



May 3, 2019

Subject: Jurisdictional Opinion (JO) #7-286
10 V.S.A. § 6007(c)
Act 250 disclosure statement; jurisdictional determination

Victory Hill Trails, Victory Hill Sector, Conservation Collaboratives, LLC
± 1100 acres, Town of Victory
Existing Recreation Trails, Camping, Special Events

and

Carol Easter
2428 Victory Hill Road, Town of Victory
Ticket and Merchandise Sales for Recreation Trails

To: All parties identified on the attached Certificate of Service

This jurisdictional opinion is written in response to a request received from Tracey Martel, Town of Victory. Tracey Martel is the town clerk for the Town of Victory.

I. Summary of Opinion

Construction of improvements for a commercial purpose requires an Act 250 permit pursuant to 10 V.S.A. §6001(3)(A)(ii). Accordingly, Conservation Collaboratives, LLC must obtain an Act 250 permit for existing trail improvements and land uses, as further identified and detailed below. It is noted that some of the existing trails which have not involved substantive improvements or modification to the land (if fully restored and abandoned), and some of the special event activities (if discontinued), can be omitted from an application, if so elected from the property owner, as further detailed below.

The related improvements and activities at the residential property owned by Carol Easter are also subject to Act 250 jurisdiction via 10 V.S.A. §6001(3)(A)(ii), to the extent the uses and activities will be continuing, as further outlined below; at the Carol Easter property, if the very modest improvements are fully removed, and the use ceases, an Act 250 permit is not required. It is requested that Carol Easter please notify the Act 250 office of her intentions, by May 30, 2019.

II. Facts and Documents

In reaching the conclusions identified above, I relied upon the facts supplied by a representative for the primary landowner, supplemented with additional information obtained from public record.



Exhibits 001-019 can be found at the following link:

<https://anrweb.vt.gov/ANR/vtANR/Act250SearchResults.aspx?Num=JO-7-286>

Following is a summary of Project history and facts:

1. Conservation Collaboratives, LLC (CC) purchased 1,100 acres of heavily harvested forestland in Victory, Vermont in 2007, seeking to balance conservation, sustainable forest management and outdoor recreation. Additional land under consideration for acquisition by CC would increase the total acreage owned to 1,150 acres.
2. All or part of the CC property is enrolled in Use Value Appraisal, also known as “Current Use”, thereby subject to a plan for forestry management.
3. A logging contractor, under prior ownership, left behind post-logging erosion on the CC property. Ongoing erosion problems on logging roads and logging skid trails left ruts several feet deep in places. In 2009, CC matched USDA funds to build dozens of waterbars and clean up areas of erosion on several skid trails on the property. CC also commenced creation and construction of recreation trails, located primarily along logging corridors (e.g. haul roads, skid trails), around this time.
4. A conservation easement funded by the Agricultural Conservation Easement Program of the United States Department of Agriculture and the Vermont Housing and Conservation Board, to be held by the New England Forestry Foundation, has been drafted and is currently (spring 2019) being finalized by the Trust for Public Land. This conceptual easement focuses on the protection of the natural resources and sensitive habitats on the land, with agriculture, forestry and sustainable recreational trail management.
5. Kingdom Trails Association (KTA) is a charitable non-profit conservation organization, overseen by a volunteer Board of Directors, working in partnership with private landowners, local businesses, government agencies and other non-profit organizations, to create and manage outdoor recreation opportunities and to preserve and protect trails. During all seasons of the year KTA offers an extensive trail network for non-motorized, multi-use recreation activity. Currently all mapped KTA trails are located on land that is privately owned.
6. In 2009, CC partnered with KTA to launch the “CircumBurke” (Exhibit 018), an annual running and bike “challenge” race event that uses recreation trails located around Burke and Umpire Mountains, on land owned by CC and others, including land owned by the State of Vermont.
7. Between 2009 and 2018, trail development on CC land was undertaken using a variety of volunteer labor including those with ties to local schools (Lyndon State College, Burke Mountain Academy) and ties to KTA. The trail improvements developed on CC land include the following elements: (a) trails created or constructed on top of logging roads or logging skid trails (b) trails constructed across open land (c) trails constructed through wooded areas, with removal of vegetation where necessary, and earthwork to create the trail surface, and (d) improvements to create interesting and more challenging trail features such as stone masonry jumps or wooden boardwalks.
8. The trails located on CC land became known as the “Victory Hill Sector” (VHS), an informal organization overseen by John McGill, for CC. Laurie Saligman is the principal owner or

shareholder of CC, and John McGill is her husband and trail enthusiast who oversees the trail related activities under the VHS name.

