

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

RE: Spaulding's Fuels by Findings of Fact, Conclusions
Porter E. Noble, Esq. of Law and Order
Abatiell & Abatiell Declaratory Ruling #172
Fifth Floor Gryphon Building
Rutland, VT 05701

This decision pertains to an advisory opinion request filed with the Environmental Board ("the Board") on August 8, 1985, on behalf of Sherman V. Allen which the Board elected to treat as a declaratory ruling petition. The Petition seeks a determination of the applicability of 10 V.S.A., Chapter 151 (Act 250) to the operation of a commercial truck stop by William Spaulding.

On September 30, the Board notified the parties of its intention to **hear this** matter through an administrative hearing officer pursuant to Board Rule ("**EBR**") 41 and 3 V.S.A. § 811. There having been no objection to the use of this procedure, the Board's Chairman, acting as hearing officer, convened a public hearing on October 18 in **Rutland**, Vermont. The following participated as parties in the hearing:

Petitioner Sherman V. Allen and Sherman V. Allen, Inc. by
Theodore A. **Parisi**, Esq.;
William Spaulding, d/b/a Spaulding's Fuels by Porter E.
Noble, Esq.

The hearing was recessed on October 18; and the hearing officer conducted a visit of the project site. The matter was recessed pending the preparation of a Proposed Decision and a review of the record and deliberation by the full Board. A preliminary **proposed decision** was issued by the hearing officer on **December 4, 1985**, and by memorandum dated January 23, 1986, the hearing officer requested the Agency of Environmental Conservation to perform an evaluation of the site from a hazardous waste perspective. That written evaluation was filed on March 12, and forwarded to all parties on March 21. Petitioner requested that the proceedings be reconvened to take additional evidence on the fuel storage issue. On April 30, 1986, the hearing officer reconvened the hearing, took additional evidence with regard to potential impacts arising from fuel storage, and recessed the hearing. A final Proposed Decision was issued May 5, 1986. No party having requested the opportunity to present oral argument to the full Board, the Board conducted a deliberative session in this matter on June 4, 1986. On that date the Board determined the record complete and adjourned the matter. This matter is now ready for decision. The following findings of fact and conclusions of law are based upon the record presented at the hearing.

ER#172
6/10/86

I. ISSUES IN THE APPEAL

The two parties agree that the commercial operation acquired and operated by the Spauldings existed in some form prior to June 1, 1970. They, therefore, agree that the sole issue for our determination is whether or not the pre-existing operation has been "substantially changed" within the meaning of EBR 2(G) and now requires a permit as directed by the final sentence of 10 V.S.A. § 6081(b).

