



NATURAL RESOURCES BOARD
District 5 Environmental Commission
10 Baldwin Street
Montpelier, Vermont 05633-3201

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Re: Jurisdictional Opinion 5-39
Alan Goldman Jurisdictional Opinion Request
City of Montpelier's Tax Increment Financing Plan (TIF)

Dear Attorneys Gillies and Low:

This letter constitutes a jurisdictional opinion pursuant to Act 250 Rule 3 on behalf of your client Alan Goldman as to whether the City of Montpelier's municipal redevelopment plan, consisting of projects located mostly within Montpelier's Tax Increment Financing (TIF) District constitutes a development pursuant to 10 V.S.A. § 6001(3)(A)(v) because the projects involve the physical disturbance of more than ten acres such that an Act 250 permit is required for the TIF.

FACTS

Facts and documents relied upon in making this determination include your October 13, 2018 jurisdictional opinion request; the City of Montpelier's position in response, filed on November 1, 2018; supplemental comments filed by your office on November 9, 2018 in reply to the City's position; the "Montpelier TIF District Plan"; and the State of Vermont Economic Progress Council's "Authorization to Utilize Incremental Municipal Property Tax and Incremental State Education Property Tax Revenue for a Tax Increment Financing District, City of Montpelier Final, Determination, Exclusions, Conditions and Obligations"; dated August 30, 2018.

1. The City of Montpelier has proposed numerous municipal construction projects, all of which are in various stages of planning and development. Some projects have completed designs and are either currently under construction, such as the transit center on Taylor Street, or approved for construction, such as the bike path from Barre Street to Gallison Hill; and the downtown bike path). Other projects have completed design and are entering the permitting review stage, such as the Capital Plaza/Hampton Inn and parking garage. Still others are in early planning stages. Existing buildings have been demolished preparatory to securing funding to proceed to proposed design. For instance, the existing structures located at the



Mowatt Property and on the corner of Governor Aiken Avenue and State Street were recently demolished. (Exhibit 1)

2. The City proposes to fund these municipal projects via tax increment financing, or TIF, a mechanism a Vermont town may employ for diverting the anticipated increase in TIF District tax revenue accruing through property development to finance public improvements like streets, sidewalks, and stormwater management systems.
3. The Montpelier TIF District Financing Plan was adopted by the City Council on May 23, 2018. (Exhibit 2) To be approved, a TIF District Plan must include “a schedule for public improvements and projected private development to occur as a result of the improvements” and a map of the boundaries of the TIF District.
4. The City of Montpelier’s TIF District Plan includes 148 properties on approximately 182 acres. (Exhibits 2 and 3) The TIF Plan identified “potential development opportunities” within the proposed TIF boundary and assessed and ranked them on a three -tier analysis “based on impact, planning stage, financing, and design.” (Exhibit 1 at 23) A map entitled “Montpelier TIF District” identifies both public infrastructure projects and private infrastructure projects is included in Exhibit 2.
5. The City’s TIF District Plan was approved by the Vermont Economic Progress Council (VEPC) on September 27, 2018. (Exhibit 3)
6. Mr. Goldman contends that “while the City of Montpelier is rolling out and developing these projects in a piecemeal fashion, it is in reality a planned-out, single, unified public infrastructure development project.” Mr. Goldman contends that “This is a substantial, citywide municipal redevelopment plan that the City has laid out, sought financing for, and treated as a single, unified project. Together these projects involve disturbed land well in excess of ten acres.” A list of proposed municipal projects Mr. Goldman included in his jurisdictional opinion request is found in Exhibit 1, pages 2-7. Not all of the municipal infrastructure projects Mr. Goldman identified would be located within the TIF and financed with TIF funding, such as the Mowatt Properties and Caledonia Spirits. (Exhibits 4 and 5)
7. As a result of his review of public records, Mr. Goldman compiled the acreages of 10 municipal projects, and calculated that together they would “disturb at least 15.47 acres and tying in another 6.8 acres project recently permitted by Act 250” (the bike path from Granit Street to Gallison Hill). Mr. Goldman concluded that as the total acreages of these municipal projects exceeds the 10 acres jurisdictional trigger, an Act 250 permit review for the “large, multi-phase development is required pursuant to 10 V.S.A. § 6001(3)(A)(v).” (Exhibits 1, 6 and 7)



