VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

RE: Town of Williston Road Improvements
[redacted]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding concerns Respondent Town of Williston's ("Williston's") proposal to make roadway and pedestrian improvements to the intersection of Routes 2 and 2A, **also known** as Taft Comers, in Williston, Vermont ("Project"). The Environmental Board ("Board") concludes that as a matter of law the Project does not require a land use permit pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250") because it will physically disturb only 5.84 acres.

I. PROCEDURAL SUMMARY

On March 11, 1999, the District #4 Environmental Coordinator ("Coordinator") issued Jurisdictional Opinion ("JO") #4-145, in which he opined that the Project proposed by Williston does not require a land use permit pursuant to Act 250. The Coordinator twice reconsidered and reconfirmed the conclusions of the JO, in opinions dated April 19, 1999 and July 26, 1999.

On August 19, 1999, Petitioners Judge Development Corp. and Winter Development Corporation ("Petitioners") filed a petition for a declaratory ruling with the Board pursuant to 10 V.S.A. § 6007(c) and Environmental Board Rule ("EBR") 3. Petitioners contend that the Project requires an Act 250 permit pursuant to EBR 2(F)(3) because it involves more than 10 acres of land.

On October 5, 1999, Chair Harding issued a Prehearing Conference Report and Order ("PHCRO").

On October 25, 1999, Petitioners and Respondents Vermont Agency of Transportation ("AOT") and Williston (collectively, "the parties") [1] filed a joint stipulation in which they agreed to narrow the issues set forth in the PHCRO.

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[1] AOT represents the interests of the State of Vermont as owner of the state highway system on which the proposed improvements will be made. Williston believes that its own interests are identical to those of AOT and therefore has not participated in these proceedings as an independent party.

Chair Harding approved this stipulation in a Chair's Preliminary Ruling (Revised) dated October 28, 1999. She ruled, in accordance with the parties' request, that the sole question presented by this case is whether, pursuant to EBR 2(A)(4), the Project constitutes development and requires a land use permit because it contains more than 10 acres of "involved land" pursuant to EBR 2(F)(3).

On November 19, 1999, the parties filed a Stipulation Regarding Hearing Procedure that requested to waive their right to an evidentiary hearing and site visit and to withdraw an earlier request to submit responsive memoranda. The parties instead requested that the case be submitted to the Board on stipulated facts and exhibits, memoranda of law, and oral argument.

Chair Harding approved the parties' request in a Chair's Preliminary Ruling as to Scheduling dated November 22, 1999.

Stipulated facts and exhibits were filed on November 2, 15, and 16, 1999. Respondent AOT filed its Memorandum of Law on November 29, 1999; Petitioners on November 30, 1999. Petitioners also filed Proposed Findings of Fact, Conclusions of Law and Order on November 30, 1999; Respondent AOT filed its Proposed Findings on December 10, 1999.

The Board heard oral argument and deliberated in this matter on December 15, 1999. It deliberated again on January 12, 2000. Based on a thorough review of the record, relevant argument and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned the hearing on January 12, 2000. The matter is now ready for final decision.

II. ISSUE

Whether, pursuant to EBR 2(A)(4), the Project constitutes development and requires a land use permit because it contains more than 10 acres of "involved land" pursuant to EBR 2(F)(3).

III. FINDINGS OF FACT

To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. See Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp., 167 Vt. 228,241 (1997); Petition of Village of Hardwick Electric Department, 143 Vt. 437,445 (1983).

1. The purpose of this Project is to make certain improvements at and near the intersection of U.S. Route 2 ("US. 2") and Vermont Route 2A ("Vt. 2A") in the Town of Williston.[2]

2. US. 2 and Vt. 2A both are part of the Vermont state highway system.

3. Respondent Town of Williston is managing the Project in accordance with a December 10, 1997 Cooperative Agreement (amended August 24, 1998) between it and AOT.

4. The Project elements include replacement of the existing Taft Comers traffic signal; installation of pedestrian signals for the crosswalks at the intersection; construction of sidewalks on a portion of the west side of Vt. 2A north of Taft Comers, on a portion of the east side of Vt. 2A north of Taft Comers, on portions of the east and west sides of Vt. 2A south of Taft Comers, and on portions of the north side of U.S. 2 east and west of Taft Comers; widening the west U.S. 2 approach to add an exclusive right turn lane, reconfiguring the east U.S. 2 approach to add an exclusive right-turn lane and to delete one of the two existing eastbound departure through lanes and widening the north and south Vt. 2A approaches to provide two lanes for southbound through traffic; construction of raised curbed islands in the northwest and southeast quadrants of the intersection to provide improved channelization and pedestrian crossings; and the installation of interconnection cables for the traffic signal at Taft Comers and other nearby traffic signals, to permit the future development of a coordinated signal system.

