



November 21, 2008

Mary O'Leary
EIV Technical Services, LLC
95 South Main Street, Suite 1
Waterbury, VT 05676

RE: Jurisdictional Opinion, South Hero #6-004.

Dear Mary;

This is in regards to your request for a Jurisdictional Opinion, on behalf of the Town of South Hero, to determine whether the proposed roadway work along South Street in South Hero requires an Act 250 permit. Your request involves two issues:

1. whether pursuant to §6001(3)(A)(v), the project constitutes a "development", and
2. whether pursuant to §6081(b) and Act 250 Rule 2(A), the project constitutes a "substantial change" to a "pre-existing development"?

Pertinent facts:

1. The Town of South Hero proposes a roadway project along 2.5 miles (13,125 feet) of South Street in South Hero ("Town"), Vermont. The primary purpose of the project is to improve the safety for non-motorized and pedestrian traffic travelling between the Allen Point Access area and the Village of South Hero. The project will improve safety by separating non-motorized traffic from vehicular traffic by reducing the width of the existing travel lanes to 9 feet, and consistently paving a 24 foot wide roadway to enable 3-foot paved shoulders on each side of South Street for pedestrians and non-motorized traffic. Secondly, the Town intends to perform repair and maintenance to the roadway drainage infrastructure to correct previous drainage deficiencies and to protect the road from future drainage problems.
2. The existing pavement area along South Street is inconsistent and varies between 20 - 22 feet. The travel lanes vary from 10 feet to 11 feet and the existing gravel shoulders vary from 6 – 12 inches. Drainage ditching along both sides of the road is inconsistent in several areas causing ponding and requires cleaning and maintenance. There is approximately 3600 linear feet of the road that will need to undergo full depth reconstruction to correct historical roadbed problems.



3. The existing 2.5 mile project along South Street involves approximately 6.63 acres of pavement.¹ After the 2.5 miles stretch is paved to a consistent 24 foot width which includes the paved three foot shoulder, the approximate area increases 7.23 acres. The project will involve approximately 0.6 acres of new pavement.
4. The road alignment will not change from its existing alignment and no additional right-of-way will be needed. There will be no significant widening or tree cutting and it is unlikely that there will be a need to relocate any utility poles.
5. The work along the 2.5 miles of South Street will include repaving, reclamation, full depth reconstruction, resurfacing and incidental items. The scope of the project also includes shoulder and roadside drainage maintenance and ditch construction.
6. Repaving involves surface milling of the existing asphalt road, then laying down new asphalt and re-striping to narrow the travel lanes to 9-feet to allow for a consistent 3 foot shoulder along the entire 2.5 miles.
7. Reclamation involves using equipment to grind up the existing asphalt and some base material while almost simultaneously reapplying that material, which is mixed and ground up by a machine, put back on the road and then overlaid with new asphalt. Reclamation is proposed at a depth of approximately 8 inches.
8. Full depth reconstruction involves removing road material down to the bottom of the subbase (typically 2-3 feet) and then rebuilding the road foot print back up with subbase, base materials and asphalt. Full depth reconstruction involves approximately 4.2 acres and includes 1.8 acres of disturbance outside the existing paved area.
9. Roadside drainage and ditch maintenance and construction will involve clearing and reshaping of several sections of roadside ditches, such that water drains away from the roadway instead of ponding as it currently exists. There is an additional 1.9 acres of disturbed area for slope impacts where they need to be extended or created beyond the existing roadway.

Applicable Regulations:

10 V.S.A., §6001(3)(A)(v) states:

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 incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings.

¹ This was conservatively estimated by multiplying the entire length of the road (13,125 feet) by the approximate width (11 feet) and divided by the number of square feet per acre (43,560 feet per acre).

10 V.S.A., §6081(b):

Jurisdiction attaches to any substantial change to a pre-existing development.

Act 250 Rule 2(C)(7):

"Substantial change" means any change in a pre-existing development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. Section 6086(a)(1) through (a)(10).

Act 250 Rule 2(C)(8):

"Pre-existing development" mean any development in existence on June 1, 1970 and any development which was commenced before June 1, 1970 and completed by March 1, 1971.

Act 250 Rule 2(C)(5) "Involved land" includes:

(b) 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.

Jurisdiction Analysis and Opinion:

a. Does the project constitute a "development" pursuant to 10 V.S.A., §6001(3)(A)(v)?

The roadway project along South Street involves both construction of improvements, and work associated with the maintenance and repair of the existing roadway. Road work or activities which constitute repair or routine maintenance do not constitute construction of improvements under 10 V.S.A., §6001(3)(A)(v) and therefore do not count toward the 10 acres of involved land required to trigger the need for an Act 250. In Re: Productions. Ltd., Declaratory Ruling #168 at 4 (April 10, 1985). On the other hand, ten acres of improvements would trigger the need for a permit.