9. Commencing in around 2009 or 2010, and continuing thereafter, conversations between CC and KTA took place, concerning whether or not recreation trails located, and to be located, on CC land, would be formally integrated into the KTA trail network, and thus become part of the KTA trails system.
10. In around 2011, CC signed an agreement with KTA (Exhibit 005) which gave KTA permission to develop specific (though not clearly documented) trails on CC land.
11. On April 5, 2019, KTA communicated to VHT (Exhibit 019) that the KTA board, at a meeting in August 2018, officially voted to terminate VHT's status as KTA landowners. VHT (John McGill) appears to understand that the VHT/VHS trails were part of the KTA trail system, or likely part of the KTA trail system, until KTA "formally" identified otherwise, in August 2018 (which followed an inquiry from John McGill, related to this Act 250 jurisdictional opinion). Even though KTA determined, in August 2018, that the VHT trails were not part of KTA, this does not, by itself, mean that the VHT trails were, in fact, part of the KTA system, prior to this date.
12. Formal integration of the subject trails on CC land, into the KTA network, never fully materialized.
13. The subject trail system, located on CC land, does not directly connect to the KTA system. The CC land is separated from the KTA system land by a tract of land that is owned by the State of Vermont, in the form of the Victory Basin Wildlife Management Area and the Victory State Forest, as illustrated on a map within Exhibit 012. These state-owned lands are adjacent to the Darling State Park, where Burke Mountain and some KTA trails are located.
14. KTA prepares and publishes an annual KTA trail map, which it makes available for purchase, in paper copy. To date, KTA has not included the trails located on land owned by CC in its ongoing published map of the KTA trails. John McGill understood that official inclusion of the VHT trails on the KTA map hinged on an updated plan for the adjacent state-owned lands, to officially designate specific trails located on these state-owned lands (CC Road and Weir Mill Brook Trail, located between Burke and Victory) for bicycle use. The "Long Range Management Plan" for the "Victory Management Unit" was approved by the State of Vermont Agency of Natural Resources on June 1, 2017, encompassing the Victory Basin Wildlife Management Area, the Victory State Forest, and the Darling State Park. Excerpts from the 2017 plan (Exhibit 012) identify the location of two "proposed bike corridor" (page 110) and that "two small segments of existing forest management roads on VSF will be designated for mountain bike use, to enable connections to/from private lands with extensive trail networks" (page 112). It appears that bike trail connectivity between the KTA system and the VHT system "officially" occurred (across the state land) with the adoption of this 2017 Plan on June 1, 2017. It appears that, prior to June 1, 2017, the trails located across the adjacent state land physically existed, but the usage for mountain biking was not officially "sanctioned", excepting for some approved special events (e.g. as identified in Exhibits 006a, 006b, 006c).
15. In 2015, a more formal organization called Victory Hill Trails (VHT) was formed, by John McGill, to manage the trails and events on CC land, through a lease executed with CC. A copy of this lease agreement was not provided (and is not essential to this JO).

16. VHT was initially formed as an "L3C", or "Low Profit Company", and has more recently filed to become a 501 3C (non-profit status). The stated mission of VHT is "to coordinate outdoor recreation with the landowner's forest management and conservation priorities".
17. After VHT was formed, VHT, together with its earlier affiliate, VHS, represented CC in matters pertaining to the trails located on CC land.
18. Sometime between ± 2015 and ± 2017, VHT and/or VHS advised KTA that VHT (and/or CC) required a lease agreement, including a monetary payment from KTA, in order for the VHT trails to be formally integrated into the KTA network, and managed by KTA. KTA did not agree to the lease proposal, in large part because a lease was not consistent with the established KTA landowner model.
19. On December 4, 2017. Agency of Natural Resources (ANR) personnel discussed the possibility of "stewarding" the CC property, including the still-developing trail system, for a (not-yet-consummated) easement holder (Exhibit 013a). A map of the property, with existing recreation trails Exhibit 013b) was considered, and the discussion included responsibility for various permits (including Act 250). To date, ANR has not assumed a role in such stewardship or management of the CC property.
20. In December 2017, VHT (John McGill) contacted the Act 250 office to gain an understanding of permit requirements and how Act 250 jurisdiction might apply to the VHT trails project. I explained that if a trail system is not part of the Vermont Trails System, and the owner collects fees or donations from users, this qualifies as "commercial purpose" as defined by Act 250, and an Act 250 permit is required. I also explained what constitutes construction of a trail improvement, that examples of such improvements include new trail construction; trail widening; installation of drainage where none existed; installation of new or upgraded features; replacement of a drainage structure (e.g. culvert or bridge) with a larger or longer one as an "upgrade"; installation of signage; development of parking areas, etc.
21. Between 2015 and 2018, CC donated \$100,000 to VHT, for professional trail-building on the CC land. VHT oversaw and managed the use of some or all of these funds for continued construction of trail improvements on the CC land. These additional trail improvements were largely completed by a local professional trail building company, Ide Ride, hired by VHT and/or CC. This additional trail improvement construction work was completed via manual labor and via mechanized equipment.
22. Between 2009 and May 2019, a system of recreation trails, located on the CC land, was established, constructed, and mapped (Exhibits 005a, 005b).
23. A primary recreation use of the VHT trails is mountain biking. Some of the mountain bike trails are known as "singletrack", where, as the name implies, a single track supports bike travel. Approximately 40%-100% of each "singletrack" VHT recreation trail corresponds to a former logging skid trail. The most popular VHT expert trails are 100% former logging skid trails ("Phil's Drop" & "Lower Middle Finger").
24. VHT plans to join the Vermont Mountain Bike Association (VMBA) in 2019, as a chapter or as a non-profit affiliate.