5. The area that will be physically disturbed by the Project totals 5.84 acres.

6. With several exceptions, the Project has been designed to remain within the existing highway right-of-way. The physically disturbed area includes the entire right-of-way between Station 9+75 and Station 16+25 on U.S. 2 west of the intersection, and between Station 108+44 and Station 116+50 on Vt. 2A north of the intersection. On U.S. 2 east of the intersection the proposed construction is limited primarily to the roadway (pavement overlay, striping and signage), with the exception of the sidewalk, which will be built within the existing highway right-of-way. The calculation of involved area on the east approach uses the entire right-of-way width to Station 19+6 1 LT (left) and Station 19+71 RT (right), and thence a perimeter 10 feet to the outside of the existing roadway to the easterly project limit of Station 22+75. Similarly, on the Vt. 2A south approach, the calculation of involved area uses the entire right-of-way width from Station

[2] In several places, the precise wording of the Stipulation to Facts has been altered for clarity or to conform the language of the Stipulation to Facts to Board conventions. The substance of the stipulated facts, however, has not been changed.

104+00 LT and Station 105+00 RT to Station 108+44. South of Station 104+00 LT and Station 105+00 RT, a perimeter 10 feet outside the existing roadway on the east plus 20 feet outside the proposed roadway on the west were used to the southerly project limit at Station 99+50. The latter distance on the west side is greater in order to include proposed fill slope limits.

7. Aiso included in the calculation of the physically disturbed area is a construction easement 5 feet wide by 247 feet long on property owned by Jolley Associates (new curbing and pavement will be installed within the highway right-of-way, but the easement provides additional work space for the contractor); an area 15 feet wide by 337 feet long on property owned by East Williston Road Associates (bordering both U.S. 2 and Vt. 2A), on which sidewalks, new storm sewer pipes and grading will be installed; plus, an area 20 feet wide by 322 feet long extending northward along the west side of Vt. 2A to permit the replacement of an existing undersized storm sewer pipe.

8. For the traffic signal interconnect portion of this Project, which will extend beyond the above-described Project limits south to I-89 Exit 12 and west to South/North Brownell Road, the calculation of the physically disturbed area includes only those areas where the installation of underground conduit will be necessary. In those areas, which total 385 linear feet, a 20-foot wide disturbed area was assumed. Segments of the new signal interconnect wire which will be installed aerially on existing utility poles (totaling 7,275 linear feet) were not included in the physically disturbed area calculation.

IV. CONCLUSIONS OF LAW

A. Scope of Review and Burden of Proof

A petition for declaratory ruling is conducted de novo to determine the applicability of any statutory provision or of any rule or order of the Board. 10 V.S.A. §6007(c); EBR 3(D). The issue in a declaratory ruling proceeding is not whether a jurisdictional opinion, or any part thereof, is correct. Thus, facts stated or conclusions drawn in the jurisdictional opinion are not considered to be binding on the Board. Provided a petition is timely filed, the only issue is the applicability of any statutory provision or of any rule or order of the Board over the project described in the jurisdictional opinion. David Enman (St. George Property), Declaratory Ruling #326, Findings of Fact, Conclusions of Law and Order, at 11 (December 23, 1996).

The party seeking to change the status quo generally has the burdens of production and proof. Lincoln Haynes Gravel Pit, Declaratory Ruling #192 (September 25, 1987), aff'd, Lincoln W. Haynes, 150 Vt. 572 (1988); Re W. Joseph Gagnon, Declaratory Ruling #173, Memorandum of Decision at 5 (July 3, 1986), citing McCormick, Evidence

949. In this case, the status quo is that the Project is not subject to Act 250 jurisdiction. Petitioners seek to change the status quo by obtaining a declaration that the Project is subject to Act 250 jurisdiction; accordingly, Petitioners have the burdens of production and proof.

