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

Re: BHL Corporation
Declaratory Ruling #267

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER .

This decision pertains to a request for a declaratory ruling filed by BHL Corporation (the Petitioner) on March 27, 1991, concerning whether there is jurisdiction pursuant to 10 V.S.A. Chapter 151 (Act 250) for certain shale extraction and road construction activities on a tract of land owned by the Petitioner and located in the Town of Castleton. As is explained below, the Environmental Board concludes that the extraction of shale that took place at the Petitioner's property constituted development subject to Act 250 jurisdiction.

I. SUMMARY OF PROCEEDINGS

In Advisory Opinion #1-151, dated September 17, 1991, the District #1 Coordinator concluded that the Petitioner was required to obtain a land use permit for certain shale extraction and road construction activities on a 69-acre tract of land. The tract is owned by the Petitioner and is located east of Route 30 in Castleton, Vermont. The Petitioner had not requested the advisory opinion.

On October 16, 1991, the Petitioner appealed the District Coordinator's jurisdictional determination, challenging both the substance of his decision and his legal authority to issue the advisory opinion. On February 27, 1992, the Executive Officer of the Board issued Advisory. Opinion #EO-91-247, in which she concluded that the District Coordinator had authority to issue an advisory opinion without the Petitioner's request. She further concluded that, based on the affidavits and other written submissions in her possession, she was unable to determine whether the activities at the Petitioner's property constituted development subject to Act 250 jurisdiction.

On March 27, 1992, the Petitioner sent a letter to the Executive Officer requesting a hearing. This request was deemed a petition to the Environmental Board for a declaratory ruling, pursuant to Board Rule 3(C) and (D).

267

Board Chair Elizabeth Courtney convened a prehearing conference in. Rutland on. June 1, 1992. None of the parties was represented by legal counsel. A prehearing conference report and order was issued on June 16. Adjoining landowners, John W. and Leslie J. Knox, were admitted as parties. Upon the written request of Mrs. Knox, on July 2 the Chair issued subpoenas for witnesses Patricia Ryan, Thomas Trombley and Frank Taggart.

A public hearing was convened on July 8, 1992, in Castleton before an administrative hearing panel of the Environmental Board, Chair Elizabeth Courtney presiding. The following parties participated in the hearing:

BHL Corporation by Roy Lewis
John W. and Leslie J. Knox

The panel received evidence from the Petitioner and the Knoxes and conducted a site visit. The panel recessed the hearing on the same date.

The parties were given until July 23, 1992, to submit proposed findings of fact and conclusions of law. The Xnoxes submitted proposed findings of 'fact. On July 23, the Board received a notice of appearance and motion requesting additional time from attorney Robert P. McClallen, Esq., on behalf of the Petitioner. The Knoxes filed a written objection on July 30. By memorandum to the parties, dated August 4, 1992, the Chair extended filing deadlines. The Petitioner filed proposed findings and conclusions of law on August 14 and the Knoxes submitted additional proposed findings on August 24.

A proposed decision was sent to the parties on September 23, 1992. The parties were provided an opportunity to submit written objections to the proposed decision and to present oral argument before the full Board. On October 9, 1992, counsel for the Petitioner filed objections to the panel's proposed findings, conclusions, and order. This was followed by a written response submitted by John Knox on October 13, 1992. The panel reviewed the filings and made certain revisions to its proposed decision. This was sent to the parties on December 28, 1992.

Oral argument was held on January 13, 1993. On January 27, 1993, the Board conducted a deliberative session. The Board reviewed the record, adjourned the hearing, and voted to issue the decision as proposed by the Panel. 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 certain shale extraction and road construction activities that have taken place on the Petitioner's tract in Castleton constitute development within the meaning of 10 V.S.A. §6001(3) and Board Rules 2(A)(2) and 2(A)(6).

2. Whether the District Coordinator had authority to issue an advisory opinion without receiving a request from the Petitioner.