25. VHT was not part of the Vermont Trail System when substantive trail construction and development occurred, using the \$100,000 of funds donated by CC to VHT, between 2015 and 2018; this work was conducted independent of KTA.
26. On or around November 2018, VHT applied to become part of the Vermont Trails System, seeking recognition from the Vermont Trails and Greenways Council (Exhibit 009). As of May 1, 2019, this application remained pending, under review.
27. Although KTA has sometimes been involved supporting work on the subject trail system, and co-hosting events, KTA did not exercise effective control of the trail development on CC land, particularly when substantive trail improvements occurred, between 2015 and 2018, using monies donated to VHT by the landowner, CC. Although a prior agreement (Exhibit 005c) was executed with KTA in around 2011, any KTA control of trail improvement activities on CC land had been effectively relinquished to CC/VHS/VHT when CC directly funded and controlled its own independent trail development activities, between 2015 and 2018, by VHS, and later more formally by VHT via the lease agreement between CC and VHT.
28. CC has a landowner agreement with the Vermont Association of Snow Travelers (V.A.S.T.) to provide a snowmobile trail through the CC property. This agreement is understood to be subject to annual renewal in accordance with standard V.A.S.T landowner agreement renewal procedures.
29. On or before April 2018, VHT established a social media and website presence (Exhibits 015a, 015b, 016.). The full website can be found at the link below, as of May 1, 2019:

<https://victoryhillmtb.com/>
30. Commencing on or around May 9, 2018, VHT, through its affiliate VHS, commenced collecting required fees from trail users, for usage of its recreation trails, and updated its website and social media accordingly (Exhibits 015a, 015b, 016.). Day passes and season passes were made available for purchase to the general public, via online booking, and via purchase at a property under separate ownership, owned by Carol Easter, located at 2428 Victory Hill Road, where a portable tent was erected, and T-Shirt sales also took place (Exhibit 004b).
31. On August 17, 2018, the VHT website ticket sales information included the following statement: "Kingdom Trails (KT) Passes are NOT valid in Victory". (Exhibit 015a). On April 22, 2019, the VHT website ticket sales information included the following statement: "Please remember, VH is an independent trail network. We are not KT" (Exhibit 015b). VHT has not always collected a trail fee from trail users. Prior to May 2018, trail fees were not mandatory; prior to May 2018, donations from trail users were collected into an unstaffed box. VHT has sometimes accepted a KTA trail pass for those riders arriving by bicycle from the KTA system, concurrent with collecting a donation or fee, for those arriving in Victory by car.
32. VHT collected trail user fees (\$15 / day or \$75/ season), to offset trail maintenance costs, trail building costs, EMT and porta-potty costs during special events, and contractor costs, and to pay for future trail building. In 2018, estimated gross income from ticket sales was \$15,000, and estimated gross income from events was \$16,500.
33. In 2018, the estimated costs of trail building, event organization, equipment repairs, supplies and general maintenance was \$37,000.

34. The activities taking place on the CC property have included camping, for a fee, at primitive campsites where the only improvements consist of a ring of stones to designate a place to have a campfire. In 2018, VHT began collecting fees online and on site for the use of its 3 primitive campsites; the estimated gross receipts from rentals of primitive campsites was \$500 in 2018. The campsites are advertised via social media, via the VHT website, and via Hip Camp, a camping reservation platform oriented to anyone seeking a campsite (e.g. mountain bikers and other outdoor recreation enthusiasts).
35. The CC property is used to host special recreation trail events, or races. Some of these special race events originate and have a base of operations located on land not owned by CC, involve trail users traveling through and across the VHT trails, and may also involve activities such as aid stations (e.g. food, supplies, medical care) temporarily staged on CC land during the event. Some of the special events are principally hosted by VHT on CC land, and typically encompass an overall greater scope of activities occurring on CC land, corresponding to parking, registration tables and tents, portable toilets, etc., temporarily staged on CC land. Some of these events may, or have already, become annual events, whereby the “temporary” improvements are present, and the land uses occur, annually. The special events include:
- the annual CircumBurke (Exhibit 018) for which VHT partnered with KTA to organize and host the event. The CircumBurke event encompasses use of KTA trails, VHT trails, and other trails located on land owned by the State of Vermont. According to the CircumBurke website, in 2014, 2015 and 2016, the CircumBurke was voted “Best Bicycle Race in Vermont” by Vermont Sports readers, and very few sections of dirt road or cart trail are used on the course. Every year between 300 and 600 bikers and runners use the VHT trails, and a large feeding station is organized on the CC land, in a field.
 - for the past three years, the Eastern States Cup Enduro event, hosted by VHT, which brings 200 racers and their entourage to Victory. A field on CC land is open to car and tent camping for Friday and Saturday nights, and fees are not collected for camping. In 2018, during the practice day for this Enduro, VHT also hosted a cross country event called the VT3 Stage Race, organized by the Craftsbury Outdoor Center.
 - the Enduro World Series Continental Series (CLIF ENDURO EAST), held at Burke Mountain and at VHT. The event comprises the North American Finals of this top level international competition, and was based at Burke Mountain. On September, 15, 2018, 200 competitors used the VHT trails.
36. Special events on CC land, organized by VHS/VHT and/or hosted and/or co-hosted by VHS/VHT/CC, have generated income. The CircumBurke event, co-organized by VHT/VHS, has been taking place since 2014 or earlier. In 2018, gross income to VHT, from special events, was \$16,500.
37. In 2019, VHT plans to allow the Craftsbury Outdoor Center to hold their VT3 event on August 16, 2019; the Eastern States Cup Enduro on the weekend of September 7-8, 2019; and the CircumBurke (to use VHT trails) on September 22, 2019.
38. The special events have involved use of existing trails located through adjacent land owned by the State of Vermont, for which special use permits have been issued (Exhibits 006a, 006b, 006c) and required insurance certificates are provided (Exhibits 007a, 007b, 007c).

