

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

Re: Keith Van Buskirk d/b/a
American Wilderness Resources, Inc.
Declaratory Ruling #302

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to a petition for declaratory ruling (the "Petition") filed with the Environmental Board by the Vermont Natural Resources Council ("VNRC") requesting a jurisdictional determination with respect to timber harvests on land owned by Keith Van Buskirk ("Van Buskirk") in Duxbury, Vermont. As is explained below, the Board concludes that no permit or permit amendment is required pursuant to 10 V.S.A. Chapter 151 ("Act 250").

I. SUMMARY OF PROCEEDINGS

On December 20, 1994, the District #5 Coordinator issued Advisory Opinion #5-94-9 (the "Advisory Opinion"). The Advisory Opinion pertains to whether there is Act 250 jurisdiction over the harvesting of timber on approximately 10,000 acres of land owned by Van Buskirk. The timber harvesting is occurring in several towns located in the Mad River Valley.

The Advisory Opinion contained two, separate jurisdictional analyses. First, the Advisory Opinion considered the activities occurring on land identified as the "Fayston Lands (NELA Parcels 14G and 47A)." Second, the Advisory Opinion considered the activities occurring on land identified as "Town of Duxbury (Parcels 2A & 6A)." This declaratory ruling is limited to the activities reviewed in the Advisory Opinion's second jurisdictional analysis.

On January 19, 1995, VNRC filed the Petition with the Board.

On March 13, 1995, Chair John Ewing convened a prehearing conference in Montpelier, Vermont. The Petitioner attended, but Van Buskirk did not.

On March 21, 1995, the Chair issued a Prehearing Conference Report and Order (the "Prehearing Order"). The Prehearing Order provided, in part, that: (i) the Chair would serve as hearing officer pursuant to EBR 41; (ii) the issues to be decided would be the four issues identified in Section IV of the Prehearing Order; (iii) legal memoranda relative to the four issues could be filed on or before April 19, 1995; (iv) official notice would be taken of the 29 documents listed in Section V of the Prehearing Order and a hearing would not be convened unless the Chair or Board

decided otherwise; and (v) pursuant to EBR 16, the Prehearing Order would be binding on all parties unless a written objection was filed on or before April 5, 1995.

No party objected to the Prehearing Order. Accordingly, the Chair issued a proposed decision (the "Proposed Decision") on June 2, 1995.

On June 23, 1995, VNRC filed an objection to the Proposed Decision and a supporting memorandum of law (the "VNRC Memorandum").

On July 17, 1995, the Central Vermont Regional Planning Commission filed a letter in response to the Proposed Decision.

On July 26, 1995, the Board convened an oral argument relative to the Petition. VNRC was the only participant at oral argument.

On July 26, 1995, the Board deliberated concerning this matter. On that date, following a review of the Proposed Decision and the evidence and arguments presented in the Petition, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision.

II. ISSUES

As provided in the Prehearing Order, the issues in this Petition are:

1. Whether Parcel "2A" is physically contiguous to Parcel "6A", notwithstanding that a legal trail separates Parcels "2A" and "6A".
2. Whether, if Parcel "2A" is physically contiguous to Parcel "6A", Parcels "2A", "6A", and "9A" constitute one tract for purposes of Act 250 jurisdiction because they form a contiguous land mass owned by the same person.
3. Whether, if Parcels "2A", "6A", and "9A" constitute one tract for purposes of Act 250 jurisdiction, said tract is the involved land that is subject to Act 250 Land Use Permits #5W0911, #5W0911-1, or #5W0911-2 (the "#5W0911 Permits").
4. Whether, if Parcels "2A", "6A", and "9A" constitute one tract which is subject to the #5W0911

Permits, the timber harvesting by Van Buskirk constitutes a material change under EBR 2(P) or a substantial change under EBR 2(G) to those projects authorized by the #5W0911 Permits and, therefore, requires an Act 250 permit amendment pursuant to EBR 34 notwithstanding that construction for logging purposes below the elevation of 2500 feet does not constitute development under 10 V.S.A. § 6001(3).

III. PROCEDURAL ISSUES RAISED BY VNRC

A. Issues to be Decided

The VNRC Memorandum objects to the Board's consideration of the issues identified in Section II. VNRC contends that the Petition was limited to the first issue and that the Board should so limit its decision. VNRC repeated this objection at the oral argument.