B. Discussion

The parties have framed the issue in this case as whether, pursuant to EBR 2(A)(4) and 2(F)(3), the Project constitutes a "development" because it contains more than 10 acres of "involved land." EBR 2(A)(4); EBR 2(F)(3). Petitioners contend that the Project requires an Act 250 permit because even though the parties have stipulated that the proposed improvements will physically disturb only 5.84 acres, the Town of Williston controls in excess of 10 acres of land within a 5 mile radius of the Project, and this involved land bears a relationship to the Project such that values sought to be protected by Act 250, specifically Criterion 5 (Traffic), will be substantially effected. See 10 V.S.A. § 6086(a)(l)-(10); EBR 2(F)(3). In the alternative, Petitioners argue that Act 250 jurisdiction exists because, pursuant to EBR 2(F)(3), the Project is part of a larger plan or undertaking by Williston to coordinate traffic south of the Project site to Interstate 89 and north to North Brownell Road. The Petitioners' arguments are unavailing.

The starting point for determining whether the proposed improvements are subject to Act 250 jurisdiction is the Act 250 statutes, 10 V.S.A. §§ 6001-6092. Cf. Committee to Save the Bishop's House v. Medical Center Hospital of Vermont, 137 Vt. 142 (1979).

10 V.S.A. § 6081(a) sets forth a sweeping requirement that "[n]o person shall ... commence construction on a... development, or commence development without a permit." 10 V.S.A. § 6081(a); Agency of Administration, 141 Vt. 68, 75 (1982).[3] 10

[3] Readers should note that several cases cited in this decision possess similar or identical names. For example, two different "City of Montpelier" Declaratory Rulings are cited (Declaratory Ruling #190, dated September 6, 1988, and Declaratory Ruling #220, dated July 13, 1990). So are two different "Agency of Administration" cases, one a Vermont Supreme Court decision issued in 1982 and the other an Environmental Board decision fully titled Agency of Administration. Windsor Correctional Facility, Declaratory Ruling #15 1, dated May 8, 1984. In addition, the Board cites Declaratory Rulings in cases involving both the "City" and "Town" of Rutland. These are Citv of Rutland, Declaratory Ruling #146 (February 8, 1984), and Town of Rutland, Declaratory Ruling #207 (May 5, 1989)). To minimize confusion, the citation forms normally followed by the Board have been altered throughout this decision where necessary to distinguish among cases.

V.S.A. § 6001(3), in turn, then refines this requirement by defining seven distinct kinds of activity that constitute "development." Specifically, 10 V.S.A. § 6001(3) provides:

> "Development" means 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,** ... the construction of **housing projects** ... on a tract or tracts of land, owned or controlled by a person, within a radius of five miles of any point on any involved land, [and] ... *the construction of improvements on a tract of land involving more than IO acres which is to be used for* **municipal, county or state purposes.** *In computing the amount of land involved land shall be included which is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings.* [4] In the case of a project undertaken by a **railroad,** no portion of a railroad line or railroad right-of-way that will not be physically altered as part of the project shall be included in computing the amount of land involved ... The word development shall also mean the construction of improvements for commercial, industrial or residential use **above the elevation of 2500 feet**[,]... the exploration for **fissionable source materials** [and] the drilling of an **oil and gas well.**

10 V.S.A. § 6001(3)(emphasis added).

As both the Board and Vermont Supreme Court have noted, significant definitional distinctions exist between development for commercial or industrial purposes and development for state, county and municipal purposes. See City of Montnelier, Declaratory Ruling #220, Findings of Fact, Conclusions of Law and Order, at 7 (July 13, 1990); Agency of Administration, Supra at 75. For example, development for commercial or industrial purposes is defined as "the construction of improvements on a tract *or tracts* of land, *owned or controlled by a person ... within a radius of five miles of any point on the involved land,"* while development for state, county and municipal purposes omits these underlined provisions. 10 V.S.A. § 6001(3)(emphasis added); Citv of Montnelier, Declaratory Ruling #220, supra at 7; Agency of Administration, supra at 75.

