

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

Re: Howe Center Limited
Declaratory Ruling #300

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to a certain soil **screening** activity at Howe Center in **Rutland**, Vermont, and whether Howe Center Limited is required to seek an Act 250 permit to conduct such activities.

As explained below, the Board concludes that an Act 250 permit is not required for this activity.

I. BACKGROUND

On November 29, 1994, William Burke, District #1 Coordinator, issued Advisory Opinion #1-236 regarding soil screening activities at the south end of the Howe Center complex. Mr. Burke opined that these activities did not constitute a substantial change to a pre-existing development. Mr. Burke concluded that Howe Center Limited (HCL) was not and is not required to seek an Act 250 permit or permit amendment to conduct the activities at issue.

On December 29, 1994, Karen Moore and Kevin Smith filed a petition for a declaratory ruling (the Petition) with the Environmental Board. The Petition addresses whether the soil screening activities considered by Mr. Burke necessitate an Act 250 permit.

On February 14, 1995 Chairman John T. Ewing convened a prehearing conference in Montpelier, and a Prehearing Conference Report and Order were issued on February 16, 1995. The Chair announced his decision that the Board would use a hearing officer, subject to objection to that officer's findings and decision before the full Board.

Witness and exhibit lists and prefiled testimony and rebuttal testimony were filed by all parties. Objections to **portions** of such testimony and exhibits were filed on behalf of HCL and Petitioners.

A second prehearing conference was convened by the Chair on May 1, 1995 and the Chair ruled on the objections to testimony as previously filed. The Chair's evidentiary rulings were placed on record at the May 3, 1995 hearing.

On May 3, 1995 the Chair convened a hearing in the City of **Rutland** with the following parties participating:

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Howe Center Limited, by Sigismund J.A. Wysolmerski,
Esq.

Karen Moore and Kevin Smith, by John D. Hansen, Esq.
Angela R. Hinchley, pro se

At the commencement of this hearing a site visit was conducted with all parties in attendance. The soil screen was being operated during the site visit.

Chair Ewing's proposed decision was sent to the parties on May 16, 1995. The parties were provided an opportunity to submit written objections to the proposed decision and to present oral argument before the full Board. No objections to the proposed decision or requests for oral argument were submitted.

On June 21, 1995, William Martinez **recused** himself from this case; thereafter, following a review of the proposed decision and the evidence presented in the case, the Board declared the record complete and adjourned the hearing and deliberated. This matter is now ready for decision. To the extent any of the parties' proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are deemed irrelevant, inaccurate and/or redundant and are denied.

II. ISSUE

Do the soil screening activities at issue constitute, pursuant to 10 V.S.A. § 6081(b) and Environmental Board Rule '2(G), a substantial change to a pre-existing development requiring an Act 250 permit?

III. FINDINGS OF FACT

1. The Site is commonly known as the Howe Center and is located in the southwest quadrant of the City of **Rutland**.
2. The Site dates back to 1877 when the Howe Scale Company moved to and commenced commercial operations at the Site. The manufacturing of all types of scales, weighing equipment and two and four wheel carts continued at the Site until it closed in 1982. After a transition period a purchase agreement for the site was entered into by HCL on February 15, 1987.

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3. HCL completed the purchase on July 27, 1989. The Applicant has renovated the Site and made it into a multi-use commercial/industrial complex. The soil screen began operating in either late 1989 or in the spring of 1990.
4. The Site contains 18 acres of land and is laid out in the shape of a triangle. The triangle's base is the Site's southern boundary. There are three railroad tracks along the eastern side of the Site, and four tracks and several spurs along the western side. The City of **Rutland's** downtown business district is located to the northeast across from the eastern side railroad tracks.
5. Along the south side of the Site, commercial and residential uses are located along Moulthrop Avenue, Porter Place, and Park Street. Park Street runs east and west and connects U.S. Route 7 and Granger Street.
6. Ms. Moore and Mr. Smith live on Porter Place. Angela Hinchey lives on Park Street.
7. The soil screen is a single deck, conveyor type screening machine. Soil is placed in a hopper and then elevated along a conveyor belt, dropping onto a vibrating mesh screen. Materials which pass through the screen fall down a chute into a pile, and other materials roll off the screen and down a chute to a different pile. The soil screen is powered by a diesel engine which drives the conveyor belt and the screen. The screen is painted green. The machine stands 17 feet tall. The machine is made to be portable and has wheels at one end.
8. The components of the soil screening operation consist of a front-end loader to feed raw material into the hopper, the soil screen, and a loader to remove the material after processing by the screen. Dump trucks to deliver raw material and to receive the final product for delivery to a site for use or disposal, are also part of the process.
9. Some of the topsoil produced by the soil screening operation is used at Howe Center, with the larger portion being used off site at other construction projects.

