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

Re: **Salvas Paving, Inc. by Peter Anderson, Esq. Diamond & Associates P.O. Drawer D Montpelier, VT 05602 and Gerald R. Tarrant, Esq. Law Offices of Gerald R. Tarrant P.O. Box 1440 Montpelier, VT 05601-1440**

Findings of Fact, Conclusions of Law, and Order Declaratory Ruling #229

This decision pertains to a petition for a declaratory ruling concerning a construction and excavation business located in the Town of Stowe, Vermont. As is explained below, the Board concludes that a land use permit was and is required for the business pursuant to 10 V.S.A. Chapter 151 (Act 250).

I. SUMMARY OF PROCEEDINGS

On December 13, 1989, the District #5 Coordinator issued an advisory opinion concerning the alleged introduction of fill and construction of a sedimentation pond by Salvas Paving, Inc. (the Petitioner) on a tract of land owned by Jerome and Joan Salvas located in the Town of Stowe. The opinion concluded that a permit was reauired pursuant to Act 250 for these activities and related works such as the construction of an equipment storage area and a garage structure.

On December 19, 1989, the Petitioner filed a request for an advisory opinion from the Executive Officer. On February 13, 1990, Executive Officer Stephanie J. Kaplan issued Advisory Opinion #EO-89-197, which affirmed the District Coordinator's opinion.

On March 15, 1990, the Petitioner filed a petition for a declaratory ruling with the Board. On April 24, the Petitioner filed a memorandum of law. On May 7, Environmental Board Chairman Stephen Reynes convened a prehearing conference in Waterbury with the Petitioner and the Town of Stowe Planning Commission participating. At the prehearing conference it was agreed that the parties would attempt to have this matter adjudicated based on stipulated facts. On May 18, the Board issued a prehearing conference report and order.

On May 21, 1990, the Petitioner submitted a proposed statement of facts with attached exhibits. On May 31, the Planning Commission filed objections to the proposed statement of facts. On June 8, the Petitioner filed a supplemental statement of facts with attached exhibits, and a response to

the Planning Commission's objections.

On September 28, 1990, the Board issued a memorandum inquiring whether the parties wanted a hearing to resolve factual disputes. In October, each party requested a hearing.

On December 21, 1990, the Board issued a prehearing memorandum setting a schedule for filing testimony and a hearing date of January 31, 1991. On January 21, 1991, the Petitioner and the Planning Commission filed prefiled testimony. On January 28, the Petitioner filed objections to the Planning Commission's prefiled testimony.

At the request of the Petitioner, the hearing set for January 31, 1991 was continued. On February 15, the Petitioner filed rebuttal testimony. On February 25, the Planning Commission filed objections to the prefiled testimony of the Petitioner.

An administrative hearing panel of the Board convened a hearing on February 26, 1991 in Stowe. After taking a site visit and hearing testimony, the panel recessed the hearing pending the filing of proposed findings of fact and conclusions of law, deliberation, and preparation of a proposed decision. On March 19, the parties filed proposed findings of fact and conclusions of law. On March 26 and 27, the parties filed responses to the initial proposed findings and conclusions of the other party.

A proposed decision was sent to the parties on April 15, 1991, and the parties were provided an opportunity to file written objections, and to present oral argument before the full Board. On April 23, the Petitioner requested oral argument. On April 25, the Planning Commission filed a written response to the proposed decision. The Board convened a public hearing in Waterbury on May 2, with the Petitioner and the Planning Commission participating. The Board deliberated concerning this matter on May 3. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUE

The issue before the Board is whether, pursuant to 10 V.S.A. §§ 6001(3) and 6081(a), the Petitioner has created a development requiring an Act 250 permit. Two specific questions in this regard are (1) whether the Petitioner's business is on a tract or tracts of land involving ten or more

acres, and (2) whether improvements have been constructed on the relevant tracts for commercial purposes.