II. FINDINGS OF FACT

1. On October 1, 1984, William Spaulding acquired from a Mr. Bird a parcel of land, slightly more than one acre in size, located on the east side of Vermont Route 22A in Fair Haven, Vermont. The parcel is especially well situated for the commercial sale of fuel because Route 22A is a major truck route and the site is approximately 1,000 feet south of the U.S. Route 4 interchange in Fair Haven.
 2. Prior to his acquisition of the project site, Spaulding operated a fuel oil distribution business in Bomoseen. Through an informal arrangement with the previous owner, in November, 1983, Mr. Spaulding installed two above-ground 20,000 gallon fuel oil storage tanks on the Route 22A site. The tanks were placed on the south side of the Bird property and were surrounded with an earthen dike. Mr. Spaulding then began servicing his fuel oil customers from the Bird site.
 3. While the premises were owned by Mr. Bird and at some time before 1963, a two-bay, concrete block garage structure was erected and gasoline storage tanks and pumps were installed. The garage was continually used by Mr. Bird for commercial purposes until the premises were sold to Mr. Spaulding.
 4. Under Mr. Bird's ownership, the Route 22A premises were used for the following purposes: occasional sale of new and used cars (Mr. Bird was a low-volume dealer of Chevrolets), automotive repair, sale of used car parts, storage of numerous junk cars and salvaged parts, and occasional gasoline sales. Mr. Bird employed up to four full-time employees and occasionally hired high school students to work at the repair shop. The premises were generally unkempt during Mr. Bird's tenure, with cars (operating and non-operating) and car parts strewn throughout the premises.
 5. Since acquiring the premises, Mr. Spaulding has performed the following improvements:
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- a) junk cars and parts have been removed, and the exterior of the building has been painted;
 - b) the exterior of the foundation has been filled to permit vehicles to drive through repair bays;
 - c) an earth mover was retained to bring in fill and gravel, the site was regraded and levelled; this involved the addition of 1,500 yards of fill material and 1" of gravel on parking areas;
 - d) 13 employees work for Spaulding, four of which are part time and two of which are truckers who are usually off-premises making oil deliveries; an average of seven to eight employees are on site during operating hours;
 - e) the portion of the site used for the parking of vehicles has been enlarged;
 - f) 62,000 gallons of fuel storage capacity has been added: the twin 20,000 gallon fuel oil storage tanks, a 20,000 gallon diesel fuel storage tank, and a 2,000 gallon kerosene storage tank;
 - g) the premises are now operated as a diesel fuel truck stop in addition to the sale of gasoline and car service;
 - h) the volume of traffic entering and leaving the premises has increased;
 - i) pre-packaged convenience food items are sold;
 - j) lights were added to the ends of the garage building and a new sign with exterior lighting was added to the front facade.
6. The regrading of the site was performed in a manner designed to channel water to the sides and rear of the site. Drainage patterns in the front of the premises were not altered and surface water run-off may, on occasion, flow over a sidewalk in the northwest corner of the site and run toward a catch basin on Route 22A, north of the site. Should this catch basin clog, storm run-off could, theoretically, continue to flow northward and eventually cross to the west side of Route 22A and enter the premises owned by Sherman V. Allen, Inc. Most stormwater run-off flows to the rear of the Spaulding parcel and into an adjacent field.
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7. Spaulding has not altered interior plumbing at the premises. The building is served by a municipal water supply.
 8. Bird installed an on-site sewage disposal system approximately four years ago, consisting of a 1,000 gallon septic tank, a 1,000 gallon dry well and a leach field located to the rear of the premises. Cars are occasionally parked over the septic tank area. Spaulding has not experienced, nor is he aware of any, operational problems with the septic system.
 9. While traffic volume has increased due to changes in the garage's operations, site distances both north and south of the access drives are substantial. Sufficient space has been provided on-site to allow safe ingress and egress of trucks and cars.
 10. The aesthetics of the site have been substantially improved by the Spauldings' removal of junk materials and cars, painting of the building and the general tidiness of the operation. Exterior lighting does not project substantially beyond the garage premises.
 11. The diesel tank installed behind the garage was placed in a 12' deep hole which had one foot of standing water in it. Twenty yards of crushed stone were placed in the hole to elevate the tank above the groundwater before fill was added. The diesel tank is of single-wall welded steel design. Spaulding uses the daily inventory control method to detect leakage and the diesel system has an automatic pump shut-off when leakage in the piping system is detected. However, the tank has no internal protection, no secondary containment system and no groundwater monitor program is in place.
 12. Until a fuel leak occurs on the site, the impact of a hazardous waste spill cannot be predicted with any degree of certainty. However, statistically speaking, 50% of all below-ground tank installations fail (either tank leak or piping leak) within the first five years of use and the probability of leakage increases to nearly 100% after 20 years of use. Once a subsurface leak occurs, petroleum products tend to be persistent and renovation of area soils and groundwater would be a difficult task.
 13. The above-ground tanks installed by Spaulding are of less concern because any significant leakage would be visible upon regular inspection, and an earthen dike has been constructed around the base of the tanks which is apparently lined with impervious material. However, these tanks are old and exhibit welded patches and plugged fittings.
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14. While Spaulding and its employees apparently exercise due caution in the dispensing, storage and monitoring of the fuel supply, in view of Findings #12 and #13, above, we find that the installation of the below-ground diesel and kerosene tanks and, to a lesser degree, the above-ground fuel oil tanks may result in a significant impact under Criterion 1, water pollution and waste disposal.
15. Fair Haven does not have both permanent zoning and permanent subdivision regulations.

III. CONCLUSIONS OF LAW

Sherman V. Allen, Inc. qualifies as an "interested party" for the purposes of EBR 3 and is, therefore, entitled to request a ruling from this Board with respect to the applicability of Act 250. Allen owns both the Fair Haven Grand Union southwest of Spaulding Fuels and the Fair Haven Truck Stop northwest of Spaulding. The Fair Haven Truck Stop could potentially be affected by the Spaulding operation in the event stormwater flows cross Route 22A. Both operations could be impacted if the Spaulding operations cause unreasonable congestion or unsafe conditions with respect to traffic.