10. The current site of the soil screen is in the southeast corner of Howe Center and southeasterly of Moon Brook. It is approximately 175 feet from the southerly property line of Howe Center and approximately 300 feet from the Moore/Smith home on Porter Place.
11. The operator of the soil screen is Giancola Construction Company, a company owned by the Giancola family which also owns Howe Center.
12. The usual hours of operation of the soil screening equipment is from 6:00 am to 6:00 pm, Monday through Friday, although on occasion the equipment may also be utilized at other times.
13. The operation has generated up to 600 yards of finished topsoil per year, although the demand can be higher if needed to supply lawns at Howe Center. The normal annual usage requires approximately 60 truckloads of raw material brought to the screen from off-site, and results in 43 truckloads of finished product, each year.
14. Prior to 1970 and until 1982 the Howe Center property was used by Howe Scale in its manufacturing of scales and associated equipment. The southeast corner was used for lumber storage and was also the site for the disposal of foundry wastes. A soil screening operation was not a part of Howe Scale activities.
15. The soil screening operation creates noise primarily from the bucket loaders and dump trucks, with some noise also produced by the diesel engine driving the soil screen. The other components of the soil screen create a minimal amount of sound. Decibel readings have a range between 62-64 **dba** at the south entrance to Howe, with lesser readings at the Moore/Smith home.
16. A minimal amount of dust is created by the soil screen.

IV. CONCLUSIONS OF LAW

Howe Scale Company and its operations constitute a **pre-existing development** in existence on June 1, 1970 under **Environmental Board Rule 2(0)**, and abandonment of the site **has not occurred**. The issue is whether the soil processing operation falls within this pre-existing development and is **therefore not required** to seek an Act 250 permit.

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10 V.S.A. § 6081(b) states that the permit requirement applies "to any substantial change in [an] excepted subdivision or development." Rule 2(G) provides:

"Substantial change" means 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 (a)(10).

The Board analyzes the issue of substantial change using a two-part test: (1) it determines whether there has been or is planned a cognizable change to the project and (2) it determines whether changes to the project have the potential for significant impacts with respect to any of the ten Act 250 criteria at 10 V.S.A. § 6086(a). Re: Village of Ludlow, Declaratory Ruling #212 at 8 (Dec. 29, 1989).

In this case the soil screen is not a use that occurred during the Howe Scale manufacturing processes. However, those processes did involve a smelting operation near this site that generated significant impacts. Howe Center currently involves a wide variety of uses, including manufacturing, education, retail services, repair shops and other enterprises.

The Board concludes that a cognizable change to the project has occurred. The question then becomes whether such changes represented by the soil screening **activities** have the potential for significant impacts with respect to any of the ten Act 250 criteria (Re: Villaae of Ludlow, Supra).

The screen itself is relatively quiet and not a substantial creator of dust; only the diesel engine which powers the screen can be deemed to contribute to substantial change, along with loading and truck traffic.

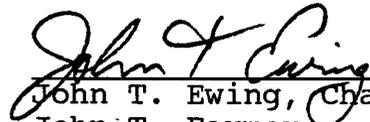
The observations at the site visit; the distance of the soil screen activities from the southerly boundary of Howe Center property; the presence of far more substantial noise from other truck and railway traffic in the vicinity; the customary hours and days of operation; and the number of truck trips normally occurring to and from the site lead the Board to conclude that the soil screening activities do not **have** the potential for significant impacts with respect to **the** ten Act 250 criteria as contemplated by Rule 2(G).

V. ORDER

An Act 250 permit is not required for Applicant's soil screening operation at Howe Center.

Dated at Montpelier, Vermont this 23rd day of June, 1995.

ENVIRONMENTAL BOARD



John T. Ewing, Chair
John T. Farmer
Arthur Gibb
Marcy Harding
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