

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

RE: Capital Heights Associates Findings of Fact, Conclusions
 and Snowfall, Inc. of Law and Order
 c/o William J. Ryan, Esq. Declaratory Ruling #167
 Ryan and Ryan
 P.O. Box 967
 Montpelier, Vermont 05602

This decision pertains to a Petition for Declaratory Ruling filed with the Environmental Board ("the Board") on February 1, 1985, by Robert B. Stewart seeking a determination as to the applicability of 10 V.S.A., Chapter 151 (Act 250) to road construction and logging activity adjacent to **Pinewood** Road in Montpelier, Vermont.

On February 5, 1985, the Board notified the parties of its intent to designate the Chairman to act as administrative hearing officer in this matter pursuant to Board Rule 41 and 3 V.S.A. § 811. Having received no objection, a public hearing was convened on February 22, 1985, in Montpelier, Vermont, with Darby Bradley acting as hearing officer. The following participated as interested parties at the hearing:

Petitioners Robert and Irene Stewart;
Stephen **McArthur**, an adjoining property owner;
Capital Heights Associates by James A. Palmisano, Esq.

The hearing was recessed on February 22, pending a view of the site, preparation of this Proposal for Decision, a review of the record and deliberation by the full Board. A view of the site was conducted immediately following the recess. No party having requested the opportunity to present oral argument to the full Board, the Board determined the record complete and adjourned the hearing on March 27. This matter is now ready for decision. The following findings of fact and conclusions of law are based upon the record developed at the hearing.

I. ISSUES RAISED BY THE APPEAL

The issue before the Environmental Board is whether certain road improvements and logging activities which were conducted on a 280-acre tract of land in Montpelier, Vermont, during the winters of 1984 and 1985 fall within, or are exempt from, Act 250 jurisdiction.

The Petitioner Robert Stewart claims that the construction of an access road into the property and the harvesting of timber constitute "commencement of construction" and "construction of improvements," requiring Act 250 review. Stewart argues that Capital has constructed improvements on the land according to an intention to develop the land. He further argues that Capital has constructed permanent improvements to the land which have substantial impact on a number of Act 250 criteria.

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It is Capital's position that all activity on the land is logging work, and there is no relationship between the cutting and any development which might occur if and when the land is sold.

II. FINDINGS OF FACT

1. Capital Heights Associates is a partnership which has, since the 1970s, owned a 280-acre parcel of land located westerly of **Pinewood** Road in Montpelier, Vermont. The parcel is below 2,500 foot elevation.
2. In the summer of 1983, one of Capital's partners, William J. Ryan, engaged a professional forester, Robert Hoffman, to evaluate the timber stand on the parcel and to mark trees for cutting. Hoffman determined that the stand should be harvested on a selective basis to leave a healthy stand of growing stock. Trees were marked for removal based on their maturity, vigor and risk of death. The testimony indicated that the management plan was consistent with good forestry practices.
3. Capital hired a professional logger, Merrill **Legare**, to conduct the timber harvest. In January, 1984, Mr. **Legare** built a 150 foot access road into the property. Mr. **McArthur**, whose land is adjacent to Capital's property, allowed the access road to cross one corner of his land for temporary logging purposes, in order to reduce the visual impact of the road. The construction work for the road took only a short time and entailed cutting some trees, bulldozing stumps and boulders and smoothing the land. No permanent roadbed was constructed. However, crushed stone was applied on several occasions during the logging operations to enable trucks to negotiate the steep grade in snowy conditions. The cleared area for the road is approximately 30 feet wide in the widest spot; the travel way is only 12-14 feet wide.
4. The access road ends at a landing area, where the logs are piled after they are cut. This area, which is approximately one acre in size, is the only portion of the tract which was to be **clearcut** under Mr. Hoffman's harvesting plan.
5. Timber harvesting first began in the late winter of 1984. The cutting was discontinued after the spring thaw, and did not begin again until the following winter. Mr. **Legare** logs only during the winter months because the landing area is very swampy when not frozen and because he runs a truck farm business which keeps him occupied during the summer. As of the date of the hearing, approximately one-third of the timber harvest had been completed. Mr. **Legare**

anticipated that the completion of the logging would require two more winters.