These omissions suggest that the legislature intended Act 250 jurisdiction to attach to government projects in more limited circumstances than commercial or industrial ones. See Citv of Montpelier, Declaratory Ruling #220, supra at 5-7 (Board

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4 The definition of development for state, county and municipal projects includes all of the italicized language. See Bishop's House, supra at 152-l 53; Town of Rutland, supra at 4; Citv of Montpelier, Declaratory Ruling #220, supra at 4-6.

must presume that all language in a statute was drafted advisedly). As both the City of Montpelier and Agency of Administration cases have noted, to legally distinguish commercial and industrial development from state, county and municipal development is consistent with the legislative history of Act 250. Ibid.; Agency of Administration, supra at 76-79. The original bill to create Act 250 expressly exempted the activities of the state and municipalities from the definition of development. Id. at 76. Apparently, there was some concern that the total exclusion of state and municipal activities was in conflict with the broader purposes of the Act, and so the bill was amended to include such activities. See id. at 77. However, the "tracts," "owned or controlled," and "radius of five miles" language appeared in the final bill only in the definition of development for commercial and industrial purposes, not development for state or municipal purposes. 1970 Journal of the House 63 1 (April 2, 1970); 10 V.S.A. §6001(3); see Agency of Administration, supra at 78-79. The Board concludes that the definitional distinctions between commercial and industrial development, on the one hand, and state, county and municipal development, on the other, represent the legislature's considered intent to limit Act 250 jurisdiction over the latter. This conclusion has been borne in mind in determining the outcome of the present matter.

Having looked at the statutory requirements for obtaining an Act 250 permit, the Board's task becomes one of defining the meanings of the terms "involved land" and land "incident to the use" as they are used in 10 V.S.A. § 6001(3).[5] The statute itself does not specify their meaning. See 10 V.S.A. §6001(3). Instead, these terms have been defined through case law and the application of EBR 2(F).

From early on in the history of Act 250, the Board has consistently ruled that "involved land" in state, county and municipal development projects means only land that is physically disturbed by the project.[6] See e.g., City of Burlington. Resource Recovery Project, Declaratory Ruling #125 (March 11, 1981) counting city landfill as involved land incident to use of proposed resource recovery facility in part because recovery project required use of landfill to receive non-processable wastes from recovery project, and landfill would require many "physical alterations" to be able to accept such wastes); City of Rutland, Declaratory Ruling #146, Findings of Fact, Conclusions of Law and Order, at 4 (counting only "land involved with the actual improvements"); Anency of

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[5] The term "involved land" appears in the definition of several of the seven types of "development" specified in 10 V.S.A. § 6001(3); the term "incident to use" appears only in the definition of state, county and municipal development. See 10 V.S.A. § 6001(3).

[6] The **only** exception is Village of Ludlow, Declaratory Ruling # 2 12, Findings of Fact, Conclusions of Law and Order (December 29, 1989). For the reasons discussed below, the Board will no longer rely on Village of Ludlow.

Administration. Windsor Correctional Facility, Declaratory Ruling #15 1, Findings of Fact, Conclusions of Law and Order, at 2-3 (May 9, 1984) (counting only land "directly associated" with installation of new sewage line); City of Montuelier, Declaratory Ruling # 190, Findings of Fact, Conclusions of Law and Order, at 6 (September 6, 1988) (counting only land "directly involved" in water and sewer project); Town of Rutland, Declaratory Ruling #207 at 5 (May 5, 1989)(Board looks only to land which will be changed or physically altered because of a proposed project); Citv of Montuelier, Declaratory Ruling #220, Findings of Fact, Conclusions of Law and Order, at 6-8 (same)(July 13, 1990). The Board has also consistently ruled that land is not "'incident to the use' ... unless it will somehow be changed because of the project." Town of Rutland, supra at 5-6; Town of Windsor, supra at 5; City of Montpelier, Declaratory Ruling #220, supra at 5. Policy considerations underlie these interpretations. As the Board stated in Town of Rutland, it believes that such a result is necessary "because government entities often own a great deal of land which would be considered 'incident to use' [and therefore "involved land"] under a broader interpretation, ... leading to unmanageable extensions of board jurisdiction." Town of Rutland, supra at 5-6; see also Town of Windsor, supra at 5; Citv of Montpelier, Declaratory Ruling #220, supra at 5.

Based on the case law interpreting 10 V.S.A. § 6001(3)'s "involved land" and "incident to use" provisions as they apply to state, county and municipal development projects, Act 250 jurisdiction cannot be asserted over Williston's proposed Project, because the parties have stipulated that the area that will be physically disturbed by the Project totals only 5.84 acres. Unless some other source of law justifies a different conclusion, the Petitioners' argument fails.

The Petitioners urge that EBR 2(F)(3) provides an independent basis for determining that Act 250 jurisdiction exists. The Board disagrees.

