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

Re: Vermont Association of Snow Travelers (VAST) Declaratory Ruling Request #430

MEMORANDUM OF DECISION

The Vermont Association of Snow Travelers (VAST) has requested a declaratory ruling on whether an Act 250 land use permit is required for approximately 8 miles of snowmobile trails in the towns of Fayston, Duxbury and Huntington, Vermont (Project). This decision addresses two motions for summary decision.

I. PROCEDURAL HISTORY

On January 29, 2001, the District 5 Environmental Commission Coordinator (Coordinator) issued a Project Review Sheet (PRS) in which he determined that a land use permit was required pursuant to 10 V.S.A. Ch. 151 (Act 250) for the Project. A timely request to reconsider the PRS was filed on February 27, 2001.

On January 7, 2004, after several meetings, continuances, and the issuance of a related land use permit amendment, #5W0905-7, the Coordinator issued Jurisdictional Opinion 5-04-1 (JO) in which he again determined that a land use permit was required for the Project.

On February 6, 2004, VAST filed a Petition for Declaratory Ruling with the Environmental Board (Board), pursuant to 10 V.S.A. § 6007 and Environmental Board Rule (EBR) 3, appealing the JO. VAST contends that the Project does not require an Act 250 permit. This appeal was suspended pending the Coordinator's resolution of a second motion to reconsider. On March 5, 2004, the Coordinator issued a decision denying a Second Request to Reconsider the JO.

On May 7, 2004, Board Chair Patricia Moulton Powden convened a prehearing conference with the following participants:

VAST, by L. Brooke Dingledine, Esq., with Bryant Watson
Agency of Natural Resources (ANR), by Elizabeth Lord, Esq.
James & Clair Lathrop, by George Vince, Esq.
Vermont Natural Resources Council (VNRC), by Kelly Lowry, Esq. and Jamey Fidel, Esq.
Vermont ATV Sportsman's Association (VASA), by Todd Sheinfeld

The Lathrops and VNRC filed petitions for party status at the prehearing conference. VASA does not seek party status. No other person notified the Board that he or she has an interest in participating as a party in this case.

The Board deliberated on the party status issues on June 23, 2004. On July 9, 2004, the Board issued a Memorandum of Decision on Party Status, granting the

Lathrops party status pursuant to EBR 14(A)(2) and VNRC party status pursuant to EBR 14(A)(6).

The Board deliberated on July 21, 2004.

II. ISSUES

The issue on appeal is whether the Project requires a land use permit pursuant to Act 250. (Prehearing Conference Report and Order, Section III(A).)

III. DISCUSSION

A. Summary Decision

In separate motions, VNRC and VAST seek summary decision pursuant to EBR 23. Under Rule 23, the Board may grant summary decision "if the information in the record, admissions on file, and affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a decision as a matter of law." EBR 23(D). As set forth below, summary decision is inappropriate on most of these arguments because material facts remain in dispute, and the Board defers decision on VNRC's motion until after a hearing on the merits, to give the parties an opportunity to brief the legal issues.

A. VNRC's Motion for Summary Decision

VNRC seeks summary decision on the grounds that it is undisputed that portions of the Project are over 2,500 feet in elevation. VNRC correctly points out that Board rules define "development" to include the "construction of improvements, for any purpose, above the elevation of 2,500 feet." EBR 2(A)(1)(a); *see also*, 10 V.S.A. § 6081(a)(permit required prior to "development"). However, the statute defines "development" more narrowly, to include only the "construction of improvements for commercial, industrial or residential use above the elevation of 2500 feet." 10 V.S.A. § 6001(3).

The Vermont Supreme Court has held that the legislature ratified Board rules in 1985, giving them the force of statute. *See, In re Spencer*, 152 Vt. 330, 336-337 (1989)(citing No. 52, § 5 (1985)); *In re Barlow*, 160 Vt. 513, 521 (1993). "By the clear language in § 5, the Legislature intended to approve and sanction all rules of the Environmental Board under 10 V.S.A. §§ 6025(a) and 6086(d) prior to May 15, 1985." *Spencer*, 152 Vt. at 337. In *Spencer*, the Court rejected the argument that the "road rule," which defined development to include roads of a certain size, exceeded the Board's authority. *Id.* At the time *Spencer* was decided, the statute defined development, in relevant part, 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." 10 V.S.A. § 6001(3)(superseded). The road rule was not included in the statute's definition of development, but the Court held that it had the force of statute by operation of Act 52 in 1985. *Spencer*, 152 Vt. at 337. For the same reason, the *Barlow* Court upheld EBR 2(G)'s definition of "substantial change," which imposes a more broad permit requirement by limiting the statutory exemption for preexisting developments, 10 V.S.A. § 6081(b). *Barlow*, 160 Vt. at 521-522 (citations omitted).

Similarly, the rule in question in this case is more broad than the statute's definition of development because it requires a permit for construction of improvements over 2,500 feet <u>for any purpose</u>, EBR 2(A)(1)(a), whereas the corresponding statutory language is limited to commercial, industrial or residential purposes. The rule that was ratified as EBR 2(A)(1) in 1985 is the same rule in effect today, renumbered as EBR 2(A)(1)(a). Both rules define "development" to include the "construction of improvements, for any purpose, above the elevation of 2,500 feet." Applying *Spencer* and *Barlow*, EBR 2(A)(1)(a) has the force of statute because the legislature ratified the rule's language in 1985.

