STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A. CHAPTER 151

RE: G. S. Rlodgett
Shelhurne, Vermont

Declaratory Ruling #122

This is a declaratory ruling regarding the applicability of 10 V.S.A., Chapter 151 (Act 250) to the construction of an industrial facility to be located in Shelburne; Vermont. A petition for this ruling was filed with the Environmental Board on September 24, 1980 by the G.S. Rlodgett Co., the owner of the site. The Environmental Board heard evidence and oral argument on this matter on November 12, 1980, and received additional information from the petitioner on December 8, 1980. The only party participating in these proceedings was the petitioner, G.S. Blodgett Company, represented by Frederick M. Reed, Esq. The Town of Shelburne was present, represented by Margaret Elmer, Town Planner.

Findings of Fact

1. Petitioner G.S. Rlodgett Co. owns two adjacent tracts of land in Shelburne, Vermont . The first parcel, consisting of 9.01 acres, was acquired by Blodgett in 1974. It is the site of an industrial building of approximately 54,000 square feet, utilized by Blodgett for storage and parts fabrication in the manufacture of commercial ovens. The second tract of land, originally consisting of 45 acres, was purchased by Elodgett in 1978. A parcel of approximately 5 acres, located at the west end of that tract, has been conveyed to the Town of Shelburne, leaving approximately 40 acres of this tract in Blodgett's ownership. The Town of Shelburne has adopted permanent zoning and subdivision bylaws; the land involved in this petition is zoned for industrial use.

2. Petitioner proposes to construct a second industrial building on the 40-acre parcel, immediately adjacent to, but not connected to the existing manufacturing facility. This facility, which will also be used in petitioner's manufacturing process, will cover approximately 150,000 square feet. We find that the land to be used directly in the construction and operation of this facility is in excess of ten acres. This finding is based upon the following facts:

   a. Petitioner's witnesses testified that the manufacturing plant, together with the parking areas and stormwater treatment area serving the facility, would directly occupy 9.43 acres. The land area involved in this

measurement was outlined by petitioner's architect on a plan of the site (Exhibit #6).1/

b. Inspection 0f Exhibit #6 reveals several aspects of this development that are integral to the construction project but which were not included in the petitioner's acreage calculations:

(1) The roadway that will be constructed by petitioner to serve this facility is clearly shown on Exhibit #6 but was not included in the petitioner's acreage calculation. Petitioner's architect testified that this roadway will be approximately 950 feet in length; the paved surface will be 24 to 30 feet wide. The road will be upgraded to town standards, including provision for a 60-foot right-of-way, when plans are developed by Rlodgett for the development of the western part of the 40-acre tract. The 60-foot right-of-way associated with this 950-foot long road will encompass in excess of 1.3 acres.

(2 The railroad siding that will be constructed by petitioner to serve this facility is clearly shown on Exhibit #6 but was not included in the petitioner's acreage calculations. Approximately 350 feet of this siding will be located on Blodgett's 9.01-acre parcel. "he 50-foot right-of-way associated with this new construction will encompass four-tenths of an acre in addition to the acreage calculated by the petitioner as being involved in this project.

(3 The development of this manufacturing facility will involve considerable landscaping to improve the attractiveness of the project and to satisfy the requirements of the permit granted Blodgett by the Town of Shelburne. Exhibit #6 indicates that landscaping and screening will be added along at least 700' of the length of the new access road Additional plantings are shown along the access road serving the existing manufacturing facility, and to the north of that facility. Finally, Exhibit #6 shows an area denoted, "Existing dense trees & brush to remain" as part of this project. Testimony of Blodgett's witnesses and the Shelburn Town Planner reveals that this area is dedicated to the project as part of the Town's approval of the manufacturing facility, because this area is

1/ Although the area outlined by Mr. Lamphere, the petitioner's -architect, scaled from Exhibit #6, appears to encompass closer to 11 acres, for the purposes of this decision, we have utilize the 9.43 acre figure supplied by the petitioner. The potential difference does not alter the outcome of the decision.

needed and required to screen the new building from view of the surrounding area. Altogether, the areas to be landscaped or retained as screening as part of this project encompass at least two acres not included by the petitioner in its calculation of land involved in the development.

c. In summary, then, the land directly utilized in construction or incidental to the use of this facility is, at a minimum, 13.1 acres..