III. FINDINGS OF FACT

1. Jerome and Joan Salvas are married.' In 1971, they purchased an approximately 154-acre tract of land located on both sides of Route 100 near its intersection with the Moscow Road in Stowe. The purchased land included a residential house on the west side of Route 100 and a large barn on the east side of Route 100. Immediately following purchase, the Salvases began conducting a construction and excavation business on the property. The Salvases own and operate trucks as part of their business and have done so since 1971.

2. In December 1972, the Salvases began placing fill in an area on the west side of Route 100 near the existing house. The fill consisted of topsoil which was excavated as part of their business. The purpose of putting the fill in this area was to raise the grade of the land to make it accessible from Route 100.

3. On June 11, 1974, the District #5 Environmental Commission issued Land Use Permit #5L0282 to the Salvases. That permit authorizes "the construction of a road to serve as access to parcels of land for sale known as North Hill Development ...." The permitted project included the creation of lots out of the Salvases' 154-acre tract for sale to other persons. The Salvases retained 37.5 acres of the tract. Of the retained acreage, approximately 18 acres were on the west side of Route 100 and 19 acres were on the east side. The Salvases still retain the 37.5 acres, which are located at the intersection of Route 100 and the Moscow Road.

4. Initially, the Salvases used the existing house to provide an office for their business and for their own residence. The existing barn was used for storage. In the late 1970s, the Salvases turned the existing barn into a shop and made some renovations to it. These renovations included interior alterations, new siding, new windows, and installation of a garage door. The Salvases moved their business office into the barn after the renovations were completed.

5. The Salvases installed underground fuel storage tanks on the property during-the late 1970s. They attached a dispensing pump to these storage tanks in the mid-1980s and have been using the pump since then for their business vehicles.

6. The Salvases formed Salvas Paving Company, Inc. and filed articles of association for that corporation on March 18, 1980. This petition is brought in the name of the corporation. The Salvases own all of the Petitioner's stock and hold all of its corporate officer positions.

7. The Petitioner claims that the Salvases lease 6.8 acres of the 37.5-acre tract to the Petitioner and that all activities associated with the excavation and construction business occur within the 6.8 acres. The 6.8 acres are on both sides of Route 100. The Petitioner also claims that the Salvases began leasing this acreage to the Petitioner at the suggestion of their accountant. There is no written lease specifying the acreage rented or the term of the rental. The Petitioner pays $800 monthly rent to the Salvases.

a. During the early 1980s, the Salvases constructed a new barn structure on the 19-acre portion of the tract east of Route 100. Part of this barn is used to house a horse and store hay. Other parts of the barn are used in connection with the excavation and construction business of the corporation. Fittings and shovels that are used as part of the business, as well as a water pump which is owned by the Petitioner, are stored in the barn.

9. In 1988, the Salvases began construction of a pond on the portion of the tract east of Route 100. Construction of the pond was completed in 1989. The pond is approximately one-eighth of an acre in size. Trees have been planted near the pond and the area has been landscaped. The pond is used for fire protection of the barns nearby as well as the other structures on the property. There is a fire hydrant next to the pond.

IV. CONCLUSIONS OF LAW

10 V.S.A. § 6081(a) prohibits the commencement of development or the commencement of construction on a development without a permit. 10 V.S.A. § 6001(3) provides:

> *'Development'* means the construction of improvements on a tract or tracts of land, owned orcontrolled 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.

Environmental Board Rule 2(F)(l) defines involved land in relevant part to include "the entire tract or tracts of land upon which the construction of improvements for commercial or industrial purposes occurs ...." This rule was ratified by the General Assembly in 1985 and therefore has the effect of a legislative enactment. 1985 Vt. Laws No. 52 § 5; In re R. Brownson Spencer II, Joseph Varaas III, Harry and Martha Rvan, 152 Vt. 330, 336 (1989).

In Re: G. S. Blodaett, Declaratory Ruling #122 (May 18, 1981), the Board concluded that the entire tract of land on which a development occurs must be counted for the purpose of determining jurisdiction. Id. at 3.