39. A residential property owned by Carol Easter, located at 2428 Victory Hill Road, in proximity of the VHT Project, is involved in the day to day operations of the VHT system. At the Easter property, a very small seasonal tent is erected, exterior signage advertises this location for ticket sales, and T-Shirt merchandise is available for purchase, as illustrated in Exhibit 004b. VHT trail system users who have not purchased a pass on-line are instructed to stop at this location to purchase a trail pass. This activity, directly related to VHT trail system operation, has potential to generate traffic and noise well in excess of levels that would be typical for a residence in the very small town of Victory. The improvements installed at the Easter residence are very modest and minimal in total scope and all are fully removable, leaving no permanent modification to the land, whereby the use could be fully and very easily restored to a strictly residential activity if so desired by landowner Carol Easter. The details of the relationship between Carol Easter and VHT has not been researched for this JO (but one might reasonably expect that Carol Easter likely receives compensation or otherwise benefits, directly or indirectly, from her role assisting with day to day operation of the VHT ticket and T-shirt merchandise sales).
40. The Town of Victory is very remote and unpopulated, in comparison to the vast majority of other Vermont towns. As of the 2010 census the recorded town population was only 62 residents living in ± 43 square miles.
41. VHT has provided the following inventory of current trail “assets” located on CC land, the full details of which have not been verified as a component of this JO:
- 8 Miles of purpose built singletrack mountain bike trail
 - 5 Miles of woods roads and skid trails converted for MTB (and future forestry)
 - 5 Miles of multi-purpose woods roads (suitable for hiking, snowshoeing, hunting, trapping, biking snowmobiling, XC skiing, EMT use and future forestry operations)
 - Umpire Mt. hiking route (a traditional hiking route)
 - 3/4 Mile of V.A.S.T snowmobile trail maintained by Lyndonville V.A.S.T. Chapter
 - 1.5 miles of retired V.A.S.T snowmobile trail along the ancient “Victory Hill Road”
 - Three unimproved primitive campsites in a field
 - Two porta potties
 - One, three foot by three foot map kiosk
42. The CC property is improved with an abandoned farmhouse located along the driveway, which has been reportedly uninhabited since 1953. An unwinterized log cabin and two sheds, also located on CC property, are occupied intermittently by representatives of CC and VHT (McGill and Saligman) who have a principal place of residence elsewhere.
43. The Town of Victory has not adopted permanent zoning and subdivision bylaws.

III. Analysis

RELEVANT LAW

Under 10 VSA § 6081(a) No person shall [...] commence construction on a subdivision or development, or commence development without a permit.

Under Act 250, various types of land uses which qualify as "development" are subject to jurisdiction, and include:

- (ii) *The construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality that has not adopted permanent zoning and subdivision bylaws.*
- (v) *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.*

§6001(3)(A)(ii),(v).

In addition, under the Act 250 Rules, in relevant part:

Rule 2c(3)

"Construction of improvements" means any physical change to a project site except for:

- (a) any activity which is principally for preparation of plans and specifications that may be required and necessary for making application for a permit, such as test wells and pits [...]
- (b) construction for a home occupation as defined in these Rules; or
- (c) construction which the person seeking the exemption demonstrates (i) is de minimis and (ii) will have no potential for significant adverse impact under any of the criteria of 10 V.S.A. § 6086(a)(1) through (10) directly attributable to such construction or to any activity associated with such construction.

Rule 2c(4):

"Commercial purpose" means the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object or service having value.

Rule 2c(5):

"Involved land" includes:

- (a) The entire tract or tracts of land, within a radius of five miles, upon which the construction of improvements for commercial or industrial purposes will occur, and any other tract, within a radius of five miles, to be used as part of the project or where there is a relationship to the tract or tracts upon which the construction of improvements will occur 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 event that a commercial or industrial project is to be completed in stages according to a plan, or is part of a larger undertaking, all land involved in the entire project shall be included for the purpose of determining jurisdiction.
- (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.

Rule 2c(15):

"State, county or municipal purposes" means the construction of improvements which are undertaken by or for the state, county or municipality and which are to be used by the state, county, municipality, or members of the general public.

Rule 2c(17):

"Home occupation," solely for purposes of Rule 2(C)(3), means the use, by a resident, of a minor portion of the residence, including ancillary buildings, for an occupation or business:

(a) that is customary in residential areas; and

(b) that does not have a potential for significant impact under the criteria of 10 V.S.A. §§ 6086(a)(1) through (10).

