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

RE: City of Montpelier c/o Ryan D. Cotton, City Manager City Hall Main Street Montpelier, VT 05602	Findings of Fact and Conclusions of Law and Order Declaratory Ruling #190
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On June 25, 1987, the Environmental Board issued Declaratory Ruling #190 in which it concluded that the City of Montpelier did not need to obtain a land use permit pursuant to 10 V.S.A. Chapter 151 for certain proposed improvements to its water and sewer system (hereinafter "the Project"). Based upon the information presented to the Board by the City, the Board found that the improvements did not constitute a "development" within the meaning of 10 V.S.A. § 6001(3) or a "substantial change" within the meaning of 10 V.S.A. § 6081(b) and Board Rule 2(G).

On May 9, 1988, Stephen R. Dale, a resident of Montpelier who lives adjacent to the Project, submitted a letter to the Board in which he claimed that the City was constructing an above-ground pump station instead of a "subterranean" pump station as the City had represented to the Board. Mr. Dale requested that the Board reopen the declaratory ruling proceedings and require the City to cease construction. On May 27, the Board issued a memorandum of decision that ordered a public hearing to determine whether the Project is being built in substantial conformance with the plans and facts represented to the Board in the prior proceedings.

On June 23, an administrative hearing panel of the Board convened a public hearing. The following parties participated in the hearing:

City of Montpelier by J. Paul Giuliani, Esq.
Stephen R. Dale
Bernard Percy

After the hearing was recessed, the panel visited the site of the pump station and drove up Terrace Street to the site of the proposed water tower.

The hearing panel issued a proposed decision on July 7 and the parties were given an opportunity to file written comments and present oral argument before the full Board on July 14. On July 14, a representative of the City requested a continuance of the oral argument. Oral argument was rescheduled for August 18 and held on that date. Following a review of the proposed decision, the evidence

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presented, and the written objections and oral argument submitted by the parties, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based exclusively upon the record developed at the hearing, including the site visit. To the extent the Board agreed with and found necessary any findings proposed by the parties, they have been incorporated herein; otherwise, said requests to find are hereby denied.

I. ISSUES IN THE DECLARATORY RULING

The issue to be decided is whether the construction of approximately 9200 feet of water line, one-half mile of sewer line, a booster pump station, and a 2-million gallon water storage tank along and in the vicinity of Terrace Street in Montpelier requires an Act 250 permit either as a "development" pursuant to 10 V.S.A. § 6001(3) or as a "substantial change" to a pre-existing development pursuant to 10 V.S.A. § 6081(b) and Board Rule 2(G). Mr. Dale claims that a substantial change has occurred by virtue of the construction of a 14 foot x 22 foot pump station which has an undue adverse effect upon the aesthetics of the area because of the visual impact and the noise from the pumps. Mr. Percy believes that more than 10 acres are involved in the Project. The City contends that the pump station is "subterranean" as previously represented to the Board and that the entire Project has been constructed in substantial conformance with the original plans.

II. FINDINGS OF FACT

1. On April 14, 1987, the City of Montpelier filed a petition for a declaratory ruling with the Environmental Board regarding whether certain improvements proposed to the City's water and sewer system require an Act 250 permit.
2. On May 14, 1987, the City filed a statement of facts and on May 21, 1987, the Chairman of the Board convened a public hearing. Oral argument before the full Board was held on June 10 and on June 25 the Board issued a declaratory ruling. The Declaratory Ruling concluded that no Act 250 permit was required because the Project was neither a "development" nor a "substantial change." The record developed during the original proceedings and the Declaratory Ruling are incorporated into this decision by reference.

3. The Board concluded that the Project did not constitute "development" according to 10 V.S.A. § 6001(3) because fewer than 10 acres of land were involved.
4. The Board concluded that the Project did not constitute a "substantial change" within the meaning of 10 V.S.A. § 6081(b) and Board Rule 2(G) because while physical changes to a pre-existing development would occur, those changes would not result in significant impacts.
5. During the May 21, 1987 hearing and in the City's Statement of Facts (Exhibit #3), the City made the following representations to the Board:
 - a. All the new facilities will be located below the surface of the ground, except for the water storage tank. The pump station was variously characterized as being "subterranean," "underground," and "buried in the ground."
 - b. Terrace Street will be excavated to a depth of six feet, the pipes installed, and the roadway back-filled. The pavement will be disrupted for a minimum width of six to seven feet.
 - c. The construction of one-half mile of new sewer line on upper Terrace Street will be for the purpose of allowing approximately 15 existing homes that have experienced problems with their on-site septic systems to connect to the City's municipal treatment plant.
 - d. The City has no immediate plans to upgrade the upper 1800 feet of existing sewer line from Dairy Lane approximately to the Joslin Farm and would not allow a major development on the upper section of Terrace Street to connect to the municipal sewer unless that section were first upgraded.
 - e. **Only** small portions of the pavement (100-200 feet) will be opened at one time.
 - f. Construction will commence in late June (1987) and will be completed in 90 to 120 days.
 - g. Land directly involved in the Project **as** originally planned includes the water storage tank site of 2.16 acres, the water transmission main of 4.22 acres (based upon a **20-foot** right of way), and the booster pump station site of 0.5 **acres**, for a total of 6.88 acres.