The construction of the new manufacturing facility is part, of a plan to develop a much larger area of the petitioner's 40-acre tract. Although the petitioner has not yet defined its specific intentions for the development of the western part of the tract, its representatives maintained throughout these proceedings that it intended to develop the land for a commercial use, and we find that such development is both planned and reasonably likely. The plan for this project (Exhibit #6) shows that the access road will be built with turnouts to accommodate future development in the western part of the tract. The location, value and physical characteristics of this land make it attractive for commercial development; we find no inherent commercial or physical limitation to the development of the remaining 27 acres .2/

Conclusions of Law

1. The jurisdiction of Act 250 extends to the "construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes." 10 V.S.A. §6001(3). Petitioner here proposes to construct a major industrial facility on a tract of land encompassing 40 acres, far in excess of the 10-acre threshold. Because the entire tract of land upon which the development occurs must be counted for the purpose of determining jurisdiction, we conclude that this project requires a permit pursuant to 10 V.S.A. §6081(a). Board Rule 2(A)(2), restating this jurisdiction, clearly states, "(i)n determining the amount of

2/ We note that we find petitioner's arithmetic puzzling. out of a 40-acre tract, it claims only 9.43 acres involved in the manufacturing facility. But in testimony and written submissions, it repeatedly refers to the "remainder" of the tract as encompassing 27 acres. This would leave 3.57 acres unaccounted for.

land, the area of the entire tract or tracts of involved land owned or controlled by a person will be used."

In drawing this conclusion,' we are cognizant of the admonition of the Supreme Court that this Board does not have the authority to extend its jurisdiction beyond that granted in the statute. Committee to Save the Bishop's House v. Medical Center Hospital, 137 Vt.142 (1979). We believe that the language of the Act is clear -- jurisdiction over commercial and industrial projects is stated in terms of the acreage of each tract of involved land. The tract upon which the construction of improvements occurs is obviously "involved"; therefore, the acreage of the tract is to be counted for the purpose of determining jurisdiction. The Court's decision in Bishop's House is consistent with this conclusion. In that case, the Court invalidated the Board's practice of automatically including as "involved land" any tract in common ownership within'a radius of five miles, whether or not the tract was one upon which the construction of improvements would occur. The Court did not question, however, whether the acreage of the tract upon which the construction of improvements actually would occur should be counted for jurisdictional purposes. See Bishop's House at 150.

There are compelling practical reasons to support this interpretation of the language of the Act as well. To begin with, we believe that the legislature foresaw the enormous practical and administrative difficulties of employing a jurisdictional dividing line that would somehow separate a single tract of land into three categories: land that will literally be built upon; land that is functionally "involved" in the development because of an important relationship comprehended by the criteria of the Act; and remaining land in the same tract that is not at all related to the proposed development. If such a rule were to be implemented, the jurisdictional process itself would overwhelm the administrative process. The Environmental Board and the District Commissions would be forced to convene extensive fact-finding hearings merely to discover whether the jurisdiction of the Act would apply in a given case. These hearings would necessarily explore the merits of the proposed project just to reach the question of how much of the tract of land being built upon is involved in the project. Their findings might well require, and could well turn on the results of detailed, and expensive, surveys of the square footage of land affected or utilized by the project.