Rule 71(A):

Jurisdiction Over Trails

(A) When jurisdiction over a trail has been established pursuant to 10 V.S.A. § 6001(3)(A), such jurisdiction shall extend only to the trail corridor and to any area directly or indirectly impacted by the construction, operation or maintenance of the trail corridor. The width of the corridor shall be ten feet unless the Commission determines that circumstances warrant a wider or narrower corridor width.

Related to Rule 2c(15), and whether or not a trail project qualifies as "state, county or municipal purpose" – i.e. public purpose - the Vermont Trails Act (Act) provides in part that [t]he development, operation, and maintenance of the Vermont Trails System is declared to be a public purpose. 10 V.S.A. 10 V.S.A. § 441(c)(maintenance of Vermont Trails System deemed to be a public purpose). *Re: Vermont Association of Snow Travelers (VAST), Declaratory Ruling #430, Findings of Fact, Conclusions of Law, and Order (Altered), Page 9, available at the link below:*

https://nrb.vermont.gov/sites/nrb/files/documents/dr430-fco_0.pdf

D.R. #430, above, also informs concerning the necessity of a plan, to interpret the scope of involved land, for a trail project, pursuant to Rule 2c(5), as follows:

[...] There is no indication that VAST had any sort of master plan to complete the trail improvements in stages, and the Board concludes that the Loop Trail is not incidental to, or part of, the larger Six-Mile Trail project. Accordingly, the area of disturbed land involved in each trail is considered separately [...].

Other Board precedent (Declaratory Ruling #258) distinguishes an exempt repair maintenance activity from an improvement, in the case of town roads (also a linear project). D.R. #258 found, in relevant part, emphasis added, that an upgrade over an historic condition is not repair or routine maintenance. D.R.#258 is available at the link below:

<https://nrb.vermont.gov/sites/nrb/files/documents/dr258-fco.pdf>

D.R. #258 also provides an interesting discussion of factors to consider when determining the scope and land involved in a town road "project". Although town road improvement projects are not fully analogous to recreation trail development, particularly in the context of how some trail organizations typically control and manage trail development activity and land, sometimes across land owned by multiple unrelated private parties (which differs considerably from how a town owns and plans its roads) DR. #258 also concerned a linear transportation project and the following excerpts are noted, emphasis added:

[...] each of the road improvements listed in the Plan **must be examined to determine whether it is a project or is part of a larger project** which meets the definition of development. We will perform this examination with respect to the two sets of 1991 road improvements before us: Ray Hill and Shearer Hill Roads.

[...]

The notion that a project is shown by **common ownership, planning, and funding** is consonant with other cases which have construed the term "project". For example, the Supreme Court upheld a Board decision concerning a housing project in In re Trono Construction 146 Vt. 591(1986). [...]

The Supreme Court concluded that two sets of housing units within a half-mile of each other were properly considered one project. **The following factors were cited as relevant to this determination: common ownership or management, common funding, shared facilities, and contiguity in time of development.**

Lastly, other precedent confirms that donations and contributions, even when not required, establish a "commercial purpose" *In re Baptist Fellowship of Randolph*, 144 Vt. 636, 639 (1984). It is noted that the definition of "commercial purpose" in effect in 1984 when the noted decision was issued, was as follows, which is nearly identical to the definition currently in effect via Act 250 Rule 2c(4):

"Commercial purpose" means the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object having value.

[Former Environmental Board Rule 2(L)].

CENTRAL ISSUES

Concerning the Victory Hill Trail (VHT) Project, including camping and special events, located on CC property, the central issues concern whether or not the Project involves construction of improvements, and a commercial purpose, and thus requires an Act 250 permit as commercial purpose "development" pursuant to (a) 10 VSA § 6001(3)(A)(ii), or is exempt as a state or municipal purpose project involving less than 10 acres of land pursuant to 10 VSA § 6001(3)(A)(v). A related issue concerns whether or not the subject Project trails were part of the Vermont Trails System when construction of improvements occurred.

Concerning the related uses at the Carol Easter property, the central issues concern applicability of 10 VSA § 6001(3)(A)(ii), and also whether or not the use qualifies as a "home occupation" pursuant to Rule 2C(17).

JURISDICTIONAL ANALYSIS – TRAIL SYSTEM AND SPECIAL EVENTS

Commercial Purpose, or State, County or Municipal Purpose?

Concerning whether or not the VHT Project is for a "state, county or municipal purpose", the subject VHT trail system, located on CC land, is separately owned, separately controlled via lease between CC and VHT, and physically separated from KTA land (via land owned by the State of Vermont). Although some discussions with KTA occurred, concerning integration of the VHT trails into the KTA system, and a landowner agreement was signed in around 2011, and a special event is co-hosted by VHT and KTA, these activities and facts do not establish that the VHT Project trails were part of the KTA trail system when CC, through VHS / VHT constructed substantive trail improvements between 2015 and 2018. VHT's own website identified, in April 2018 and April 2019, respectively that

“Kingdom Trails (KT) Passes are NOT valid in Victory”, and “[...] VH is an independent trail network. We are not KT”.