Pursuant to 10 V.S.A. § 6007(c) and EBR 3(D), petitions for declaratory rulings determine the applicability of any statutory provision or of any rule or order of the Board. Provided a petition is timely filed, the issue before the Board is the applicability of any statutory provision or of any rule or order of the Board over the project described in the advisory (now jurisdictional) opinion. Pursuant to EBR 16, the Prehearing Order clarified the issues in controversy, and gave parties an opportunity to object or file legal memoranda. VNRC neither objected nor filed a memorandum of law pursuant to the Prehearing Order's express requirements.

The Board concludes that the issues in this Petition are those stated in the Prehearing Order and as repeated in Section II, above.

B. Request for a Hearing

The VNRC Memorandum requests that the Board convene an evidentiary hearing. VNRC repeated this request at oral argument.

The Prehearing Order states, "[a]t the prehearing conference, VNRC repeated its request that this declaratory ruling proceeding be decided without the convening of an evidentiary hearing." (Emphasis added.) The Prehearing Order provided for official notice of 29 documents pursuant to 3 V.S.A. § 810. In addition, the Prehearing Order reserved to the Chair and the Board the opportunity to convene an evidentiary hearing notwithstanding VNRC's

request to do otherwise. The parties were given until April 5, 1995 to object. No party objected. Finally, VNRC's hearing request does not contend that there are additional material facts discoverable to it only since the issuance of the Prehearing Order. Therefore, the Board concludes that a hearing is not necessary to decide the issues in this proceeding.

IV. FINDINGS OF FACT

1. The District #5 Commission issued the #5W0911 Permits to New England Land Associates ("NELA") in 1986 and 1987. The #5W0911 Permits authorized the subdivision of a 676.5 acre tract of land. When Land Use Permit #5W0911 was issued, the land authorized to be subdivided therein was known as Parcels "9A" and "9C" (the "9A/9C Tract").
2. Parcel "9A" was a 514.5 acre tract of land with 508 acres located in Fayston and 6.5 acres located in Duxbury.
3. Parcel "9C" was a 162 acre tract of land located in Fayston which was adjacent to and south of Parcel "9A."
4. Land Use Permit #5W0911, issued on December 30, 1986, authorized NELA to subdivide Parcels "9A" and "9C" into four lots. A new tract created from Parcel "9A" was a 508 acre tract designated Parcel "9A-F." A new tract created from Parcel "9C" was a 67 acre tract designated Parcel "9C-W."
5. Land Use Permit #5W0911-1, issued on June 16, 1987, authorized NELA to subdivide Parcel "9C-W" into two lots.
6. Land Use Permit #5W0911-2, issued on October 20, 1987, authorized NELA to subdivide Parcel "9A-F" into four lots.
7. The #5W0911 Permits did not place any conditions on trees or tree cutting, nor do they mention any of NELA's land holdings in Duxbury, other than the 6.5 acre portion of Parcel "9A" which is located in Duxbury.
8. Van Buskirk owns a 120 acre tract of land located in Duxbury known as Parcel "2A". Van Buskirk also owns a 3,074 acre tract of land in Duxbury known as Parcel

- "6A". Parcel "6A" is north of Parcel "2A".
9. A legal trail separates Parcel "6A" from Parcel "2A".
 10. Together, Parcels "2A" and "6A" encompass an area of 3,194 acres (the "2A/6A Tract"). The District #5 Commission did not make the 2A/6A Tract or any part of the 2A/6A Tract subject to the #5W0911 Permits.
 11. The 2A/6A Tract is adjacent to and north of the 9A/9C Tract. At the time the #5W0911 Permits were issued to NELA for the 9A/9C Tract, the land comprising the 2A/6A Tract was also owned by NELA.
 12. Maps submitted to the District #5 Commission by NELA with respect to its application for the #5W0911 Permits show that the lands of the 2A/6A Tract are adjacent to and north of the 9A/9C Tract, with the Duxbury-Fayston town line serving as the boundary between the land of the 2A/6A Tract and the 9A/9C Tract.
 13. On October 11, 1994, Van Buskirk, Grondin Industries, Ltee, and Jean Marc Boulet entered into a "Memorandum of Timber Purchase Agreement." The Memorandum of Timber Purchase Agreement includes, in part, the 2A/6A Tract.
 14. Van Buskirk has set tree removal standards which will be adhered to by Grondin Industries. In part, they are: (i) all spruce trees 8" or larger in diameter; (ii) all pine and hemlock trees 10" or larger; (iii) all hardwood species 12" or larger in diameter excluding beech trees; (iv) no trees located above the 2,500 foot elevation level; (v) selective cutting within buffers along property lines, streams, and town roads.
 15. While there will not be "clear cutting" because trees below a certain size will not be harvested, 75% of all merchantable timber over 12 inches in diameter will be cut, and the timber harvests may result in a reduction of approximately 25% of the overall mature forest cover on the land subject to the Memorandum of Timber Purchase Agreement.