8. The City of Montpelier disagrees, arguing that “all of the projects in the City’s TIF District are mere proposals. Voter approval is required before the City can incur debt or use tax increment funds to develop municipal projects within its TIF District.” The City further argues that “the municipal projects are conceptual proposals, which are not sufficiently certain, coordinated and interconnected that they constitute a common plan or larger undertaking. Act 250 jurisdiction is not applicable.” (Exhibit 4)
9. In its TIF application, the City assessed and ranked the proposed municipal infrastructure projects on a three-tier analysis based on impact, planning stage, financing and design. Tier 1 projects include “the two most likely projects to proceed in the near term.” Tier 2 projects include properties which have owner-investor interest.”, and “can possibly move forward independent of other development initiatives, but will certainly benefit from the economic momentum, which will accrue with the Tier 1 projects.” Tier 3 properties include “buildings and land identified within a planned collective vision for Montpelier.” (Exhibit 2 at 23)
10. Some of the proposed municipal projects Mr. Goldman included are ranked in the TIF under Tiers 2 and 3, including the Vermont Mutual site, the Barre Street reconstruction Phases 1 and 2, the Barre/Main Street intersection, and the brownfields remediation. (Exhibit 2) According to the TIF, projects included in “Tiers 2 and 3 are speculative.” The TIF also states that a Tier 3 ranked project “has the potential for redevelopment in a ten-year window.” (Exhibit 2 at 23) The TIF further states that “The City has included many projects in this TIF Financing Plan that may never come to fruition or may not be structured exactly as modeled in this Plan.” (Exhibit 2 at 19)
11. VEPC’s approval of the Montpelier’s TIF District Financing Plan included the condition that “the City of Montpelier seek any available and appropriate non-TIF funding sources [state and federal grants] to offset TIF revenue.” (Exhibit 3 at 12 and 27) VECP’s approval also requires that “should the cost of the Main/Barre Street intersection project increase significantly, Montpelier will submit a substantial change request to the Council following the Vermont Statute and TIF Rule in place at the time of the change.” (Exhibit 3 at 13)
12. VECP’s approval concludes as follows: “The City of Montpelier must seek a vote on each instance of debt to be financed with incremental property tax revenues and provide notice to voters in accordance with the requirements of 24 VSA § 1894(h) and (i).”

DISCUSSION AND CONCLUSIONS

10 V.S.A. § 6001(3)(A)(v) in relevant part defines development as

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.

Act 250 Rule 2(C)(5)(b) defines involved land as

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.

Mr. Goldman contends that the City's municipal projects, much of which are "set out in Montpelier's TIF application.", constitute a "planned out, single, unified public infrastructure development project...that the City has laid out, sought financing for, and treated as a single, unified project. Together these projects involve disturbed land well in excess of ten acres." Mr. Goldman concluded that the municipal infrastructure development project meets the definition of development under 10 V.S.A. § 6001(3)(A)(v).

The City of Montpelier argues that the projects in the City's TIF are "conceptual proposals, which are not sufficiently certain, coordinated and interconnected that they constitute a common plan or larger undertaking." The City noted that the TIF states that the City "has included many projects in this TIF Financing Plan that may never come to fruition or may not be structured exactly as modeled in this Plan."

In determining whether a "plan" constitutes "development", thus necessitating an Act 250 permit, the Vermont Supreme Court held that: "development activity [must] have achieved a finality of design and a readiness[for] performance." *In re Agency of Administration, State Buildings Division*, 141 Vt.68,81 (1982).

