

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

Re: Casella Waste Management, Inc.
Declaratory Ruling #244

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision, dated February 7, 1992, pertains to a request for a declaratory ruling filed with the Environmental Board by Robert and Marcia Weeks (the Petitioners). The Board concludes that a permit is required pursuant to 10 V.S.A. Chapter 151 (Act 250) for the operation by Casella Waste Management, Inc. (Casella) of a recycling center in Center Rutland.

I . SUMMARY OF PROCEEDINGS

This declaratory ruling request was filed on March 6, 1991 as an appeal from Executive Officer Advisory Opinion #EO-90-205 issued on February 28, 1991. In that opinion, the Executive Officer concluded that an Act 250 permit is not required for Casella's operation because it qualifies for an exemption pursuant to 10 V.S.A. § 6081(b) as a pre-existing operation to which there has not been a substantial change.

A prehearing conference was convened by Acting Chairman Ferdinand Bongartz on June 26, 1991 and a prehearing report and order was issued on July 23. The prehearing order established a hearing date of September 11 and dates for filing final lists of witnesses and exhibits and prefiled testimony for all direct witnesses to be presented (August 21) and rebuttal witnesses (September 5). The order stated that no witness could be called to testify at the hearing if he or she has not been identified in compliance with the order, and witnesses will not be allowed to testify unless prefiled testimony is filed by the date specified.

On August 21, the Petitioners filed prefiled testimony and a list of witnesses and exhibits. Casella did not file witness and exhibit lists or any prefiled testimony. On August 26, 1991, the Petitioners filed a motion to deny untimely submission of evidence by Casella and motion for a directed verdict. A hearing was held on September 11. The following parties participated:

Casella Waste Management, Inc. by John A.
Serafino, Esq.

Marcia and Robert weeks by Tracee Oakman, Esq.

Town of Rutland by Joseph Zingale, Town Administrator

The Panel and the parties took a site visit and observed the recycling operation and the neighborhood.

A proposed decision was sent to the parties on January 10, 1992, and the parties were provided an opportunity to file written objections, and to present oral argument before the full Board. On January 16, 1992, Casella and the Petitioners submitted responses to the proposed decision and requested oral argument and rebuttal oral argument, respectively. The Board convened a public hearing in Windsor on January 22, 1992.¹ The Board deliberated concerning this matter on January 22, 1992. On January 22, following a review of the proposed decision and the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. 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. ISSUES

1. Whether the Petitioners are entitled to a directed verdict because Casella had the burden of proving that the recycling facility is entitled to an exemption as a pre-existing development and without any testimony from Casella that burden could not be met.
2. Whether, pursuant to 10 V.S.A. § 6081(b), the site of the recycling operation contained a pre-existing development.
3. Whether, if the site of the recycling center contained a pre-existing development, any changes have occurred to the site since 1970.
4. Whether, if changes have occurred, those changes resulted in or have the potential to result in significant impacts with respect to any of the criteria at 10 V.S.A. § 6086(a).

¹Board member Charles F. Storrow chaired the oral argument but did not participate in the decision because of a potential conflict of interest.

III. FINDINGS OF FACT

1. Casella operates a recycling center on two contiguous parcels of land totalling 3.13 acres at the corner of West Proctor Road and Old Route 4A in the Town of Rutland. Casella leases the property.
2. The Town of Rutland does not have both permanent zoning and subdivision regulations.
3. Casella began operating the recycling center in approximately 1977.
4. Several different businesses have historically occupied the site. In 1946 the northern parcel contained a gas station and consisted of a small building with one bay and an office, and the southern parcel contained a house and a barn. International Paper Company bought the northern lot and used it as a transfer station from about 1946 through the 1950s. International Paper had three employees. Following use by International Paper, a used car dealer was located on the property.
5. In 1964, Temple Brothers bought both lots. Temple Brothers consisted of a cement business which made such things as septic tanks, steps, and cement vaults.
6. Temple Brothers employed about five people and used small flatbed trucks to deliver their products to customers. The operation was conducted entirely inside the building. The only outside activity consisted of bringing out the products for storage. The business operated from about 8:00 a.m. to 5:00 p.m. five days per week.
7. Based upon a Lister's Card dated August 28, 1967, the building where Temple Brothers operated its business consisted of approximately 7,726 square feet.
8. Casella began operating a garbage business on the site in 1977. Casella collected household garbage and brought it to the site to store it until it was removed. Neighbors smelled unpleasant odors coming from the site.

