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

Re: U.S. Quarried Slate Products, Inc. and Scotch Hill Leasing Corporation by James P.W. Goss, Esq.
P.O. Box 578
Rutland, VT 05702

Declaratory Ruling Requests #279 and #283

Genier Slate Quarry
c/o Victor C. Genier
Fair Haven, VT 05743

MEMORANDUM OF DECISION

This decision pertains to a motion to dismiss filed by Victor C. Genier on the basis that his operation involves only 9.9 acres of land. As is explained below, the Environmental Board denies the motion because the question of how much land is involved should be the subject of proof at hearing.

BACKGROUND

This matter pertains to whether a permit is required pursuant to 10 V.S.A. Chapter 151 (Act 250) for two different slate quarry operations located near each other off Blissville Road in Poultney.

One of the operations involves U.S. Quarried Slate Products (U.S. Slate) and Scotch Hill Leasing Corporation. U.S. Slate is the quarry operator and Scotch Hill is the landowner. U.S. Slate's quarry operation is located on the site of the former Eagle Quarry. On July 31, 1992, District #1 Coordinator Anthony Stout issued Advisory Opinion #1-165, concluding that no Act 250 permit was required for U.S. Slate's proposed reopening of the Eagle Quarry. In that opinion, the District Coordinator stated that no Act 250 permit would be needed for the reopening because he believed it did not present "a potential for significant impacts." He also stated that an Act 250 permit will be required for a manufacturing facility proposed for the site by U.S. Slate.

The District Coordinator's opinion was appealed by Alfred Locke and Roger and Doreen Bushey, who own property near U.S. Slate's quarry site. On November 5, 1992, Associate General Counsel Aaron Adler issued Advisory Opinion #EO-92-267, concluding that an Act 250 permit was and is required prior to reopening the Eagle Quarry. On November 13. 1992. U.S. Slate filed a petition for a declaratory ruling. Following agreement by the Associate General Counsel to reconsider and a withdrawal request from U.S. Slate, Board Chair Elizabeth Courtney remanded the matter for reconsideration. On January 8. 1993, the Associate General Counsel issued Advisory Opinion #EO-92-267 (Reconsidered),

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stating that it remains his opinion that an Act 250 permit was and is required. On January 14, 1993, U.S. Slate and Scotch Hill refiled their petition for a declaratory ruling.

The other quarry operation involves extraction by Victor Genier near the site of the former Sbardella Quarry on land located off Blissville Road which he leases and proposes to buy from William P. Lenz II and Katherine Lenz. On December 7, 1992, the District #1 Coordinator issued Advisory Opinion #1-174, concluding that no permit is needed for Mr. Genier's planned extraction activity because the quarry was operating until the early 1970s and resumption of quarry activity on-site will not create new significant impacts. On December 14, 1992, the Busheys filed an appeal of this opinion. Pursuant to 10 V.S.A. § 6007(c), their appeal is being treated as a petition for a declaratory ruling.

On January 21, 1993, the Board issued a notice of a prehearing conference stating that the petitions for declaratory ruling concerning these two quarries will be consolidated due to the proximity of the quarry sites, similarity in issues, and overlap in the parties. On February 2, the Chair convened a prehearing conference.

On February 9, 1993, Mr. Genier filed a motion to dismiss. On February 19, the Chair issued a prehearing conference report and order. On February 22, the Board received both an opposition to the motion from the Busheys and response by Mr. Genier to that opposition. The Board deliberated on February 24. Mr. Genier and the Busheys were orally informed of the Boards decision on February 26.

DISCUSSION

Mr. Genier has filed a motion to dismiss that is now before us. Under Board Rule 18(D), the granting of a motion to dismiss is discretionary.

The basis for Mr. Genier's motion is his allegation that only 9.9 acres are involved and Poultney is a so-called "lo-acre town." Mr. Genier specifically states that he is only leasing a 9.9-acre portion of the approximately 91-acre Lenz parcel for the quarry operation and that this is the portion he plans to buy.