6. The President of Snowfall, Inc. ("Snowfall"), Jack Heaton, first contacted William Ryan about a potential purchase of the tract in May 1984. On July 11, 1984, Mr. Ryan sent Snowfall a signed Purchase Option for the property. Snowfall signed the Option on September 7, 1984, along with an Addendum allowing Snowfall to enter the parcel for purposes of testing and surveying. Mr. Ryan agreed to the Addendum on September 11.
7. Shortly thereafter, Snowfall filed a Vermont Intergovernmental Consultation System Application For Review (A-95 Review), in which it stated financial information for a proposed construction project on the tract. During the late fall of 1984, Snowfall undertook some soil testing and survey work on the property. Test pits were dug and borings taken with a backhoe over a two-day period. A number of stakes were placed in the ground by the survey crews. There is evidence that Snowfall is interested in building a residential development on the property. No applications for local or State permits had been filed by Snowfall as of the date of the hearing.
8. There was no evidence that the plans for, or the conduct of the logging operation, or the size or location of the access road and landing area, were altered in any manner after the Purchase Option and Addendum were signed.

III. CONCLUSIONS OF LAW

10 V.S.A. § 6081(a) requires that a permit be secured prior to the "commencement of development." 10 V.S.A. § 6001(3) expressly exempts from the definition of "development" construction for farming, logging or forestry purposes below the elevation of 2,500 feet. Under certain circumstances, the cutting of trees and construction of logging roads may constitute "commencement of construction" of a development, rather than for logging purposes. Board Rule 2(C) defines "commencement of construction" to mean:

(T)he construction of the first improvement on the land or to any structure or facility located on the land including work preparatory to construction such as clearing, the staking out or use of a **right-of-way** or in any way incidental to altering the land according to a plan or intention to improve or to divide land by sale, lease, partition, or otherwise transfer an interest in the land.

We conclude that Capital's activities on the 280-acre tract are being conducted as a bona fide logging operation, rather than commencement of construction, and are completely unrelated to any plans which Snowfall may be preparing for the future development of the property. The logging was initiated in the summer of 1983, nine months before Snowfall contacted Capital about the potential purchase of the land. Although Snowfall has indicated an intention to develop the land if and when they buy it, no creditable evidence was presented to show that the timber harvest presently being carried out is intended to prepare the ground for the development. The tract is being selectively cut, according to good forestry management practices. The access road was constructed solely for the purpose of hauling logs from the landing area, and we do not consider it a permanent improvement to the land. However, we note that if the road is ever used or improved incidental to a plan to develop or subdivide the land, it will then be subject to Act 250 jurisdiction. See Re: Agency of Environmental Conservation, Declaratory Ruling #83 issued October 13, 1977 (conversion of logging road to subdivision access road requires Act 250 review).

Petitioner also argues that the activity on the tract constitutes "construction of improvements," which is defined in Board Rule 2(D) to mean any action on a project site which initiates development. Even if the Board were to conclude that the land is a "project site," Rule 2(D) specifically exempts from permit requirements "activity which is principally for preparation of plans and specifications that may be required and necessary for making application for a permit, ... provided that no permanent improvements to the land will be constructed and no substantial impact on any of the 10 criteria will result." Although Snowfall employees have done some testing and surveying on the tract, no permanent improvements have been constructed and no substantial impact on the ten criteria have resulted in connection therewith.

If, at some point in the future, Snowfall exercises its option to purchase the tract and commences construction on the land, it may be subject to Act 250 review if the size of the proposed development were to reach jurisdictional thresholds. However, we conclude that the work Capital is doing on the tract at this time is a bona fide logging operation, and is exempt from Act 250.

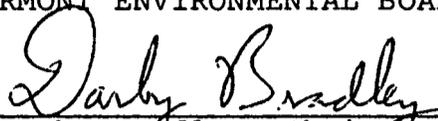
IV. ORDER

Because we have concluded that the activity on Capital's land is a logging operation, it does not require a permit.

Dated at Montpelier, Vermont this 27th day of March, 1985.

VERMONT ENVIRONMENTAL BOARD

By:



Darby Bradley, Chairman
Ferdinand Bongartz
Lawrence H. Bruce, Jr.
Melvin H. Carter
Warren M. Cone