9. Casella later changed its operation to a recycling center. Members of the public deposit various materials in containers, called "roll-offs," outside. Recyclable materials are also brought to the site from other areas of the state. These materials include newspapers, cans, bottles, cardboard, and plastic jugs. The materials that are brought to the site are processed for recycling: Cans and bottles are crushed by machines, paper is shredded, and all the materials are dumped into machines which compact the material into bales. The bales are stored outside until they are loaded onto tractor-trailer trucks.
 10. The recycling operation uses various types of transportation equipment. A "yard horse" is used to transport items around the site. Large trucks are used to move the roll-offs.
 11. The operation has been conducted 24 hours a day, seven days a week.
 12. The recycling operation generates considerable noise that can be heard by the neighbors. Sources of noise include bottles being thrown into bins by the public and bottles being crushed inside; the conveyor belts; trucks and dumpsters and forklifts banging outside; and the roll-offs dumping on the cement pads trying to dislodge the cardboard.
 13. Some time after Casella began operating at the site, the house and barn were torn down. The area on which the house and barn were located is now used for the storage of tractor trailers, dumpsters, and junk metal.
 14. Casella has built two additions to the building, poured cement pads and cement bins for recyclables, and constructed a roof and a dock area, a three-bay loading dock, new overhead doors around the building, and added three conveyors.
 15. Casella's business generates substantial amounts of traffic. On one Saturday, 137 vehicles from the general public were counted dumping between the hours of 9:00 a.m. and 12 noon.
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16. The volume of business and traffic to and from the site has increased substantially since Temple Brothers operated its business there. There is a constant flow of traffic to and from the site. Both Old Route 4 and the West Proctor Road are often blocked by tractor trailers backing up to the loading dock. Neighbors are sometimes unable to get out of their driveway because of traffic backed up past their driveway on the West Proctor Road waiting for tractor trailers from Casella's operation.
17. Casella uses the Town's right-of-way on Old Route 4 for employee parking and storage of dumpsters.
18. The operation creates dust that blows around the property at times.
19. The operation creates debris which blows onto neighboring property. Neighbors have found bottle strippings, plastic bags, newspapers, styrofoam peanuts, cardboard, and shredded paper on their lawns and hanging out of their trees.

IV. CONCLUSIONS OF LAW

A. Directed Verdict

At the hearing, the Petitioners renewed their motion for directed verdict. They contend that, based upon previous Board decisions, Casella has the burden of proving that the operation was pre-existing. Since Casella did not comply with the Board's order requiring the filing of prefiled testimony and the Board accordingly prohibited Casella from presenting any witnesses, Casella could not demonstrate that the operation was pre-existing and exempt from the requirements for an Act 250 permit under 10 V.S.A. § 6081.

The Hearing Panel deferred a ruling on the directed verdict and directed the Petitioners to proceed with their case. The Petitioners presented their witnesses and Casella was provided the opportunity to cross examine them.

Although the Hearing Panel has concluded that Casella needs a permit to continue its operation because a substantial change has taken place, it believes that the Petitioner's motion should nevertheless be addressed because similar situations may arise in the future.

A permit is required pursuant to 10 V.S.A. § 6081(a) prior to commencing development. "Development" is defined, in pertinent part, as

the construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality which has not adopted permanent zoning and subdivision bylaws.