The facts of the present petition reveal how burdensome this result would be. Petitioner claimed that the project involves only 9.43 acres out of a parcel of 40 acres. Upon detailed questioning, the Board discovered that this figure

excluded the access road and landscaping areas, located on the same tract of land, and obviously directly related to the construction of the facility. If we accepted petitioner's argument, the square footage of these areas and many other factors -- e.g. proposed lawns, and drainage areas -- would have to be calculated precisely in order to answer the jurisdictional question. This is not an easy task, For example, in this case, the petitioner's architect indicated an area of involved land for this project on the site plan; this area may encompass anywhere- from 9 to 11 acres. Precise calculation would require much more thorough analysis and perhaps even an on-site survey. We do not believe that the legislature intended to introduce this high degree of uncertainty and cost into the determination of acreage jurisdiction under Act 250. Jurisdiction turns on the acreage of the tract of land upon which construction occurs; this "bright line" rule is administrable, reasonable, and it is reasonably well crafted to serve the purposes of the Act. We believe that the legislature intended to make this choice when it enacted the jurisdictional language that this Board employs.

The facts of the present case also highlight a second practical reason for basing acreage jurisdiction on the entire acreage of the tract that is built upon: the acreage within the tract but not immediately built upon is available for additional development or expansion of the initial project. Petitioner admits that it has plans for future development of the remaining 27 acres on this site. A jurisdictional procedure that did not consider the entire tract of land to be built upon would invite developers to avoid the permit process by segmenting their projects, claiming each segment to be separable. As this Board has recently observed, such a result is contrary to the purposes of Act 250. See In re State Buildings Division, D.R. #121 (October, 29,1980).

2. Because we have found that the land directly utilized in construction of, or incidental to the use of, this facility is, at a minimum, 13.1 acres, we find it unnecessary to determine whether the 9.01-acre tract and the existing Blodgett facility are "involved" in this development for the purposes of determining jurisdiction over the project. We believe this to be an open question on the state of the evidence put before this Board, We note that the access road serving the existing facility will be widened with the construction of the new facility; that the new and existing access roads are physically interconnected; that the railroad sidings serving these facilities will be interconnected' that the siding serving the new facility will be built in part upon the 9.01 acre tract; and that significant areas

of landscaping and screening, required by the construction of the new facility, will be located on the 9.01-acre tract. These relationships are direct and physical, and they raise the likelihood of increased impacts upon the values sought to be protected by Act 250 due to the close relationship of these two facilities. Because we have found that more than ten acres of land -is involved directly in the development of the new facility, it is unnecessary for the Board to determine whether the 9.01-acre tract is "involved land" within the meaning of that term as defined by the Supreme Court in Bishop's House. Were this not our finding, we would find it necessary to inquire further, so as to address fully the issues identified by the Court in that case.

3. We now address petitioner's contention that this project is not subject to Act 250 jurisdiction because it does not represent a large scale change in land utilization. Based upon its interpretation of the decision in Bishop's House, petitioner argues that "if a project does not represent a large-scale change in land utilization, then Act 250 will not apply in any event (in towns having both zoning and subdivision) even though the ten-acre limit may be exceeded." Petitioner's Memorandum of Law (November 10, 1980) at 3. We find no merit in this argument. First, we would observe that the construction of a major industrial facility on a vacant parcel is a change in land utilization even though the zoning ordinance may have permitted the development for many years. More importantly, the jurisdiction of Act 250 is established by statute. The position advanced by petitioner would elevate the explanatory language of the Supreme Court, interpreting statutory language, above the plain meaning of the statutory language itself. By definition, if a tract of land in excess of ten acres is involved in this development, it is subject to the jurisdiction of Act 250 because the development presents the potential for a large scale change in land utilization. We have found that land in excess of ten acres is directly involved in this development. We have also found that the construction of improvements for commercial or industrial purposes will occur on a tract of land in excess of ten acres. The project is therefore subject to the permit requirements of Act 250.

Dated at Montpelier, Vermont this 18th day of May, 1981

ENVIRONMENTAL BOARD

Members participating
in this decision:
Ferdinand Bongartz
Dwight E. Burnham, Sr.
Melvin H. Carter
Leonard U. Wilson

By Richard H. Cowart
Richard H. Cowart
Executive Officer