Pursuant to relevant precedent, D.R. #430, and D.R. #258, one must consider whether or not the trails were part of a plan (no such plan has been identified), and factors such as common ownership or management, common funding, shared facilities, and contiguity in time of development, to determine if these were part of a common undertaking. The VHT trails were not mapped on the KTA map, evolved into their own separately controlled trail system through owner-funded construction activities, and do not connect directly to the KTA trail system. The subject VHT Project trails were not part of the KTA trails under a common “project” undertaking, for purpose of interpreting status relative to the Vermont Trail System, when substantive trail improvements occurred between 2015 and 2018. Further, the VHT Project trail system is not itself part of the Vermont Trails System (as of May 1, 2019, its application remained under review), and VHT lacked such status when it undertook construction of improvements, particularly in 2015-2018. For these reasons, pursuant to D.R. #430 and Rule 2c(15), the VHT Project is not for a “state, county or municipal purpose”.

Concerning whether or not the VHT Project is for a “commercial purpose”, since May 2018, the trails Project includes collection of fees from customers, thus encompasses *“provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object or service having value”*. Prior to 2018, benefit and fees were derived from hosting of special events and from donations. Status as a “low profit” or “not-for-profit” entity does not negate the applicability of Rule 2c(4), pursuant to *in re Baptist Fellowship of Randolph*, 144 Vt. 636, 639 (1984). The VHT Project qualifies as “commercial purpose” under Rule 2c(4).

Construction of Improvements?

The Project includes new construction (a physical change to the project site) specifically planned and intended for the VHT recreation trails Project. The conversion of forestry (post-logging) travel corridors, such as skid trails and logging roads, to recreation is a change in use. The recreation trails created or constructed along these post-logging corridors physically connect to the overall VHT trail system, and the impacts from the recreation trail and its users extend throughout all recreation trail locations – both trails created on and along post-logging corridors, and those created along new corridors. For this reason, all trails must be accounted for, including those created on post-logging corridors. This is consistent with a colleague’s jurisdictional opinion (JO # 7-280), wherein the “existing woods road” trail was added together with the length of new trails to determine the “project disturbance area”. The referenced JO # 7-280 is available at the link below:

<https://anrweb.vt.gov/PubDocs/ANR/Planning/JO%207-280/JO%207-280%20and%20COS.pdf>

It is noted that above-referenced JO #7-280 explains how Act 250 jurisdiction is determined when a trail project is part of the Vermont Trail System (VTS), thus qualifies for consideration as “state or municipal purpose”, whereby Act 250 jurisdiction is only implicated when the project physically disturbs 10 acres of land, pursuant to D.R. #430; since the VHT Project is not part of the VTS, jurisdiction is not determined based on the area of physical disturbance or “project disturbance area” as occurred in JO #7-280.

The attached maps, description and photographs illustrate the scope of improvements constructed to create the VHT Project trail system. Between 2009 and 2018, trail development on CC land was completed and includes the following elements: (a) trails created or constructed on top of logging

roads or logging skid trails (b) trails constructed across open land (c) trails constructed through wooded areas, with removal of vegetation where necessary, and earthwork to create the trail surface, and (d) improvements to create interesting and more challenging trail features such as stone masonry jumps or wooden boardwalks.

Work has included erosion repair of former logging roads and logging ski trails. While this erosion repair work is highly commendable, it is also easily distinguishable from the work that occurred to create the VHT recreation trail system, which has encompassed recreation-trail specific improvements such as “single track” trails, jumps and features, and new trail construction along new cleared corridors through wooded areas. Pursuant to D.R. #258, identified above, an upgrade over an historic condition is not repair or routine maintenance. Accordingly, the erosion repair work qualifies as exempt repair maintenance activities (related to exempt logging, where below elevation 2,500 feet), and the improvements constructed to create a recreation trail system do not. The constructed trail system improvements exceed the scope of improvements that otherwise existed for exempt (i.e. logging) purposes, include a “physical change” and are “construction of improvements” as defined by Act 250 Rule 2c(3).

Conclusion

The VHT Project includes the construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality that has not adopted permanent zoning and subdivision bylaws, thus qualifies as “development” pursuant to 10 V.S.A. §6001(3)(A)(ii). An Act 250 permit is required.

Scope of Jurisdiction on CC Land – Rule 71(A)

Act 250 Rule 71(A) identifies the extent of jurisdiction when jurisdiction over a trail occurs, as follows:

When jurisdiction over a trail has been established pursuant to 10 V.S.A. § 6001(3)(A), such jurisdiction shall extend only to the trail corridor and to any area directly or indirectly impacted by the construction, operation or maintenance of the trail corridor. The width of the corridor shall be ten feet unless the Commission determines that circumstances warrant a wider or narrower corridor width.

Pursuant to Rule 71(A) above, jurisdiction is limited to the trail corridor and to “any area directly or indirectly impacted by the construction, operation or maintenance of the trail corridor”.