It seems a matter of elementary logic that in order for [Act 250] to have any meaning whatsoever, the 'plan' which triggers it must be sufficiently firm and detailed to give the notice it contemplates and which is constitutionally required, and which is also essential to effect its purposes.... Vermont's land use and development law demands an interpretation of 'plan' which carries forward the statutory requirement of activity so settled in intention and purpose that it can be called ready to commence.

Id. at 82.



The former Environmental Board held that for municipal and state projects, “involved land” means only land that is physically disturbed by the project. *Re: Town of Williston road Improvements, Declaratory Ruling #381 (1/13/00)*. The Board further held that the term “incident to the use” applies only to land which is physically changed or altered because of a proposed project.” *Re: Town of Windsor, Declaratory Ruling #255 (7/30/92)*

In considering the facts set forth above in conjunction with Court’s definition of “plan,” the record in this matter demonstrates that only three of the municipal projects identified by Mr. Goldman would constitute development pursuant to 10 V.S.A. § 6001(3)(A)(v). These projects are: the Transit Center and Confluence Park (1.16 acres), the Parking Garage (1.4 acres), and the 24’ wide public access road to be constructed and maintained by the City on its 0.95 acres located in the vicinity of the Caledonia Spirits project. The plans depict the public access road as disturbing approximately a third of the 0.95 acres tract, or approximately 0.31 acres which is consistent with the City’s estimate. It is concluded that these projects are sufficiently finalized to meet the Vermont Supreme Court’s definition of “plan.” Together, these projects total 2.87 acres. (The submittals reference future stormwater infrastructure to be constructed on this lot, however there are no design plans available for review. Thus, it has not been demonstrated that the entire 0.95 acres can be included in the acreages to be developed, as Mr. Goldman asserted.)

Although Mr. Goldman would include the acreages associated with the bike paths (Granite Street to Gallison Hill and downtown) in the total acreages of a municipal infrastructure development project, it is concluded it would be problematic procedurally to reach back and now include acreage associated with a previously permitted municipal project in a new review of an overall municipal infrastructure development plan, particularly as at the time the bike path was under review, none of the other municipal projects described herein were finalized to the extent necessary to constitute a “plan.”

Furthermore, the so-called “downtown” section of the bike path, also previously approved, is currently undergoing construction. Therefore, neither section of the bike path can properly be included in the acreage calculation.

Based on the forgoing, the record supports the City’s position that the Montpelier TIF does not constitute a “plan.” Absent a demonstration that most of Montpelier’s municipal infrastructure projects are “so settled in intention and purpose that [they] can be called ready to commence.” most of the acreages associated with TIF projects cannot be included as a part of a unified municipal infrastructure project. Simply because a city has an approved TIF, does not necessarily mean that the TIF constitutes a development pursuant to 10 V.S.A. § 6001(3)(A)(v). Likewise, an individual TIF funded project that does not constitute a development now, once finalized, may be subject to Act 250 jurisdiction. The lack of sufficient details regarding most of the municipal infrastructure projects precludes a conclusion that the statutory definition of municipal development in 10 V.S.A. § 6001(3)(A)(5) is met.



Accordingly, it is concluded that the construction of improvements for municipal purposes which meet the definition of development consistent with 10 V.S.A. § 6001 (3) (A)(v) totals 2.87 acres, which is insufficient to trigger Act 250 jurisdiction. Therefore, the City of Montpelier TIF District Plan does not require an Act 250 permit. Jurisdiction over individual municipal infrastructure projects will be revisited when projects are finalized.

Sincerely,



Susan Baird, District Coordinator
District 5 Environmental Commission

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.



CERTIFICATE OF SERVICE

I hereby certify that I sent a copy of the foregoing **JURISDICTIONAL OPINION 5-39 ALAN GOLDMAN – CITY OF MONTPELIER’S TAX INCREMENT FINANCING PLAN (TIF)** by email to those addresses listed below, on this 23rd day of January 2019:

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BY /s/ Lori Grenier
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