EBR 2(F), promulgated under rule-making authority granted to the Board pursuant to 10 V.S.A. §6025(a), provides:

> "Involved land" includes:
>
> > (1) The entire tract or tracts of land upon which the construction of improvements for commercial or industrial purposes occurs; and
> >
> > (2) Those portions of any tract or tracts of land within a radius of five miles owned or control by the same person or persons, which is incident to the use of the project; and

> (3) Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which bear some relationship to the land actually used in the construction of improvements, such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship.
>
> In the event that a project is to be completed in stages according to a plan, or is part of a larger undertaking, all land involved in the entire project shall be included for the purposes of determining jurisdiction.

EBR 2(F).

Petitioners contend that even though the parties have stipulated that the proposed improvements will physically disturb only 5.84 acres, Williston controls in excess of 10 acres of land within a 5 mile radius of the Project, and this involved land bears a relationship to the Project such that values sought to be protected by Act 250, specifically Criterion 5 (traffic), will be substantially effected. See 10 V.S.A. § 6086(a)(1)(10); EBR 2(F)(3). Petitioners further argue, in the alternative, that jurisdiction exists pursuant to EBR 2(F)(3) because the Project is part of a "plan" or "larger undertaking" by Williston to coordinate traffic south of the Project site to Interstate 89 and north to North Brownell Road.

The Board concludes that as a matter of law EBR 2(F)(3) may not be applied to ***any*** state, county or municipal development project where the amount of land that will be physically disturbed by the Project is ten acres or less. The Board bases this conclusion on the principle that administrative bodies, including the Board, may not interpret their rules in a way that compromises the substantive requirements of their enabling statutes. Bishon's House, supra at 150-l 5 1; see also Agency of Administration, supra at 74-75. The interpretation of EBR 2(F)(3) that the Petitioners urge would include in the computation of involved land for government projects not just land that is physically disturbed, but also all surrounding land within a radius of 5 miles that is owned or controlled by the government. Such an interpretation would place EBR 2(F)(3) in direct conflict with the "involved land" and "incident to use" provisions of 10 V. S.A. $600 l(3) and EBR 2(A)(4) as the case law has interpreted them, and impermissibly enlarge the legislature's grant of jurisdiction over state, county and municipal projects beyond what the legislature intended. Cf.. Bishon's House, supra at 150- 15 1; Agency of Administration, supra at 74-82.

We rule that in regard to state, county and municipal development projects, EBR 2(F) does not provide a basis for asserting Act 250 jurisdiction independent of 10 V.S.A.

§6001(3). To the extent that previous Board decisions have suggested otherwise, the Board will no longer follow them.[7]

As to Petitioners' alternative argument that the Project is subject to Act 250 jurisdiction because it is part of a larger plan or undertaking pursuant to EBR 2(F)(3), Petitioners have submitted no evidence to show the existence of any specific plan for improvements beyond those set forth above in Paragraph 4. of III. FINDINGS OF FACT. Even if evidence of such a plan existed, however, the same analysis that the Board has applied to Petitioners' other arguments would be equally applicable to this one. That part of EBR 2(F)(3) providing for "all land involved in the entire project" to be counted where the proposed improvements are part of a larger plan or undertaking may only be interpreted to mean that all land *physically* involved in the entire project may be counted. See EBR 2(F)(3).

V. ORDER

The proposed Project does not require an Act 250 permit amendment pursuant to EBR 2(A)(4) and 2(F)(3).

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[7] This ruling specifically applies to the Board's decision in Village of Ludlow, supra, on which Petitioners have heavily relied. The analysis in other decisions also are not consistent with the conclusions the Board reaches today. See, e.g., Town of Rutland, supra at 4-5; City of Montpelier, Declaratory Ruling #220, supra at 6-10; Village of Waterbury Water Commissioners, Declaratory Ruling #227, Findings of Fact, Conclusions of Law and Order at 14 (February 15, 1991); Village of Cambridge Water System, Declaratory Ruling #272, Findings of Fact, Conclusions of Law and Order at 6-7 (September 15, 1993); City of Barre Sludge Management Program, Declaratory Ruling #284, Findings of Fact, Conclusions of Law and Order at 1 O-l 1 (November 11, 1994).

Dated at Montpelier, Vermont, this 13th day of January, 2000.

VERMONT ENVIRONMENTAL BOARD

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