Based on the above facts and authorities, the Petitioner's business is a development for which an Act 250 permit was and is required. Improvements have been constructed on the tract for commercial purposes: fuel tanks, renovation of a barn into a shop, construction of a new barn used as part of the business, and construction of a fire pond to provide fire protection to the barns used as part of the business. The tract of land on which the business is located is 37.5 acres in size.

The Petitioner argues that the business activities are conducted only on a 6.8 acre area which is leased by the Petitioner from the Salvases. This argument is irrelevant. There is one tract of land at issue here. It is owned by the Salvases and is 37.5 acres in size. Accordingly, the business is located on a tract of land which involves ten or more acres and is owned by a person within the meaning of the statute.

The Petitioner asserts that the Board's interpretation is contrary to the statutory definition of development as interpreted by the Supreme Court in Committee to Save Bishop's

House. et al. v. Medical Center Hosuital of Vermont, Inc., 137 Vt. 142 (1979). The Board disagrees. In that case, the Court was presented with the question of whether an approximately 26-acre piece of land owned by a hospital was involved with a 1.44 acre piece of land on which the hospital planned to construct a parking lot. The two parcels were separate. The Court found that there was no relationship between the parking lot land and the 26-acre parcel such that "there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially increased by reason of that relationship." Id. at 153.

Thus, the Bishop's House case concerns an instance where a separate tract of land is alleged to be involved with the main tract on which the construction of improvements has occurred or is to occur.[1] The case does not address or define how much of that main tract is to be considered involved, which is the question here.

The Board believes that the statute must be interpreted to provide that the entire tract is involved if it is the site of the construction of improvements for commercial or industrial purposes. The statute defines "development" in relevant part as the "construction of improvements on a tract or tracts of land ... involving more than 10 acres of land." The Petitioners would have the Board construe the "involving" portion of this this definition to modify the words "construction of improvements" rather than the words "tract or tracts of land." The "tract" phrase, however, is placed more closely than the "construction" phrase to the language regarding involved land, and thus the Board concludes that the legislature meant that jurisdiction occurs if the tract or tracts of land involve more than ten acres, not the construction of improvements.

This construction is supported by its reasonableness and ease of interpretation. Indeed, if the Board were to adopt the Petitioner's interpretation, it would create significant administrative problems in determining Act 250 jurisdiction. As the Board stated in Blodaett:

'This interpretation of the Bishop's House case was adopted by the Board in enacting Board Rule 2(F)(3), which addresses separate tracts which are not the site of the construction of improvements and state that they constitute involved land if they meet the requirements of the language quoted above from Bishop's House.

> [W]e 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 Their findings might well require, and it could well turn on the results of detailed, and expensive, surveys of the square footage of land affected or utilized by the project.
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> 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 jurisdictional language that this Board employs.

Declaratory Ruling #122 at 4-5.

Further, even if a lease arrangement of the type alleged here were relevant, the Board would not find that there is a sufficient distinction between the Salvases and the Petitioner to justify considering the 6.8 acres to be under control of a separate person. The Salvases formed Salvas Paving, Inc. and are the sole officers and shareholders of that corporation. There is no written agreement between the Salvases and the

Petitioner which limits the Salvases' rights in any way, nor is there a term to the rental. Accordingly, the Salvases control the corporation's activities completely, and control and retain full ownership rights regarding the 6.8 acre portion allegedly leased by the Petitioner (as well as the rest of the tract). Under these circumstances, it would not be appropriate to base a jurisdictional determination on the artifice of incorporation. "Control of the corporation . . . may be inferred by proof that defendant fully controlled its activities." State of Vermont Environmental Board v. Levi Chickering, No. 88-607, slip op. at 7-8 (Oct. 19, 1990).

V. ORDER

An Act 250 permit was and is required for the Petitioner's excavation and construction business located off Route 100 in Stowe.

Dated at Montpelier, Vermont this 20th day of June, 1991.

ENVIRONMENTAL BOARD

Charles Storrow

Charles F. Storrow, Acting Chair
Elizabeth Courtney
Arthur Gibb
Samuel Lloyd
Steve E. Wright

A:DR229.FF (awpl)