10 V.S.A. § 6001(3).

Pursuant to 10 V.S.A. § 6081(b), developments that existed before 1970 are exempt from the permit requirement unless there has been a substantial change to the development. Substantial change is defined in Rule 2(G) as "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. § 6086(a)(1) through (10)." The burden to prove that a development is pre-existing is on the person conducting the allegedly exempt activity. The burden of providing sufficient information for the Board to compare the operation as it existed prior to 1970 and as it has existed prior to 1970 is also on the person conducting the activity. Re: Chamulain Construction Co., Declaratory Ruling Request #214, Memorandum of Decision at 3 (Oct. 2, 1990).

The Petitioners are correct in asserting that the burden is on Casella to establish that its operation is exempt from the Act 250 permit requirements. However, the Board could not grant a directed verdict because certain facts are required to determine whether an activity constitutes a development for which a permit is required. These facts are 1) whether the Town of Rutland has permanent zoning and subdivision bylaws; 2) whether the property on which the activity is being conducted is larger than one or ten acres; 3) whether construction took place; and 4) whether the nature of the operation is commercial or industrial. The first two facts could be established by

official notice of Town records, but testimony would be required concerning the nature of the operation. Thus, a hearing would have to be held.

The following facts were established at the hearing: The Town of Rutland does not have both permanent zoning and subdivision regulations, and the tract of land on which the operation takes place is more than one acre. Casella constructed additions to the building, a roof, dock area, three-bay loading dock, and new overhead doors, and poured cement pads and cement bins. The operation is clearly commercial. Accordingly, the elements for finding that the construction of improvements for a commercial or industrial purpose on more than one acre of land are met, and the Petitioners did not need to provide evidence concerning substantial change to a pre-existing development.

Because the Petitioners' witnesses also provided testimony on whether a substantial change has taken place at the site, the Board addresses this issue as well.

B. Substantial Change

The section of Act 250 that provides an exemption from the requirement for a permit states the following:

Subsection (a) of this section shall not apply to development which is not also a subdivision, which has been commenced prior to June 1, 1970, if the construction will be completed by March 1, 1971. ... Subsection (a) of this section shall apply to any substantial change in such excepted . . . development.

10 V.S.A. § 6081(b).

The Board concludes that part of the building in which Casella operates the recycling operation existed prior to 1970 and that the building as-described in Finding #6, above, was therefore pre-existing.

Once it has been determined that a development is preexisting, the Board analyses whether there have been any changes and, if so, whether the changes have the potential

to create a significant impact under any of the ten criteria of Act 250. This analysis has been upheld by the Vermont Supreme Court. In re H. A. Manosh Corporation, 147 Vt. 367 (Sept. 26, 1986).

The Board concludes that a number of changes have occurred at the site of Casella's operation since 1970. These include the construction of additions to the building, a roof, dock area, loading dock and new overhead doors, and the pouring of cement pads and bins, as well as the addition of conveyors, the demolition of the house and barn, and the expansion of the parking area. Other changes include the substantial increase in traffic associated with the recycling operation compared with the traffic generated by past uses, the use of the Town right-of-way for storage of equipment, the use of the outdoors for a large part of the operation, the substantial increase in noise generated by the operation, and the blowing of debris onto neighbors' properties.

The Board also concludes that the changes have the potential to create significant impacts under several of the criteria. The potential (and actual) impacts include air pollution from dust and odors and noise under Criterion 1; unsafe traffic conditions and congestion from tractor trailers under Criterion 5; and adverse aesthetic effects from blowing debris and expansion of the use of the property to the outside under Criterion 8.

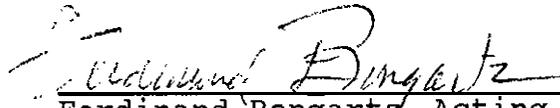
Accordingly, the Board concludes that a substantial change has occurred and an Act 250 permit is required for any further use of the site.

V. ORDER

1. The Motion for Directed Verdict is denied.
2. A permit is required pursuant to 10 V.S.A. § 6081(a) and (b).

Dated at Montpelier, Vermont this 7th day of February, 1992.

ENVIRONMENTAL BOARD



Ferdinand Bongartz, Acting Chair
Lixi Fortna
Arthur Gibb
Samuel Lloyd
William Martinez
Steve E. Wright

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