V. CONCLUSIONS OF LAW

1. Parcel "2A" is physically contiguous to Parcel "6A", even though a legal trail separates those parcels.

Where a town highway separates land owned by a person, sale of land on one side of the highway will not partition or divide the land in the context of a subdivision. Maida Z. Maxham, Declaratory Ruling #196 (January 14, 1988). In this case, the issue is whether a legal trail should be treated the same as a town highway for purposes of determining whether land on either side of the trail is or is not contiguous. 19 V.S.A. § 302(a)(5) states that "[t]rails shall not be considered highways." As such, a legal trail is not accorded the same status as a town highway by the Legislature. Accordingly, Parcel "2A" is contiguous to Parcel "6A".

2. The 2A/6A Tract and the 9A/9C Tract constitute one tract for purposes of Act 250 jurisdiction because they form a contiguous land mass owned by the same person.

Maps officially noticed show that the 2A/6A Tract and the 9A/9C Tract are contiguous. Where two lots form a contiguous land mass owned by the same person, such lots constitute one tract for purposes of Act 250 jurisdiction. New England Land Associates, Declaratory Ruling #289 (May 26, 1994). See also Gerald Costello Garage, Declaratory Ruling #243 (July 2, 1991) at 3. This rule has been upheld by the Supreme Court in the context of development. In re Gerald Costello Garage, 158 Vt. 655 (1992). Accordingly, the 2A/6A Tract and the 9A/9C Tract constitute one tract within the definition of a subdivision under 10 V.S.A. § 6001(19) and EBR 2(B).

3. The 2A/6A Tract does not constitute involved land that is subject to the #5W0911 Permits.

While the 2A/6A Tract and the 9A/9C Tract constitute one tract under the Act 250 definition of subdivision, this fact does not resolve the jurisdictional inquiry over Van Buskirk's logging activity. The unique facts of this case require an analysis as to whether in 1995 the 2A/6A Tract should be determined to be a portion of the involved land of the #5W0911 Permits issued in 1986 and 1987.

In TOFR Bayside Associates, Declaratory Ruling #158 (September 26, 1984), the Board determined that jurisdiction did not attach to a subdivision lot under a permit issued

for the subdivision. The lot at issue was purchased prior to the subdivision permit application. The owners of the lot were not made parties to the permit proceeding, nor were they required by the Commission to act as co-applicants. In finding no jurisdiction over the lot, the Board stated:

Basic principles of fairness and due process require that those whose property interests are to be subject to scrutiny under Act 250 and who will be bound by permit terms and conditions have actual knowledge that their property has come within a Commission's jurisdiction.

TOFR Bayside, at 3.

NELA provided maps to the District #5 Commission as part of the application for the #5W0911 Permits. These maps showed the contiguous nature of the land subject to the #5W0911 Permits and the lands of the 2A/6A Tract. The Commission was on notice that the involved land of the 9A/9C Tract might consist of contiguous parcels, including the lands of the 2A/6A Tract. As a result, the Commission could have concluded that jurisdiction might exist over the lands of the 2A/6A Tract. Nevertheless, the Commission did not include the lands of the 2A/6A Tract within the scope of the #5W0911 Permits and the permits do not mention those lands. See Investors Corporation of Vermont, Declaratory Ruling #249 (December 31, 1991).

Accordingly, the 2A/6A Tract does not constitute involved land that is subject to the #5W0911 Permits. See In re Taft Corners Assocs., 160 Vt. 583, 593 (1993). Therefore, the Board has no jurisdiction over the timber harvesting activities undertaken by Van Buskirk on the 2A/6A Tract and no permit or permit amendment is required.

VNRC also contends that the Memorandum of Timber Purchase Agreement between Van Buskirk and Grondin Industries, Ltee and Jean Marc Boulet is the sale of an interest in a subdivision that requires an Act 250 permit pursuant to 10 V.S.A. § 6081(a). The Board agrees that, based on Page v. Hall, Inc., 125 Vt. 275, 277 (1965), the Memorandum of Timber Purchase Agreement may be the conveyance of an interest in real property. However, no additional permit amendment or permit is required. While the 9A/9C Tract is a subdivision, a permit amendment is not required for the timber conveyance since the #5W0911 Permits already have been issued, and the timber conveyance is not a substantial or material change (see below); thus, the

conveyance complies with 10 V.S.A. § 6081(a). With regard to the 2A/6A Tract, no permit is required since the 2A/6A Tract is not a subdivision subject to Act 250 jurisdiction and, therefore, the conveyance of the timber thereon is not subject to 10 V.S.A. § 6081(a).

