

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

RE: Agency of Administration Windsor Correctional Facility
Ed Weed, Chief Engineer Declaratory Ruling #151
Division of State Buildings Findings of Fact, Conclusions
Montpelier, Vermont 05602 of Law and Order

This decision pertains to a Petition for Declaratory Ruling filed on April 6, 1984 by the Vermont Agency of Administration, Division of State Buildings, requesting a determination concerning the applicability of 10 V.S.A., Chapter 151 (Act 250) to the construction of a sewer line connecting the Windsor Correctional Facility ("the Facility") to the Windsor, Vermont municipal sewage treatment plant.

The Environmental Board ("the Board") convened a public hearing in this matter on April 25, 1984 in Montpelier, Vermont, Chairman Margaret P. Garland presiding. The only party present at the hearing was the Agency of Administration ("the Agency"), represented by Michael Donovan and William Griffin, Esq. The Board recessed the hearing on April 25, pending a review of the record and deliberation. On May 9, the Board determined the record complete and recessed the hearing. This matter is now ready for decision; The Board's Findings of Fact and Conclusions of Law are based upon the record developed at the hearing.

A. ISSUES IN THE DECLARATORY RULING

On February 14, 1984 the Agency requested an advisory opinion from the Board's Executive Officer concerning the applicability of Act 250 to the installation of a sewer line to serve the Facility. On March 1, 1984 an advisory opinion was issued concluding that the sewer line constituted a 'substantial change' to the pre-existing Facility, requiring a permit pursuant to 10 V.S.A. §6081(b). On April 4, a "Notice of Appeal" was filed by the Agency, followed on April 12, by the filing of a Petition for Declaratory Ruling. Finally, on April 23, 1984, a 'Prehearing Statement and Memorandum of Law' was filed setting forth the following issues:

1. Does the proposed sewer connector project constitute a change in an exempted development?
2. If there is a change, is it substantial?
3. Is the significant impact language of Rule 2(G) consistent with the substantial change language of section 6081?
4. Does Rule 2(G) adequately notify a reasonably prudent person as to whether or not he will need an Act 250 permit for additional development on an exempted property?

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5. **May** already exempted property be included in the calculation-of involved land under section **6001**?

6. Will the sewer connection to the Correctional Facility substantially increase the impact on the values sought to be protected by Act **250**?

B. FINDINGS OF 'FACT

1. The Facility, located in Windsor, Vermont, is operated by the Department of Corrections as a minimum security correctional center. While the Facility sits on a 900 acre parcel of State owned land, only a 16 acre portion of that parcel is allocated to Facility operations. Exhibit 1. Within a perimeter security fence surrounding the 16 acre Facility site are prisoner dorms, buildings associated with the prison farm, administrative space, and industrial facilities managed by Vermont Institutional Industries.
2. The Facility existed long before June 1, 1970. The current prisoner population is approximately 60 and staff consists of approximately 39 employees. The total staff and resident population does not exceed 125.
3. In 1977, the subsurface sewage disposal system serving the Facility failed, causing the surfacing of effluent which may have reached Hubbard Brook, adjacent to the Facility on the North. A replacement subsurface system was then installed, consisting of two pairs of leach fields located somewhat farther from Hubbard Brook than the original system. However, an outbreak of surfacing effluent was again experienced in the Spring of 1983, causing the Agency to consider alternative means of sewage disposal.
4. The Agency now proposes to connect the Facility to the Town of Windsor sewage treatment plant through the installation of approximately 13,000' of 8" gravity sewer. The line would start at an existing pump station on the Facility grounds and run approximately 1450' feet adjacent to the Facility's access road to the County Road (State Aid Highway #1). The line would proceed within the County Road right-of-way an additional two miles and would be connected to an existing pump station maintained by the Town.
Exhibit 2.
5. Approximately six acres of land are directly associated with installation of the sewer line within a 20' wide right-of-way. The line will cross Hubbard Brook and two feeder streams at six locations and at one of those crossings a Stream Alteration Permit will be required because of stream disturbance (excavation and filling). Construction will occur over a four to five month period

during which traffic along the County Road will be disrupted, although the finished road surface after construction will be an improvement **over** the existing surface.

