68 acres, the Board defined the “project site” as containing only the 10 acres and stated “we have jurisdiction over this project only to the extent the site is above 2,500’”. *Id.* at 8.

The Board cited the definition of “development” and concluded that it couldn’t impose conditions on land below 2,500 feet. *Id.* The fact that the decision has not been cited since 1984 does not weaken its precedential value. It was a clear, straightforward analysis consistent with the statute and should be reaffirmed today.