III. FINDINGS OF FACT

1. BHL Corporation, the Petitioner, is a Vermont corporation, organized for the purpose of operating rental housing;

2. Joanne Lewis is the majority shareholder of BHL Corporation and has been the principal provider of funds for the corporation. Other officers are Ben Butterfield and Russell Hurley.

3. Joanne Lewis is married to Roy Lewis. Roy Lewis is not a shareholder, director or officer of BHL Corporation.

4. Roy Lewis operates a commercial shale pit off Willis Road in Castleton. In June 1988, the District #1 Commission issued Land Use Permit #1R0647 to Roy Lewis and Harry O'Rourke, Jr., authorizing the expansion of an existing sand pit off Willis Road in Castleton.

A. Activities at Petitioner's tract

5. The Petitioner owns land consisting of 69 +/- acres on the east side of Route 30 near Route 4 in Castleton (the tract). The Petitioner purchased this land in 1986.

6. The tract is largely wooded and the land rises in an easterly direction to a ridge. Near the ridgeline, approximately four acres of trees have been cleared and a shale outcrop excavated to create a level area. Two areas, intended to be ponds, have been newly excavated and impounded near the summit. There are no buildings on the site and much of the cleared area is exposed limestone ledge and graded shale. Portions of the site are seeded to grass and other vegetation.

7. A road, between 16 and 20 feet in width and over 5,000 feet in length, has been constructed on the Petitioner's tract. The road winds easterly from Route 30 to the clearing. In a number of places, this road is significantly elevated above the natural grade. A number of smaller, unimproved roads lead off the main road.

8. Joanne and Roy Lewis intend to build their primary residence and a sheep farm in the cleared area on the tract. They intend for the main road to lead to their primary residence, and for one of the existing unimproved roads to be upgraded to provide access to a proposed sheep barn.

9. Mr. and Mrs. Lewis have not applied for or received a building permit from the Town of Castleton for construction of their proposed residence on the tract.

10. Beginning in June 1988 and continuing into 1991, a number of activities occurred at the Petitioner's tract, including blasting to break up shale ledge and the use of an excavator and a loader to break up and move stone. Trucks hauled stumps and demolition debris to the tract and carried shale away from the tract.

11. John and Leslie Knox own property adjoining the Petitioner% tract and abutting Route 30. They, acquired the land and house in April, 1987. The Knoxes' driveway and house are located a few yards north of the road leading into the Petitioner's tract. The Petitioner's road is visible from the Knoxes' property.

12. The Knoxes have experienced the following effects as a consequence of the activities at the Petitioner's tract:

    a. Noise from blasting, heavy equipment, and truck traffic coming to and leaving the tract via the Petitioner's road; and

    b. Air pollution from dust generated by trucks hauling to and from the tract via the Petitioner's road. The Knoxes also have experienced pooling of water in the yard, flooding of the basement, and attendant water damage to the house allegedly resulting from runoff and poor drainage caused or aggravated by the construction of the Petitioner's road.

13. Most of the shale excavated at the Petitioner's tract has been used to level part of the cleared area near the summit and for the construction of the road and impoundments for the ponds.

14. Roy Lewis removed and sold 21 loads of shale from the Petitioner's tract. Some or all of this material was transported in commercial trucks operated or owned by Thomas Trombley and his son Tim Trombley for use in construction of a private road off Barker Hill Road in Castleton. Mr. Lewis stopped selling stone from the Petitioner's tract in the Spring of 1990 when he learned that an Act 250 permit might be required for this activity.

15. Thomas Trombley is a contractor in Castleton, specializing in excavating and septic system installation. In 1990 and 1991, he brought a Drott excavator to the Petitioner's tract to break up shale for the purpose of leveling the site. In 1990, he removed 19 truck loads (266 cubic yards). In 1991, he removed approximately 16 truck loads (224 cubic yards). This represents fourteen cubic yards per truck load.

16. Thomas Trombley was allowed to take shale from the Petitioner's tract in exchange for breaking it up and removing it to permit construction of the driveway. Mr. Trombley also traded use of his excavator and trucks for work performed by Mr. Lewis off the Petitioner's tract. Thomas Trombley used some of the shale from the Petitioner's tract as fill for his own property. Mr. Trombley also hauled shale from the tract for use in private construction projects in the Castleton area.