6. The construction plans for the Project were not made a part of the record in the original proceedings.
7. The City intended to have the water line go in a straight line. During construction, the City realized it had to criss-cross the road several times to keep the required 10 foot distance between the water and sewer lines.
8. New **12-inch** pipes, with interconnections to the existing water mains, were installed on Jordan and Crestview Streets. Interconnections to the existing mains were installed on Walker Terrace and Dairy Lane. A total of 800 to 900 feet of additional trench was dug and an additional 12-inch pipe was installed.
9. Installation of utility lines normally is done in trenches along the sides of the travelled way. During construction, the construction equipment destroyed the road so the City decided to totally rebuild approximately 6000 feet of Terrace Street, beginning at Redstone.
10. The 14 foot x 22 foot concrete pump station was constructed immediately adjacent to the entrance of Redstone, an historic building owned by the State in which the Secretary of State is located. Seven and a half acres of tall spruce and pine woods and the remains of a formal garden surround the building. Since 1985 the Vermont Youth Conservation Corps has worked to restore the old pathways and clear the gardens to create a public park. The pump station is located in the middle of the entrance to the Redstone trail system. The Redstone property is on the National Register of Historic Sites.
11. The location of the pump station--while still on Redstone property--**is** presently being installed closer to the property of Stephen and Wendy Dale than the City had originally intended. The pump station is located 35 feet from the garage owned by the Dales, the corner of which is located on State property, and is approximately 50 feet from the Dales' house. A deck on their house overlooks the pump station. The pump station is also visible from Terrace Street.
12. The floor of the pump station is three feet above the **100-year** flood elevation. The elevation of the floor was set so that any water that leaks onto the floor will drain by gravity, as required by the Vermont Department of Health.

13. The two 1750 rpm vertical turbine pumps in the pump station will be located inside and at the bottom of a concrete chamber. Each pump can pump 800 gallons per minute of water. Only one pump will operate at a time. The pumps can only operate between midnight and 5:00 a.m. when flows are at base level.
14. The pump station will be covered with soil and landscaped. It will be insulated and will not need to be heated.
15. The ground elevation prior to construction of the pump station ranged from 628 feet to 632 feet. After construction is completed, the elevation at the top of the entrance hatch will be 637 feet. Two 14 inch curved vent pipes rise several feet above that.
16. A one-third horse power air exchanger and a dehumidifier is located in a 12 inch square box in the pump station.
17. The site of the pump was formerly a grassy area that sloped gently from the Dales' house to the Redstone building. The area around Redstone is a quiet residential neighborhood.
18. A water tower was constructed off of Terrace Street. Because ledge was encountered during excavation for the water tower footings, the footings were raised one foot which caused the dome height to be raised one foot.
19. The Board takes official notice that on April 19, 1988, Land Use Permit #5W0961 was issued to Thomas Comstock for a 10-lot subdivision on Upper Terrace Street in Montpelier. The subdivision will use municipal sewer and water.
20. The width of Terrace Street that is involved in construction ranges from approximately 20 feet in several places up to more than 40 feet. The average width appears to be approximately 30 feet. The access road to the water tower site appears to be at least 40 feet wide. The Redstone parking lot has been used as a staging area for trucks and construction equipment. Stockpiles of soil have been placed in a number of locations next to Terrace Street. Construction has taken place in segments far greater than 200 feet.
21. As of August 18, 1988, construction was substantially complete.

III. CONCLUSIONS OF LAW

In Declaratory Ruling #190, the Board concluded that the City's water and sewer Project did not constitute either "development" or a "substantial change" to a pre-existing development as defined in Act 250.

In order to constitute "development," at least 10 acres of land would have to be directly involved in the Project. According to the Board's observations, the Project likely involves more than 10 acres of land. The actual width of the area of construction along Terrace Street ranges from 25 feet in a few places up to 40 feet in others. An area of the Redstone property is used as a staging area for trucks and machinery, and a number of stockpiles of dirt are situated on the side of the road. The width of the access road to the water tower is approximately 40 feet along its entire length. It is therefore likely that more than 10 acres of land are involved in this Project. However, since the Board concludes that there has been a substantial change to a pre-existing development, Act 250 jurisdiction is asserted on that basis so it is not necessary to decide whether this Project involves more than 10 acres of land.