10 V.S.A. § 6081(b) exempts from the land use permit requirement of § 6081(a) any "development ... which has been commenced prior to June 1, 1970, if the construction will be completed prior to March 1, 1971." However, the final sentence of § 6081(b) provides that the land use permit requirement of § 6081(a) "shall apply to any substantial change in such exempted subdivision or development." The term "substantial change" is not defined by statute; however, EBR 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).

In applying Rule 2(G) in previous cases, the Board has concluded that two elements must be satisfied:

- 1) There must be some physical change to the premises involving the construction of improvements. See EBR **2(D)**.
 - 2) The new construction must raise the possibility of impact on one or more of the criteria identified in 10 V.S.A. § 6086(a).
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Re: Productions, Ltd., Declaratory Ruling #168; Re: Windsor Correctional Center, Declaratory Ruling #151.

.. If **Spaulding proposed** to construct the garage facility today, an Act 250 permit would be required: the project would involve the construction of improvements for a commercial purpose on more than one acre of land in a municipality which does not have both permanent zoning and permanent subdivision regulations. See 10 V.S.A. § 6001(3) and EBR 2(A) (2). However, because the garage was constructed long prior to June 1, 1970, the project is exempt from Act 250 permit requirements unless it has been substantially changed.

The first prong of the "substantial change" test has been satisfied. Substantial earth moving has occurred and fuel storage tanks with a total capacity of 62,000 gallons have been added. These improvements have been accompanied by a change in the nature of the operation: the premises now constitute a truck stop with significantly more activity than was experienced when occupied by Mr. Bird.

However, with one exception, the Board finds no potentially significant impacts caused by the new construction. The movement of surface water off-site is unlikely and, if it does occur, run-off is likely to discharge primarily into the existing Route 22A catch basin on the east side of the road. There has been no change in plumbing facilities and there is no evidence to support an inference that the existing water supply and sewage disposal systems are not adequate. While the number of vehicles (especially trucks) entering the site has increased, this increase will not in all likelihood have a significant impact on Route 22A traffic safety or congestion: there are adequate site distances on Route 22A and there is sufficient room on the site for vehicles to maneuver. The Spauldings' efforts have significantly improved the aesthetics of the site.

However, the storage of 62,000 gallons of fuel oil, diesel fuel and kerosene in a medium density residential and commercial area raises the potential for significant impacts with regard to waste disposal and impact on water supplies. We have found that on a statistical basis, 50% of all underground storage tanks fail (by way of some degree of tank or piping leak) within the first five years of use and virtually all leak after 20 years' use. The Spaulding installation involves only a limited monitoring capability and the above-ground tanks, while readily available to inspection shows signs of age. Finally, we have found that, once discharged underground, petroleum products are extremely difficult to recover. Based upon these findings, we conclude that installation of the storage tanks may result in a significant impact on Criterion 1 concerns pertaining to water quality and waste disposal. We, therefore, conclude that installation of the tanks constitutes a "substantial change" to the pre-existing development within the meaning of EBR 2(G).

In reaching this conclusion, we offer two cautionary notes:

1) While installation of these tanks raises potential Criterion 1 impacts as **an issue**, we offer no opinion concerning whether or not the current installation meets the substantive requirements of Criterion 1. The latter issue must be left to the Commission's determination during a land use permit application review proceeding.

2) The sole "substantial change" we identify is the addition of fuel storage tanks. Other changes described herein are deemed insubstantial because, in our opinion, they are not accompanied by the requisite potential impacts on any of the ten criteria. Therefore, the Commission's proceedings should be narrowly confined to a review of the fuel tank installation and any discernible impacts cognizable under the ten criteria of § 6086(a) arising therefrom. *

IV. ORDER

In view of our conclusion that installation of fuel storage tanks by Spaulding's Fuels constitutes a "substantial change" to the pre-existing commercial enterprise, Spaulding's Fuels must secure a land use permit pursuant to 10 V.S.A. Section 6081. On or before July 1, 1986, Spaulding's Fuels shall submit a complete land use permit application to the District #1 Environmental Commission and shall diligently pursue issuance of that permit.

Dated at Montpelier, Vermont this 10th day of June, 1986.

VERMONT ENVIRONMENTAL BOARD



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