In relevant part, 10 V.S.A. § 6081(a) states that an Act 250 permit is required prior to commencement of construction on, or commencement of. "development." To paraphrase 10 V.S.A. § 6001(3) and Board Rule 2(A)(2),

development subject to Act 250 includes, in relevant part, the construction of improvements for commercial or industrial purposes on a tract or tracts owned or controlled by a person consisting of more than an acre of land, except that in towns with permanent subdivision and zoning bylaws, the land involved must be 10 or more acres. In determining the amount of land involved, the Board counts the tract on which the improvements are located, as well as other land within a radius of five miles of any involved land which is "incident to the use" or which bears a demonstrable relationship to the main tract and the relationship is such that there is a substantial likelihood of impact on the values Act 250 protects. See Board Rule 2(F).

Mr. Genier's argument is that there cannot possibly be Act 250 jurisdiction because of the amounr of leased iand that he intends to buy. It appears uncontested that the land subject to the lease/purchase agreement consists of 9.9 acres. Even so, we see three possible and separate ways in which there may be Act 250 jurisdiction, and thus we deny the motion because these matters should be the subject of proof at hearing.

First, in Re: Salvas Paving, Inc., Declaratory Ruling #229 (June 20, 1991), the Board ruled that leasing less than 10 acres of a greater than lo-acre tract does not defeat jurisdiction if the development is in fact on a tract of greater than 10 acres owned by a person, even if the owner is not the lessor-developer. Mr. Genier's motion states that he has a lease/purchase agreement with the Lenzes but does not supply the agreement. For the reasons stated in Salvas, the lease part of the agreement is immaterial if the actual tract on which the development is taking place consists of more than 10 acres. The purchase part may be material but questions arise concerning the terms. What is the period of the lease? When will the purchase actually occur? Can the purchase be defeated by the occurrence of subsequent events (such as default on lease terms)? Mr. Genier's purchase of the 9.9 acres could occur so far in the future or be so hinged on contingencies that it may be too speculative to be a basis for decision. To assist us in resolving this issue, we will require, pursuant to 10 V.S.A. § 6027(a) and Rule 17(E), that a copy of the lease/purchase agreement be prefiled and be entered into the record at hearing.

Second, the motion addresses primarily the main tract on which slate extraction is to occur. It does not foreclose the possibility that there is additional involved land within a radius of five miles. In this regard, we note that Mr. Genier's response to the Busheys' opposition states that there is no such

additional involved land. However, it is clear from the Busheys' opposition that they believe that such land exists. Accordingly, there is a dispute concerning the facts which a hearing will be necessary to resolve.

Third, it is possible that, even if Mr. Genier purchases the 9.9-acre parcel, jurisdiction might attach because he and the Lenzes may be one "person" under 10 V.S.A. § 6001(A)(14)(iii). If they were held to be one person. then there would still be more. than 10 acres under the ownership and control of that person.

10 V.S.A. § 6001(14)(A)(iii) provides, among other things, that "person":

> [I]ncludes individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land ..

Mr. Genier and the Lenzes may fit this definition. They appear to have an agreement (an affiliation) for the Lenzes to divide their tract and sell a portion to Mr. Genier. Thus, both parties appear to be getting profit, consideration, and beneficial interest from the division of the Lenz tract. Thus, the facts we know now indicate that these individuals may constitute one person.

It may be that evidence introduced at hearing will demonstrate that the above-referenced definition of a person does not apply to the facts of this case. Further, we note that we have never applied this definition outside of the context of an allegation that lots are part of a subdivision subject to Act 250 because of the creation of ten lots within a district within five years. See 10 V.S.A. §§ 6001(19), 6081(a) (Act 250 applies to subdivisions as well as developments). In this case, the question is whether Mr. Genier's quarry operation constitutes a. development and we may well decide, after hearing from the parties, that the definition is not applicable in the context of an alleged development. However, we believe that these determinations should be made after we have had an opportunity to hear the facts.

ORDER

1. Mr. Genier's motion to dismiss is denied,

2. No later than March 11, 1993, Mr. Genier shall file a copy of the lease/purchase agreement referenced in the motion. A copy shall be served on all parties. The lease/purchase agreement shall be entered into the record at hearing.

ENVIRONMENTAL BOARD

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