Referencing Rule 71(A), above, the area of land subject to jurisdiction encompasses the trail corridor, and also the trailheads, parking areas, and areas used for special events related to the trails. Trail-related special events, when and where hosted and occurring on CC land, are directly related to the VHT trail system and its operation, and thus are within the scope of Act 250 jurisdiction via Act 250 Rule 71(A). Therefore, the subset of CC’s land that is directly used, or is directly or indirectly impacted, by hosted special events, is also within the scope of trail-related jurisdiction via Act 250 Rule 71(A), above, and extends beyond a ten foot corridor width in the areas encompassing special event activities such as parking, registration, tents, portable toilets, etc. Should VHT and CC decide that future special events will not occur, and with Act 250 staff verification that any areas previously used for special events are fully reclaimed-restored with no improvements remaining now or in the future (as appears to be very possible), these activities will be considered non-jurisdictional, and may thus be omitted from the scope of a to-be-filed application for permit. It is noted that “temporary” improvements to support hosted special

events (e.g. signage to direct parking, placement of portable toilets, registration tables and tents, etc.) though only in place periodically, constitute an improvement if occurring annually or periodically, in connection with trail operation, and thus fall within the scope of jurisdiction, and inclusion of a to-be-filed application, should VHT and/or CC elect to continue to host special events.

Other Considerations

It remains possible that some of the VHT trails created in the earlier years of VHT trail system development, e.g. prior to 2015, could qualify as “state or municipal purpose” if it is sufficiently demonstrated that these trails were in fact part of the VTS at the time construction occurred (e.g. via inclusion in the KTA system which is itself part of the VTS), and if it is demonstrated that the sum total of “project disturbance area” was below 10 acres. The burden of proof for a person claiming an exemption falls on the person claiming the exemption, and I have not received sufficient demonstration that the subject VHT trails were part of the VTS, at the time of their construction, nor that the involved land “project disturbance area” was less than 10 acres.

In addition, to the extent that some of the existing recreation trails have not involved physical changes, or have involved only “de minimus” physical changes that can be readily fully abandoned / removed / restored (e.g. removal of signage, restoration of vegetation on a “single track” trail corridor created manually with little to no soil disturbance), with good access control and management to prevent future trail use and encroachment, then in my opinion it is reasonable to omit those trails which CC does not wish to retain as future “permanent” recreation trails - providing they are fully abandoned and restored, and subject to further review and verification of any such abandonment and restoration. Having reviewed photographs of some of the trail improvements, and in consideration of the scope of work and disturbance to date, it will not be possible or reasonable to reclaim or restore all of the trail improvements to thus void the necessity to obtain an Act 250 permit. Act 250 jurisdiction has been triggered via 10 V.S.A. 6001(3)(A)(ii), and a permit is required.

To again summarize, based on the evidence considered as part of this jurisdictional determination, Exhibits 001 to 019, to which reference is made, all of the VHT trails are subject to Act 250 jurisdiction pursuant to 10 V.S.A. 6001(3)(A)(ii). However, if additional evidence is presented, the exact scope of the specific VHT trails subject to jurisdiction can be further considered and potentially refined. At a minimum, the trails constructed or improved in 2015-2018, using the ± \$100,000 of funds provided to VHT by CC, clearly are subject to Act 250 jurisdiction and require a permit 10 V.S.A. 6001(3)(A)(ii).

Concerning VHT’s pending application for inclusion in the Vermont Trails System (VTS), if VHT is admitted into the VTS, in the future, e.g. as an outcome of its pending application, it is my opinion that such a future VTS status (if obtained) could not be applied retroactively to improvements constructed when this status did not exist, thereby reversing or negating the conclusion herein - that specific improvement were constructed for a commercial purpose thus require a permit pursuant to 10 V.S.A. 6001(3)(A)(ii).

Next Steps

I would be happy to meet with you to further review the specific trail history and mapping and mutually agree on the exact specific mapped trails to include in a to-be-filed application, that you wish to retain, as we have discussed. I would be happy to meet with you to assist with preparation of the required application. To this end, the environmental resource inventory which has already been

completed in connection with other ongoing and planned stewardship, related to the pending conservation easement, should be very helpful.

JURISDICTIONAL ANALYSIS – PRIMITIVE CAMPING ACTIVITY

The 3 primitive campsites have not encompassed any clearing or construction of improvements – only a stone campfire ring which can be readily removed from the surface of the ground, simply by scattering the stones. Although the campsites are related to the recreation trail network, and campsite guests will in many cases also use the recreation trails on the property, there may be some campsite guests who visit simply to experience primitive camping, or to support activities unrelated to the recreation trails (nature photographer? wildlife viewing?). Since the primitive campsites have not encompassed any construction of improvements, they do not qualify as development pursuant to 10 VSA § 6001(3)(A)(ii). If the campsites are improved to encompass constructed improvements or features such as graveled driveways or roadways, tent platforms or cabins, toilet or bathroom structures, fencing, picnic tables, landscaping, etc., then such camping facilities will trigger Act 250 jurisdiction via 10 VSA § 6001(3)(A)(ii). Please contact the Act 250 Coordinator for an updated jurisdictional determination prior to commencing construction of any campsite improvements.

JURISDICTIONAL ANALYSIS – CAROL EASTER PROPERTY

Is the project a development?

The seasonal improvements installed at the Easter residence are very modest in total scope and all are fully removable, whereby the use could be restored to a strictly residential use if so desired by landowner Carol Easter, leaving no permanent improvements or modification to the land. The “temporary” improvements (e.g. signage, small tent, T-shirt displays) though only in place seasonally and periodically, constitute an improvement when occurring annually or periodically. Although the enterprise depicted in the submitted and reviewed photos presently resembles nothing more than the scope of activity that might occur at, for example, a road-side lemonade stand or simple farm-stand, one must consider the remote rural location and other factors such as the potential for a considerable increase in traffic (as has occurred at other recreation trail systems in Vermont).