6. The Facility generates a maximum of 15,000 gallons per day of domestic effluent, well within the existing reserve capacity of the Windsor sewage treatment plant. See Exhibit 4. The Facility's industrial workshops generate non-domestic wastes including solvents used in the manufacture of vehicle license plates and preservatives used in treating wood products.
7. The average capacity of the 8" line will be in excess of 300,000 GPD and the maximum discharge from the Facility is currently 15,000 GPD. The line will be owned and maintained by the Town upon completion. The sewer line will travel through rural, substantially undeveloped lands. While some of those lands are not developable by virtue of site limitations, other areas may experience increased development pressure after the installation of the line because of its availability for new sewer hook-ups.
8. Bedrock may be encountered in the process of installing the line. Exhibit 3. Removal of bedrock will be performed by blasting. Excavated bedrock and other materials will be removed for disposal off-site at a location within the project contractor's discretion. Groundwater may also be encountered during the course of construction.

C. CONCLUSIONS OF LAW

1. 10 V.S.A. §6081(a) requires that a land use permit be secured before the commencement of "development." The term "development" is defined by 10 V.S.A. §6001(3) to mean, inter alia, "the construction of improvements on a tract of land involving more than 10 acres which is to be used for municipal or State purposes."

We have found that only six acres of land is involved in the construction of the sewer line. See Finding #5. Therefore, construction of the sewer line does not, in and of itself, constitute commencement of "development" as that term is defined in 10 V.S.A. §6001(3).

2. 10 V.S.A. §6081(b) sets forth an exception to the rule stated in §6081(a) that a permit must be secured prior to commencement of development: any development commenced prior to June 1, 1970 which was completed by March 1, 1971 does not require a land use permit. However, §6081(b) concludes by stating:

Subsection (a) of this section shall apply to any substantial change in such excepted ... development.

We conclude that, if the Agency was today proposing to construct the Facility with its assorted components on a 16 acre parcel of land, that construction would be a "development" as defined by 10 V.S.A. §6001(3). See, for example, Woodside Juvenile Rehabilitation Center, Declaratory Ruling 139, January 26, 1983. However, we previously found that the Facility was constructed long before June 1, 1970. See Finding #2. Therefore, Act 250 does not apply to the continuing occupancy and use of the pre-existing Facility by virtue of §6081(b).

However, any "substantial change" to that pre-existing Facility is subject to the requirements of Act 250 by virtue of the final sentence of §6081(b). "Development" is defined by 10 V.S.A. §6001(3) through seven distinct clauses describing seven classes of construction. We see no basis in the statute or in logic for distinguishing between pre-existing State projects and, for example, pre-existing commercial or industrial projects. We conclude that the statutory purposes for establishing the land use permit review process as identified in the statement of Legislative findings and declaration of intent accompanying the enactment of Act 250 (see Act No. 250 of 1969 (Adj. Sess.), §1) and the preservation of values identified in the ten criteria of 10 V.S.A. §6086, argue for a uniform interpretation of the term "development" as that word is used in 10 V.S.A. 56081. See In re Agency-of Administration, 141 Vt. 68, 77 (1982); Berlin-Montpelier Intermunicipal Sewage Project, Declaratory Ruling 142, March 3, 1983.

3. The term "substantial change" has not been defined by the Legislature. However, Environmental Board Rule 2(G) defines the term as follows:

"Substantial change" means any change in a 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).

This definition requires us to make two determinations: first, whether a "change" has occurred and, second, whether that change may result in significant impact under any of the ten criteria; See Clifford's Loam and Gravel, Inc., Declaratory Ruling #90, November 6, 1978.

There is little doubt that the construction of a new sewer line, in excess of two miles in length, is a change to the Facility. The Agency argues that the sewer line is merely a

replacement of the existing, failed leach fields and, therefore, no change to the pre-existing development is proposed. We conceptually agree that repair, renovation or in-kind replacement of an existing facility may not constitute a "change." If, for example, the Agency proposed to replace the existing leach fields with an on-site system of similar design and scope, we would agree that no "change" would occur. However, the replacement of the leach fields with a different sewage disposal system, involving extensive new lands, qualifies as a "change" to the Facility.