17. Frank Taggart is a general contractor in Castleton. On November 29, 1990, he removed 21 loads of shale (a total of 157 cubic yards) from the Petitioner's property. He used his own loader and hauled the material with two trucks, one with a seven-yard capacity and the other with an eight-yard capacity.

18. Frank Taggart performed construction work at the Hilltop Motel in Castleton. Some of the shale removed by Frank Taggart from the Petitioner's tract was used by him in construction of a driveway and parking area at the motel. Mr. Taggart was paid for the cost of the finished job.

19. Thomas Trombley and Frank Taggart are business associates of Roy Lewis, having purchased earth resources from Mr. Lewis's permitted pit off Willis Road for their contracting businesses. Both men have traded hauling or excavation services with Mr. Lewis.

20. The Petitioner authorized the removal of shale from its property by Thomas Trombley and Frank Taggart. The Petitioner did not receive payment for this stone nor did it pay for the contractors' services in removing it. There was no written agreement between the Petitioner and the contractors or Roy Lewis and the contractors concerning the removal of the stone. However, Mr. Trombley had an oral agreement with Mr. Lewis that Mr. Trombley could remove shale from the tract in exchange for his excavation services and the use of his equipment on the Petitioner's tract.

21. The Town of Castleton has both permanent zoning and subdivision regulations.

B. Issuance of the Advisory Opinion

22. On December 20, 1990, the Environmental Board designated its staff as investigators pursuant to 10 V.S.A. § 8002(3).

23. On January 8, 1991, the Chair of the Board issued a memorandum designating staff of the Environmental Board as investigators of Act 250 violations. The list of designated investigators included all district coordinators and specifically named Anthony Stout, District #1 Coordinator.

24. District coordinators are not employed by district commissions, but rather provide administrative support to the district commissions and are employed by the Environmental Board.

25. Pursuant to 10 V.S.A. § 8004, the Board and the Secretary of Natural Resources entered into a memorandum of understanding (MOU) dated February 5, 1991, for cooperative enforcement of Act 250. The MOU requires that district coordinators issue advisory opinions in potential enforcement cases involving Act 250 jurisdiction.

26. On September 17, 1991, District #1 Coordinator Anthony Stout issued Advisory Opinion #1-151, concluding that an Act 250 permit was required for certain shale extraction and other activities at the Petitioner's tract. The Petitioner did not request this opinion.

IV. CONCLUSIONS OF LAW

A. Act 250 Jurisdiction

1. Shale extraction

10 V.S.A. § 6081(a) requires that an Act 250 permit be obtained prior to commencing development. 10 V.S.A. §6001(3) and Board Rule 2(A)(2) define the term development, in pertinent part, as the construction of improvements for commercial purposes on a tract or tracts of land, owned or controlled by a person. Section 6001(3) more specifically defines the term as it applies in a town with both permanent zoning and subdivision bylaws as:

> the construction of improvements on a tract or tracts of land, owned or controlled 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.

"Construction of improvements" is defined at Board Rule 2(D) as any physical action on a project site which initiates development for any purpose enumerated in Rule 2(A).

In the present case, it is clear that the petitioner or its agents have initiated the construction of improvements on more than ten acres of land in a municipality with both permanent zoning and subdivision regulations.. Therefore, the principal question to be resolved in this declaratory ruling is whether the construction initiated on the Petitioner's land has been for a "commercial purpose."

"Commercial purpose" is defined in Board Rule 2(L) as:

> the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object having value.

In In re Baptist Fellowship of Randolph, Inc., 144 Vt. 636, 639 (1984), the Vermont Supreme Court found that construction of a church building was construction for a commercial purpose within the meaning of Act 250 because consistent with Board Rule 2(L) there was a de facto exchange of the church's facilities and services for donations and contributions from its members.

More recently, the Environmental Board ruled that the extraction of earth resources associated with creation of a field for the recreational use and aesthetic enjoyment of its owner constituted the construction of improvements for a commercial purpose, thereby requiring a land use permit. Re: C. Donald Mohr, Declaratory Ruling #182 (May 27, '1987).