The Project includes collection of fees from customers, thus qualifies as “commercial purpose” under Rule 2c(4). The Project is a “development” subject to Act 250 jurisdiction pursuant to §6001(3)(A)(ii) unless the construction of improvements qualifies for one of the two exceptions noted in Rule 2c(3), i.e:

- construction for a home occupation as defined in these Rules; or
- construction which the person seeking the exemption demonstrates (i) is de minimis and (ii) will have no potential for significant adverse impact under any of the criteria of 10 V.S.A. § 6086(a)(1) through (10) directly attributable to such construction or to any activity associated with such construction.

Both of the above exceptions are analyzed, in turn, below.

Home occupation - Rule 2c(17):

In order to qualify as a “home occupation”,

(i) the resident must use only a minor portion of the residence, including ancillary buildings, for the occupation or business;

and

(ii) the occupation or business must be customary in residential areas;

and

(iii) the occupation or business may not have a potential for significant impact under the criteria of 10 V.S.A. §§ 6086(a)(1) through (10).

Regarding factor (i), the Project involves only a minor portion of the residence, therefore this factor is satisfied.

Regarding factor (ii), the activity is not customary in residential areas, particularly this very remote rural area, therefore this factor is not satisfied. It is noted that the VHT trail system welcomed approximately 3000 trail system users in 2018, although not all stop at the Easter residence to purchase a ticket, the traffic attributable to these visitors significantly exceeds that which would otherwise occur at this location, in a town with a 2010 population of only 62 people.

Regarding factor (iii), the potential for significant impact under the criteria of 10 V.S.A. §§ 6086(a)(1) through (10) has been considered. Two criteria have been identified having potential for significant impact, Criterion 5 traffic and Criterion 8 aesthetics, noting that the activity is highly visible from a public road and the increased traffic, at this very remote rural residential location, generates increased noise, dust, etc. For these reasons factor (iii) is not satisfied.

Based on the above analysis, the Project is not a “home occupation” as defined in Rule 2c(17).

The Project will next be evaluated to determine if the second exception in Rule 2c(3) applies, i.e. whether or not the Project is (i) de minimis and (ii) will have no potential for significant adverse impact under any of the criteria of 10 V.S.A. § 6086(a)(1) through (10) directly attributable to such construction or to any activity associated with such construction.

Regarding factor (i), Webster’s dictionary defines “de minimis” as “lacking significance or importance: so minor as to merit disregard”. The overall very small scope of the planned construction for the Project involves only very minor improvements, or “de minimus”. However, factor (ii) requires consideration of the potential for significant adverse impact under any of the criteria of 10 V.S.A. § 6086(a)(1) through (10). As outlined above under the analysis for the “home occupation”, Rule 2c(17), the Project has potential for significant adverse impact under two of the criteria of 10 V.S.A. §§ 6086(a)(1) through (10) and thus does not satisfy factor (ii) of the second Rule 2c(3) exception.

As outlined above, the Project does not qualify for either of the exceptions to Rule 2c(3), the Project encompasses improvements for a commercial purpose pursuant to Rule 2c(4), and thus qualifies as a “development” pursuant to §6001(3)(A)(ii).

Next steps

The de minimus and temporary nature of the improvements at the Carol Easter property are such that they can be easily and fully removed, and the impacted area completely returned to the residential condition which existed prior to the installation of the very modest improvements (tent, small signage, etc.) For this reason, if Carol Easter elects to cease the commercial land use, and remove all of the related improvements, in my opinion that Act 250 jurisdiction will not apply. If Carol Easter instead elects to retain the activity and improvements, even seasonally, an Act 250 permit is required. It is requested that Carol Easter please communicate her intentions in writing, to the Act 250 office, on or before May 30, 2019. I would be happy to meet with Carol Easter to assist her with preparation of an Act 250 application, noting that my role as Coordinator is to assist all parties.

IV. Conclusion

The identified uses on land owned by Conservations, Collaboratives, LLC and by Carol Easter are commercial purpose "development" pursuant to §6001(3)(A)(ii), within the limitations and parameters detailed in the analysis above, and an Act 250 permit(s) is required.

V. Right of Appeal

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(B). Reconsideration requests are governed by Act 250 Rule 3(B) and should be directed to the district coordinator at the above address. As of May 31, 2016, with the passage of Act 150, Act 250 Rule 3(C) (Reconsideration by the Board) is no longer in effect. Instead, any appeal of this decision must be filed with the Superior Court, Environmental Division (32 Cherry Street, 2nd Floor, Ste. 303, Burlington, VT 05401) within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (VRECP). The appellant must file with the Notice of Appeal the entry fee required by 32 V.S.A. § 1431 which is \$295.00. The appellant also must serve a copy of the Notice of Appeal on the Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

Anyone should please feel free to contact me with any questions.

Sincerely,



Kirsten Sultan, Coordinator
District #7 Environmental Commission
Natural Resources Board