We further conclude that the sewer line project may have a significant impact with respect to a number of different criteria:

a) Criterion 1(B) - Waste Disposal: substantial amounts of excavated material may be generated by this project but no specific plans have been developed for the healthful disposal of that waste material. Excavation may also reach groundwaters within the construction corridor and, without adequate protection, waste materials could well enter those groundwaters. See Finding #8. The disposal of industrial wastes generated by the Facility is an additional cause for concern under this Criterion. See Finding #6.

b) Criterion 1(E) - Streams: The sewer line will cross streams at six different locations and one such crossing will **require** excavation and fill work directly in a stream bed. See Finding #5.

c) Criterion 4 - Erosion: We assume that the Agency will insist upon the use of proper erosion management techniques. However, a failure to properly install or maintain those techniques could result in adverse impacts, especially in view of the project's proximity to Hubbard Brook. See Exhibits #2 and #3.

d) Criterion 5 - Transportation: While the Agency expects an improvement in the quality of the County Road upon completion of the project, it also conceded that the project will have a significant impact on automobile traffic during the period of construction. See Finding #5.

e) Criterion 9(A) - Impact of Growth: Upon completion, the sewer line will have the capacity to serve and will be available to new developments along the sewer line corridor, raising the possibility of significant growth impact issues. See Finding #7.

We, therefore, conclude that the sewer line proposed by the Agency is a substantial change to the pre-existing Facility.

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4. We are not persuaded by the Agency's argument that we **must** first find 10 acres directly associated with the sewer line installation before that project qualifies as a "substantial change." We conclude that once it has been determined that the pre-existing Facility meets all Act 250 jurisdictional requirements (except the requirement that the project not be completed on or before March 1, 1971), analysis shifts to the components of Rule 2(G), and the amount of acreage involved in the change itself is not determinative.

We also do not agree that every change to a pre-existing State project will require an Act 250 permit. This Board has issued 54 declaratory rulings pertaining to the "substantial change" issue. We found no substantial change in 36 of those cases, many of which involved significant construction activities.

Finally, we continue to believe that Rule 2(G) is a reasonable interpretation of the phrase "substantial change." In construing this provision we must bear in mind the nature of the review process created by Act 250. Because the Legislature directed the review of developments and subdivisions only under the specific criteria set forth in 10 V.S.A. §6086, it is logical to assume that only those changes to pre-existing projects with an impact on the ten criteria should be subject to scrutiny. This interpretation of "substantial change" is consistent with the quite similar analysis which the Supreme Court applied in interpreting the term "involved land." See Committee to Save Bishop's House v. Vermont Medical Center, 137 Vt. 142, 153 (1979).

D. ORDER

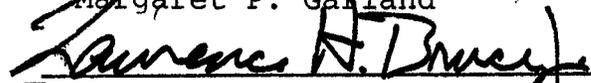
For the reasons stated above, the Board concludes that the proposed installation of a sewer line by the Agency to serve the Windsor Correctional Facility constitutes a "substantial change" to the pre-existing development. A land use permit must, therefore, be secured prior to commencement of construction on this project.

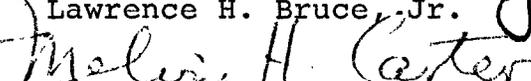
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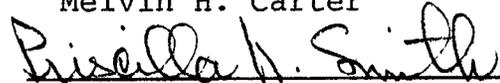
FOR THE ENVIRONMENTAL BOARD

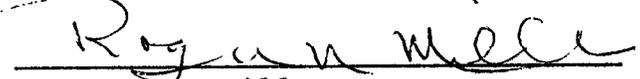
Dissenting:

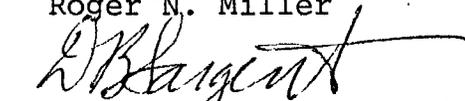

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