Repair or routine maintenance does not alter an existing development but "prevents or eradicates alteration to an existing development which has occurred or would otherwise occur over time through normal wear and tear." In Re: Vermont Agency of Transportation (rock ledges), Declaratory Ruling #296, (3d Rev.) at 10 (March 28, 1997). Installation and maintenance of ditches along

roadways are considered repair and maintenance. In Re: Atlantic Cellular Co., L.P. and Rinkers Inc., d/b/a Rinkers Communications, Declaratory Ruling Request # 340, at 10 (May 23, 1996)

Construction of improvements is more than repair or routine maintenance and includes reconstruction improvements that typically involve the removal and replacement of the entire road. In Re: Town of Wilmington, Declaratory Ruling, Declaratory Ruling Request #DR258 at 12 (June 30, 1992). Examples of other types of construction improvements that are not repair or routine maintenance include an upgrade over an historic roadway condition, a substantial widening of the roadway, substantial utility and pole relocation, and significant tree cutting. In Re: Agency of Transportation, Route 7. Leicester, Declaratory Ruling #153 at 4 (June 20, 1984).

Reclamation is a process that grinds up the existing asphalt and reapplies that material back on the road which is then overlaid with new asphalt. Reclamation is a process that is required because the asphalt breaks down over time as a result of normal wear and tear and needs to be replaced. In many cases, this is the only work that needs to be done to maintain the road. However, in some cases additional work is necessary to repair a segment of the road. The scope of the additional work may vary, but in cases that involve full depth reconstruction significant improvements are done to the subbase and historically constitute the construction of improvements. It is my opinion, that reclamation is a repair and maintenance road way function and does not rise to a level that constitutes the construction of improvements.

The amount of involved land that does constitute construction of improvements includes: 4.2 acres of full depth reconstruction and approximately 1 acre of new pavement or 5.2 acres.² It is my jurisdictional opinion that the project does not constitute a “development” pursuant to 10 V.S.A., §6001(3)(A)(v) because the amount of involved land is less than 10 acres.

- b. Does the project constitute a substantial change to a pre-existing development pursuant to 10 V.S.A., §6081(b) and Act 250 Rule 2(A)?

Land use permits are generally not required for developments that predate the adoption of Act 250. A development which was commenced prior to June 1, 1970 and completed by March 1, 1971 is presumptively grandfathered from the Act’s permit requirements. 10 V.S.A. §6081(b). Such a development is said to be pre-existing if it satisfies the initial burden of proof threshold (that if built today would trigger a “development”), and is exempt from Act 250 review provided the development is not abandoned or substantially changed. In re Catamount Slate,

² The roadside drainage and ditch work was not included in the overall calculation for involved land because it is a repair and maintenance function. But even if the 1.9 acres was classified as involved land, the total area is less than 10 acres (5.2a. + 1.9a = 7.1a)

South Street Project, South Hero
JO 6-004

2004 VT 14, & 2 (2004)(citing 10 V.S.A. ' 6081(b); In re Orzel, 145 Vt. 355, 359 (1985)).

The project area pre-dates Act 250. No party, including the Town of South Hero has provided evidence to demonstrate that if this project were built today in would involve the required 10 or more acres of involved land. Rather the evidence in the record indicates that the amount of involved land for the South Street project is approximately 7 acres. It is my opinion that the Town of South Hero has not met its burden to prove that the exemption applies and that the record indicates that amount of involved land is less than 10 acres: Therefore the South Street project is not a pre-existing development and the substantial change test is not applicable.

In summary, it is my jurisdictional opinion that the South Street project in South Hero Vermont is not a development because the amount of involved land is less than 10 acres and the South Street project is not a pre-existing development: Therefore an Act 250 permit is not required for the South Street project.

Sincerely,

/s/Geoffrey W. Green
District 6 Coordinator

cc Peter Young
Denise Wheeler

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Natural Resources Board Rule 3. Reconsideration requests are governed by Natural Resources Board Rule 3 and should be directed to the district coordinator at the above address. Any appeal of this decision must be filed with the clerk of the Environmental Court within 30 days of the date of issuance, pursuant to 10 V.S.A. Chapter 220. The appellant must attach to the Notice of Appeal the entry fee of \$225.00, payable to the State of Vermont. The appellant must also serve a copy of the Notice of Appeal in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings. For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. The address for the Environmental Court is: Environmental Court, 2418 Airport Rd., Suite 1, Barre, VT 05641-8701. (Tel. # 802-828-1660).

South Street Project, South Hero
JO 6-004