In Mohr, the landowner had arranged with a local contractor to clear and level a five-acre portion of his property. In lieu of monetary compensation for this work, the contractor agreed to accept the material from the site as payment. The rotted rock from the site was suitable for building roads and backfilling foundations, and it had been used by the contractor in his construction business. The Board stated: "It is the commercial nature of the activity, not the person conducting the activity or benefiting therefrom, that triggers Act 250 jurisdiction." Id. at 5; see also In re Baptist Fellowship of Randolph, Inc., at 639, where the court said that Act 250 speaks to land use and not to the particular institutional activity associated with that land use.

The present case is strikingly similar to Mohr. Since 1988, Roy Lewis has operated a commercial shale extraction operation at his permitted pit off Willis Road. Beginning in June 1988, Mr. Lewis removed and sold shale from the Petitioner's tract. Be did so until he discovered that such. activity might require a land use permit for the Petitioner's tract. Thereafter, the Petitioner allowed Thomas Trombley and Frank Taggart, two of Mr. Lewis's business associates, to remove shale from the tract for use in their respective construction businesses.

The evidence concerning Mr. Taggart's activities at the Petitioner's land was ambiguous. However, the Board finds that the Petitioner and the Lewises received certain excavating services and the use of heavy equipment from Mr. Trombley, in exchange for shale from the Petitioner's tract.[1]

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[1] *This is supported by the evidence at hearing as well as statements in Joanne Lewis's affidavit, dated November 15, 1991, and the representations of the Petitioner's counsel, Jon S. Readnour, in his Memorandum, filed November 15, 1991 (Exhibits: P4, P5).*

Therefore, the Board concludes that this exchange (involving the removal of 35 loads of shale), in addition to Mr. Lewis's own sale of 21 loads of shale from the Petitioner's tract, constitute shale extraction activities undertaken for a commercial purpose or "development" as defined in statute and Board rule.

While no party disputes that some shale was extracted from the site and used in various construction projects in the Castleton area, the Petitioner. argues that the quantity removed from the tract was "minuscule." The Board believes that 56 truckloads is not a minuscule amount.

A landowner's intention to use his property for residential purposes in the future and his choice to forego any monetary payment by a third party for the removal of earth resources from his property do not necessarily remove his extraction activities from Act 250 jurisdiction. Indeed, as the Board noted in Mohr, the impact upon the immediate site and the surrounding neighborhood in terms of noise, dust, traffic, and the other subjects regulated by Act 250 is no different "simply because the commercial activity is carried on by a person other than the landowner." Id. at 4. In the present case, there is evidence that the activities at Petitioner's tract resulted in actual impacts upon the site and immediate neighborhood, some of which could be subject to regulation under the Act.

Based upon the evidence in this case, it is the Board's opinion that shale extraction activities at the tract between 1988 and 1991 constituted development subject to Act 250 jurisdiction. The fact that the Petitioner may have terminated extraction and hauling activities at its property does not eliminate Act 250 jurisdiction.

2. The Road

The term development is further defined in Board Rule 2(A)(6) as including:

> The construction of improvements for a road or roads, incidental to the sale or lease of land, to provide access to or within a tract of land of more than one acre owned or controlled by a person. In municipalities with both permanent zoning and subdivision bylaws, this jurisdiction shall apply only if the tract or tracts of involved land is more than ten acres. For the purpose of determining jurisdiction, any parcel of land which will be provided access by the road is land involved in the construction of the road. This jurisdiction shall

> not apply unless the road is to provide access to more than five parcels or is to be more than 800 feet in length. For the purpose of determining the length of a road, the length of all other roads within the tract of land constructed within any continuous period of ten years commencing after the effective date of this rule shall be included.

