

Mailing address:  
c/o State Office Building PO  
Montpelier, Vermont 05602



Location:  
58 East State Street  
Montpelier, Vermont 05602

DR# 264

STATE OF VERMONT  
ENVIRONMENTAL BOARD  
MONTPELIER, VERMONT 05602  
802-828-3309

May 8, 1992

Scott A. Whitted, Esq.  
Assistant Attorney General  
Agency of Transportation  
133 State Street  
Montpelier, VT 05633

RE: Advisory Opinion #EO-91-245 (Reconsidered)  
Audley Sand Extraction  
**Brigante** and Lomartire Lands, Colchester

Dear Scott:

This opinion is a reconsideration of Advisory Opinion #EO-91-245 issued on December 5, 1991. The reconsideration is being done pursuant to a remand order by Acting Chair Charles F. Storrow issued on March 13, 1992, which became effective on March 20. Pursuant to 10 V.S.A. § 6007(c), I have been delegated authority to issue this opinion.

The matter under consideration is whether a fee is required **for** an application for sand extraction by R.S. Audley, Inc. (Audley) from lands owned by Cosimo **Brigante** and Alice Lomartire located in Colchester, Vermont. As is explained below, I have concluded that the fee paid by Audley should be refunded if the District #4 Commission issues a permit with conditions that limit the use of the sand to the Chittenden County Circumferential Highway (CCCH) project and require an appropriate reclamation plan following that use.

Issues

1. Whether the sand extraction constitutes a State project.
2. Even if the sand extraction constitutes a State project, whether a fee is still required because the extraction is being done for the State rather than by the State.

Scott Whitted, Esq.

Re: Advisory Opinion #EO-91-245 (Reconsidered)

Audley Sand Extraction, **Brigante** and Lomartire Lands

Colchester

Page 2

Facts

1. On December 5, 1988, the District #4 Environmental Commission issued Master Land Use Permit #4C0718, which approved the construction of the CCCH. The approval is conditioned on the review of plans for each highway segment.
2. Condition #7 of Permit #4C0718 requires the Permittees, who are the State of Vermont Agency of Transportation (AOT) and the Chittenden County Circumferential Highway District, to submit amendment applications to the District Commission for its "review and approval of all new off-site material supply and disposal areas when the amount of material to be extracted or disposed of will exceed 10,000 cubic yards."
3. Condition #1 of Permit #4C0718 requires that the project be completed "in accordance with the plans and exhibits on file with the District Commission ...."
4. Exhibit #88 to Permit #4C0718 contains provisions regarding applications for future permits to authorize the construction of segments of the CCCH. In relevant part, Exhibit #88 provides as follows:

The VAOT and the Circumferential Highway District shall be the co-applicants for the Land Use Permits. The owner of the land on which any material supply and disposal area is located shall not be an applicant nor shall any contractor or sub-contractor. If the owner of the property intends the borrow area to remain in operation following the completion of the project, the owner will disclose that intention .... In that event the landowner must obtain a Land Use Permit for the entire operation prior to the use of any borrow material from the borrow area for this project.

5. Similar to Exhibit #88, Exhibit #89 to Permit #4C0718 states that, if a property owner intends a material supply or disposal area to remain in operation following completion of the project, the owner must disclose this intent and obtain a land use permit for the entire operation prior to the area's use as a borrow area for the project.

Scott Whitted, Esq.

Re: Advisory Opinion #EO-91-245 (Reconsidered)

Audley Sand Extraction, **Brigante** and Lomartire Lands  
Colchester

Page 3

6. On February 28, 1991, the District Commission issued Land Use Permit Amendment #4C0718-3, which authorizes the construction of Segment "F" of the CCCH. The permit is conditioned on compliance with prior permits issued for the CCCH, including Permit #4C0718. Permit Amendment #4C0718-3 also includes a Condition #7 which is worded identically to Condition #7 of Permit #4C0718.
7. On September 10, 1991, Audley filed Land Use Permit Application #4C0898. The project is described as a sand extraction operation on 10.4 acres of land located off **Malletts** Bay Avenue in Colchester, Vermont. The AOT is a co-applicant on Application #4C0898. The land is currently owned by Cosimo **Brigante** and Alice Lomartire. The sand to be extracted is to be used in the construction of the CCCH. The application states: "The sand will be used in the construction of the Circumferential Highway." Accompanying the application is a "project **description**" which states:

The sand will be used exclusively for this and future sections of the CCCH.
8. Audley paid an application fee for Application #4C0898 of \$10,000. The fee was paid under protest.
9. The site plan filed with the application depicts six cells with an estimated 300,000 cubic yards of material in each cell. Only a portion of the first two cells is expected to be used during the construction of Segment "F" of the CCCH. In pre-application meetings and telephone conferences, the Applicants stated on several occasions that commercial extraction of material would continue beyond the construction of Segment "F." It is estimated that there is nearly two million cubic yards of material available on the site.
10. Mr. **Brigante** and Ms. Lomartire own the involved tracts of land in fee simple. The total acreage for their tracts, which they each own separately, consists of 82 acres. The amount of land directly involved in the sand extraction is approximately 10.4 acres. A **2,000-foot** access road will be constructed to assist in removal of the sand. AOT does not have any property interest in the tracts whatsoever. Mr. **Brigante** and Ms. Lomartire have entered into private agreements with Audley to supply material for the construction of Segment "F" of the CCCH.