If a development existed prior to 1970, it is exempted from the requirement to obtain a permit, pursuant to 10 V.S.A. § 6081(b), unless there is a "substantial change" to the development. In Declaratory Ruling #190, the Board found that if the City's entire water and sewer system were being built today, it would constitute "development" because there are more than 10 acres of land in the City's water and sewer system. In following its usual analysis to determine whether a substantial change has occurred, the Board first determined that physical changes would occur, thereby satisfying the first step in the analysis. The Board then concluded that there would not be a substantial change because the physical changes would not result in a "significant impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a) (1) through (a) (10)."

According to the City, construction was to take a maximum of 120 days, with only 100 to 200 feet of line opened up at one time. Important to the Board's decision was the City's representation that construction of the water and sewer lines would take place within 6 to 7 foot-wide trenches along the travelled way and in short segments, so that disruption from construction would be minimal. During construction, however, the City decided to reconstruct 6,000 feet of Terrace Street. As a consequence, the pavement has been removed from the road for a long distance, and construction has taken place in segments far greater than 200 feet.

The Board also relied upon the City's claim that the pump station would be buried under the ground and that the only above-ground (and therefore visible) structure would be the water tower. Instead, the City is building the pump station in a different location and above the ground.

The Board also found that only existing residences would be permitted to connect to the sewer system until the 1800 feet of sewer line between Dairy Lane and the Joslin Farm is upgraded. In April, 1988, however, a land use permit was issued for a **10-lot** subdivision that will hook up to the municipal sewer line.

In deciding whether Act 250 jurisdiction applies to any given project, the appropriate consideration is whether the potential for significant impact is raised. This consideration does not require an in-depth review of possible impacts, but simply a determination that significant impacts may occur. Once jurisdiction is asserted, the District **Commission** scrutinizes a proposed project to determine the actual impacts and either denies the application or imposes conditions to mitigate the impacts.

Several potential impacts have been raised by the Project as it is being constructed that the Board did not consider in its original ruling because the Project as constructed is different from the Project as represented to the Board in several significant respects. The magnitude of the disruption along Terrace Street is greater because 6,000 feet of roadway have been totally reconstructed. The pavement of Terrace Street has been removed and a large number of pieces of construction equipment and vehicles have been working in extensive areas of the street so that motorists have experienced lengthy delays. This construction went far beyond what was contemplated by the Board when it decided that no significant impacts would occur. Noise, dust, and erosion are significant impacts that are raised with respect to the major construction activities along Terrace Street.

In addition, the pump station raises the potential for significant impacts at least with respect to Criterion 8 (scenic or natural beauty of the area, aesthetics, and historic sites) and 9(K) (development affecting public investments). The City clearly represented to the Board in the original proceedings that the pump station would be located underground, thereby causing no impacts with respect to the Act 250 criteria. To the contrary, the pump station rises 8 to 9 feet above ground level, with the exhaust pipes several feet above that. Covering the pump station with soil hardly makes it "subterranean." With the exhaust vents

protruding several feet, the pump station will be a highly visible structure which certainly could have a visual impact upon the Dales, the people who work at Redstone, the public that uses the trails on the Redstone grounds, and the public that drives along Terrace Street. The siting of the structure right in the middle of the Redstone trail entrance, and visible as one enters the Redstone driveway, could have an impact with respect to Criteria 8 (historic sites) and 9(K) (public investments). Furthermore, the noise from the turbine pumps and the air exchanger could have an impact upon the Dales with respect to Criterion 8 (noise).

Impact of growth issues (Criterion 9(A)) are also raised because of the current availability of the sewer lines for new projects, contrary to the assertion of the City that no new hookups to the sewer line would be allowed.

The Board cannot judge whether the impacts will be undue and adverse, but believes that once the potential for impacts is raised, the District Commission must review the project to make that determination and to impose mitigating conditions as appropriate.

The Board realizes that minor changes to a project which were not foreseeable often occur once construction is underway. For instance, the Board believes that the one-foot change in height of the water tower caused by the need to raise the footings because of ledge is the type of change which the Board does not consider significant. The major road construction, the placement of the pump station, and the new **sewer** connections, however, are major changes that raise the likelihood of significant impacts that, if they had been made known to the Board in its initial review of this Project, would have caused the Board to assert jurisdiction at that time.

The Board concludes that the City's water and sewer project is a substantial change to a pre-existing development and that the City must apply for and obtain an Act 250 permit to authorize the construction.


Since construction of the Project is substantially complete, the Board will deny Mr. Dale's request that the Board order the City to cease construction.

IV. ORDER

1. The City of Montpelier must apply to the District #5 Environmental Commission for a land use permit pursuant to 10 V.S.A. Chapter 151 within 20 days of this order.
2. The request for the Board to issue an order to the City to cease construction is hereby denied.

Dated at Montpelier, Vermont this 6th day of September, 1988.

ENVIRONMENTAL BOARD



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