Based upon the evidence before the Board, the Board concludes tnat a land use permit was not required for the road or roads constructed on the Petitioner's tract. The Lewises have stated that they intend to use the main road, which extends from Route 30 to the clearing and is *over* a mile in length, for the purpose of providing access to the home and farm they plan to build. Although this road is substantial and a number of other. roads lead from it, and although the Petitioner is in the business of operating rentalproperties, without evidence of a proposed sale or lease of land incidental to the construction of the road or roads, the Board cannot conclude that road-building activities at the site constituted development within the meaning of 10 V.S.A. § 6001(3) and Board Rule 2(A)(6).

B. Leaalitv of the Advisorv Ovinion

The Petitioner questions the legality of the District #1 Coordinator's advisory opinion, because BHL did not request this opinion and because it was based on facts'which were not provided by BHL.

10 V.S.A. § 6007(c) states in relevant part:

> [P]rior to the commencement of development, any person ... may request an advisory opinion from the district coordinator concerning the applicability of this chapter.

In addition, Board Rule 3(C) provides:

> Any interested party seeking a ruling as to the applicability of any statutory provision or of any rule or order of the board may request an advisory opinion from a district coordinator . . . .

10 V.S.A. §§ 8004 and 8221 authorize the Board to seek enforcement of Act 250 through either administrative orders issued by the Secretary of Natural Resources or action in superior court. Section 8004 authorizes the Secretary and the Board to develop cooperative procedures for Act 250 enforcement. 10 V.S.A. § 8002(3) authorizes the Board to designate investigators.

The Board is authorized to appoint such administrative personnel and employees as it finds necessary in carrying out its duties. 10 V.S.A. § 6022. Pursuant to this authority, the Board has hired district coordinators. Part of the duties of the coordinators is to provide administrative support to the district commissions. See Board Rule l(B)(l). While the district coordinators provide such support to the district commissions, they are in fact employees of the Board and not of the commissions.

The Board has designated the district coordinators as investigators pursuant to its enforcement authorities. The Board has also signed an MOU with the Secretary concerning Act 250 enforcement. The MOU states that district coordinators are to issue advisory opinions in potential enforcement cases. Cases such as the present one, in which improvements were constructed without a permit, are potential enforcement cases since the construction may have been subject to Act 250.

The Board concludes that there is authority for district coordinators to issue advisory opinions without prior request. The provisions which refer to requests for advisory opinions, 10 V.S.A. § 6007(c) and Board Rule 3(c), do not prohibit the issuance of advisory opinions without request. Rather, they state that advisory opinions will be issued when requested. Since the Board is separately authorized to take enforcement action and to enter into .an agreement which sets out Act 250 enforcement procedures, it has lawfully authorized its staff to issue advisory opinions as part of the procedures outlined in its agreement with the Secretary.

With respect to Petitioner's argument that "from a due process point of view" the opinion of the District Coordinator is not binding on the BHL Corporation, the Board has no authority to issue an opinion concerning a claim which is constitutional in nature. This must be decided by the courts. Westover v. Villase of Barton Electric Devartment, 149 Vt. 356, 358-359 (1988); Re: Okemo Mountain, Inc., #2S0351-12-A-EB, Memorandum of Decision at 6-7 (Sept. 18, 1990). Nonetheless, the Board believes that the opportunity for a hearing following issuance of an advisory opinion as provided by 10 V.S.A. § 6007(c) satisfies any due process concerns. Indeed, on July 8, a hearing was convened at which Petitioner had an opportunity to present evidence it considered relevant to this matter and to cross-examine the witnesses of others. The Petitioner had full opportunity to introduce into the record facts which supported its position for the Board's consideration in this proceeding.

IV. ORDER

1. The extraction of shale that took place on the Petitioner's land constituted development within the meaning of 10 V.S.A. § 6001(3) and Board Rule 2(A)(2) for which an Act 250 permit should have been obtained.

2. The Road construction activities that have taken place on the Petitioner's land did not constitute development within the meaning of 10 V.S.A. § 6001(3) and Board Rule 2(A) (6).

3. The District Coordinator had authority to issue an advisory opinion without receiving a request from the Petitioner.

Dated at Montpelier,, Vermont this 11th day of February, 1993.

ENVIRONMENTAL BOARD

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