Scott Whitted, Esq.

Re: Advisory Opinion #EO-91-245 (Reconsidered)  
Audley Sand Extraction, **Brigante** and Lomartire Lands  
Colchester

Page 4

11. On September 13, 1991, Chief Coordinator Michael Zahner issued Advisory Opinion #4-093, which concludes that the Audley sand extraction is a private commercial project and therefore must pay an application fee.
12. On September 18, 1991, you filed an appeal of the Chief Coordinator's advisory opinion with the Executive Officer. On December 5, Executive Officer Stephanie J. Kaplan issued Advisory Opinion #EO-91-245, which affirms the Chief Coordinator's advisory opinion.
13. In a letter dated to me April 6, 1992, you represent that AOT will control the borrow pit operation and that the extracted material is to be used solely for the CCCH.
14. In a telephone discussion which we had on April 13, 1992, you stated that AOT will accept a permit condition which limits the use of extracted material to the Circumferential Highway.

#### Discussion

The funding of the Circumferential Highway project is authorized by the General Assembly. The 1991 capital funds appropriation act states in relevant part that AOT projects shall be exempt from Act 250 application fees. 1991 Vt. Laws No. 93 § 19(b).

10 V.S.A. § 6083(a)(3) requires that permit applications contain "**the** fee prescribed by **rule.**" Board Rule 11(B) provides:

Fees shall not be required for projects undertaken by municipal agencies or by State governmental agencies, except for publication and recording costs.

10 V.S.A. § 6001(3) in relevant part defines development subject to Act 250 to include "**the** construction of improvements on a tract of land involving more than ten acres which is to be used for municipal or state purposes." Board Rule 2(A)(4) provides that development includes "**the** construction of improvements for state, county or municipal purposes on a tract or tracts of land involving more than ten acres of **land.**" Rule 2(E) provides:

Scott Whitted, Esq.

Re: Advisory Opinion #EO-91-245 (Reconsidered)

Audley Sand Extraction, Brigante and Lomartire Lands  
Colchester

Page 5

State, county or municipal purposes means projects which are undertaken by or for the state, county or municipality and which are to be used by the state, county, municipality or members of the general public.

The first issue to be addressed is whether the Audley application constitutes a State project. I believe that the issue turns on **Audley's** intent or lack of intent to extract for commercial purposes unrelated to the CCCH project. The application materials clearly support an argument that no such intent exists because they state that the sand will be used exclusively for that project. However, it appears that some oral comments were made by the landowners and Audley consultants to the effect that they intend private commercial extraction in the future.

In view of this ambiguity, I believe that AOT and Audley should take additional steps to prove the contention that the extracted material will only be used for the CCCH. Specifically, I believe that they should actively seek and accept a permit condition to be issued if the District #4 Commission approves Application #4C0898 which provides as follows:

All extracted material shall be used solely and exclusively for the Chittenden County Circumferential Highway project. Prior to any use of extracted material for any other purpose, the Permittees shall submit an application for an amendment to this permit; shall pay an application fee to be assessed based on the premise that the project is a private, commercial project; and shall obtain a permit amendment.

I also believe that AOT and Audley must address the question of site reclamation. Use of the site only for CCCH-related extraction can be demonstrated by commitment to reclaiming the site once such extraction is concluded. Accordingly, AOT and Audley should submit a plan to the District Commission for site reclamation following the completion of extraction for the CCCH project and should seek and accept a permit condition which requires implementation of that plan.

If such conditions were sought and accepted by AOT and Audley, and issued by the District Commission, I would conclude that Application #4C0898 is for a State project and is not for a private, commercial project.

Scott Whitted, Esq.

Re: Advisory Opinion #EO-91-245 (Reconsidered)  
Audley Sand Extraction, Brigante and Lomartire Lands  
Colchester

Page 6

The second issue to be considered is whether the fee exemption for State projects is limited to only those projects undertaken "by" the State as opposed to those undertaken "for" the State by independent contractors such as Audley. As you know, the December 5, 1991 Executive Officer Opinion concludes that the exemption is so limited and therefore that, even if the Audley project is considered a State project, a fee is still required.

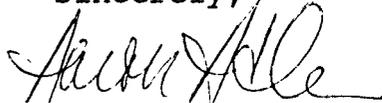
You argue that this interpretation would for all practical purposes negate the fee exemptions set forth in statute and rule. You contend that very few State projects are actually built by State employees and are usually built by contractors that are controlled by State agencies.

I believe your arguments have merit and that the fee exemptions likely were not intended to be so limited. Accordingly, I conclude that the fee exemptions apply to projects performed for the State by independent contractors who are controlled by the State.

Based on the foregoing, it is my opinion that the fee paid for Application #4C0898 should be refunded to Audley if AOT and Audley seek and accept permit conditions limiting the use of extracted material to the CCCH project and requiring appropriate site reclamation following such use, and if the District Commission issues a permit containing such conditions.

By copy of this letter, I am informing all parties of my opinion. Any party disagreeing with my opinion may seek a declaratory ruling from the Environmental Board. Any such request for a declaratory ruling must be filed on or before Monday, June 8, 1992.

Sincerely,



/s/Aaron Adler

Assistant Executive Officer

c:\eotext\91-245