4. Timber harvesting occurring on the 2A/6A Tract and any timber harvesting activity which may be occurring on the 9A/9C Tract is not within the exemption to the logging exclusion from the definition of development

Even if the 2A/6A Tract was found to be part of the involved land of the #5W0911 Permits, Act 250 jurisdiction still does not exist over the timber harvesting on the 2A/6A Tract or any timber harvesting activity on the 9A/9C Tract. Generally, Act 250 jurisdiction exists over "development" as defined in 10 V.S.A. § 6001(3) and EBR 2(A). "Development," however, does not include construction for farming, logging, or forestry purposes below the elevation of 2,500 feet. In this instance, Van Buskirk is conducting logging operations on the 2A/6A Tract. As such, Van Buskirk's logging activities under 2,500 feet are within the scope of this "logging exclusion" from the definition of development.

Application of the logging exclusion to Van Buskirk's operations does not end the jurisdictional inquiry. The logging exclusion does not absolutely prohibit the assertion of Act 250 jurisdiction over the cutting of trees. The logging exclusion only states that logging is not "development" for the purposes of Act 250 jurisdiction. A competing consideration to the logging exclusion is the Board's (or the district commission's) authority to impose conditions when granting Act 250 permits. 10 V.S.A. § 6086(c). Permits may be conditioned to the extent allowable under the police power with respect to the ten criteria of 10 V.S.A. § 6086(a).

In any given development or subdivision for which a permit is required, positive findings with respect to the criteria may require that conditions be imposed prohibiting tree cutting or logging. As such, the logging exclusion does not exempt tree cutting or logging from Act 250 jurisdiction where a permit is issued, a finding of fact is made or a condition is imposed in that permit regarding tree cutting or logging, and such finding of fact or condition was the basis for a positive finding under one or more of the criteria. Nor does the logging exclusion exempt tree cutting or logging from Act 250 jurisdiction where a permittee has represented to the Board or a district

commission that tree cutting or logging will not take place as part of a permitted project.

Where findings of fact or conditions regarding tree cutting or logging are included in a permit, or a representation is made that no tree cutting or logging will take place, tree cutting or logging which constitutes a material or substantial change to that permitted development or subdivision will only be allowed if the permit holder applies for a permit under EBR 34.

The policy behind the exception to the logging exclusion is that logging and tree cutting associated with a development or subdivision has adverse effects with respect to the ten criteria of 10 V.S.A. § 6086(a). With respect to water quality, a permit may require that trees be made to serve as buffers in order to protect streams, streambanks, lakeshores, and other riparian areas. With respect to soil erosion, a permit may require that trees be kept in place to minimize the adverse effects of erosion, especially in areas with steep slopes and shallow soils. A permit may also require that trees be preserved to protect wildlife habitat such as deeryards.

Based on a review of the #5W0911 Permits, no such elements for the exception to the exclusion exist in this case. No permit conditions or findings of fact are contained in the #5W0911 Permits nor were any representations made to the District #5 Commission by Van Buskirk's predecessor-in-title, NELA, regarding logging or timber cutting. As a result, the timber harvesting by Van Buskirk does not trigger Act 250 jurisdiction under the exception to the logging exclusion. Therefore, the Board has no jurisdiction over the activities undertaken by Van Buskirk on the 2A/6A Tract, or any activities taking place on the 9A/9C Tract, and no permit amendment is required pursuant to EBR 34(A).

VI. THE NEED FOR LEGISLATIVE ACTION

The Board is deeply concerned over the environmental impacts which are caused by large scale logging operations. The Board's decision that Act 250 jurisdiction cannot be stretched beyond its legal limits to encompass the logging operations on the 2A/6A and 9A/9C Tracts only underscores the urgent need for the Legislature to continue to address the need for regulation over such operations.

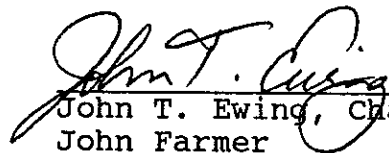
VII. ORDER

1. No Act 250 permit is required for the logging activities conducted under 2,500 feet on the 2A/6A Tract.

2. To the extent Van Buskirk is conducting logging activities under 2,500 feet on the 9A/9C Tract, no permit amendment under EBR 34 is required for such activities.

Dated at Montpelier, Vermont this 15th day of August, 1995.

ENVIRONMENTAL BOARD



John T. Ewing, Chair
John Farmer
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William Martinez
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