In a recent case the Vermont Supreme Court looked only to the plain language of Act 250 to find that a Board rule exceeded the Board's statutory authority:

> It is, of course, axiomatic that an administrative body may promulgate only those rules within the scope of its legislative grant of authority. *See In re Agency of Admin.*, 141 Vt. 68, 76, 444 A.2d 1349, 1352 (1982) (agency cannot use its rule-making authority to exceed or compromise its statutory purpose). . . . To determine the scope of authority vested in an administrative agency by a statutory grant of power, we look to its enabling legislation. *Lemieux v. Tri-State Lotto Comm'n*, 164 Vt. 110, 113 (1995).

In re Vermont Verde Antique International, Inc., No. 2001-116, at 3-4 (Sept. 6, 2002). However, the rule in question in *Vermont Verde* (the portion of former EBR 3(C) that authorized district coordinators to issue jurisdictional opinions when none was requested) was not adopted until after the legislature ratified Board rules in 1985. So Public Act 5 from 1985, as discussed in *Spencer* and *Barlow*, did not apply in *Vermont Verde.*

There is no question that Vermont Supreme Court precedent is binding on the Board. However, the Board is hesitant to grant summary decision based on a rule that is broader than its statutory counterpart, (insert cites), particularly where the Court has not cited or discussed *Spencer* and its progeny in any recent decision and the parties have not briefed the legislative ratification issue.

In short, issues raised in VNRC's motion require further examination and briefing by the parties. Any such legal briefing may be included in the parties' proposed findings and conclusions. This motion, therefore, is consolidated with the merits.

B. VAST's Motion for Summary Decision

VAST also seeks summary decision pursuant to Rule 23, arguing that:

A. the Project is for a state purpose, not for a commercial purpose, and is not large enough to trigger jurisdiction as "development" (VAST Motion at 1-4);

B. the law that took effect in 2003 limiting jurisdiction over trails should apply to limit jurisdiction in this case (VAST Motion at 4-5); and

C. it would be unfair to impose jurisdiction on the portions of this project that are over 2,500 feet in elevation because:

1. the 1989 project trails followed existing logging roads and VAST should not be required to obtain a permit when development already had occurred (VAST Motion at 7);

2. location of trails over 2,500' was inadvertent because there was no global positioning satellite (GPS) technology 15 years ago (VAST Motion at 6-7); and

3. various maps of the region are inconsistent with regard to property/boundary lines and elevations, and VAST should not be held to a higher standard of accuracy (VAST Motion at 6-7).

The Board concludes that factual disputes remain on several of these arguments, and others can be addressed as a matter of law. Each is discussed below.

1. Is the Project a "Development"?

An Act 250 permit is required for any development, as that term is defined in the Act and Board rules. 10 V.S.A. § 6081(a); *id.* § 6001(3)(defining "development"); EBR 2(A)(defining "development"). The definition of development and resulting jurisdictional threshold may vary, depending in part upon the purpose of the improvements. For instance, construction of improvements for commercial purposes

constitutes development for purposes of Act 250 if it occurs 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" in a town with duly adopted zoning and subdivision regulations. 10 V.S.A. § 6001(3)(A)(I). Construction of improvements for municipal, county or state purposes constitutes development for purposes of Act 250 if 10 or more acres of land will be physically disturbed, including land incident to the use of the project. EBR 2(F)(2).

VAST argues that the VAST trail network exists for a state purpose, not for a commercial purpose. As VAST points out, the Vermont Trails Act (Act) provides that "the development, operation, and maintenance of the Vermont trails system is declared to be a public purpose." 10 V.S.A. § 441(c). The Act authorizes the Agency of Natural Resources (ANR) to acquire rights to land to develop and maintain the trails system, 10 V.S.A. § 444(1)-(2), and to "[a]ssign responsibilities for any trail . . . to another governmental entity or not-for-profit agency upon agreement by such entity or agency to maintain and manage it for purposes consistent with this chapter," *id.* § 441(3). The Act provides that "[t]he Vermont trails system shall consist of those individual trails recognized by the agency of natural resources with the advice of the greenways council." 10 V.S.A. § 443. However, it is not clear from the undisputed facts whether the VAST trails in question exist for a state or commercial purpose. For instance, it is not clear from the undisputed facts that the VAST trails in question are recognized by ANR or the greenways council as part of the Vermont trails system, or that VAST is authorized by ANR to develop and maintain these trails. Such facts are relevant to determining whether these VAST trails are, in fact, part of the Vermont trails system, and there are insufficient undisputed facts to determine whether these trails exist for a commercial purpose.

Even if the Project exists for a state purpose, there is a factual dispute over the amount of involved land. For instance, the length and width of trail corridor and disturbed land remain in dispute.

Accordingly, summary decision on these issues is inappropriate.

2. The 2003 Amendment

VAST argues that the new law limiting jurisdiction over trails under 2,500 feet applies and exempts them from having to obtain an Act 250 permit. 10 V.S.A. § 6001(3)(D)(iii). For the reasons set forth in VNRC's memorandum in opposition to this part of VAST's motion, the Board concludes that the new statute cannot apply to make the Project exempt. In addition, the law applies only to trails <u>below</u> 2,500 feet in elevation, and it is undisputed that portions of the trails in question are <u>above</u> 2,500 feet in elevation. VAST cannot prevail on this argument on the undisputed facts.

Unfavorable summary decision is warranted on this issue. *See*, EBR 23(D)(summary decision may be granted against the moving party).

3. VAST's Policy Arguments

VAST also argues that the Project should not require a permit for several policy reasons. To summarize, VAST contends that it would be unfair to apply the rule requiring permits for improvements over 2,500 feet because the placement of trails at high elevations was inadvertent; there was no GPS technology when it happened; elevations and boundaries on current maps are inconsistent, so VAST should not have to get it right; and the trails go over old logging roads so the loggers should have to get the permit. The Board rejects these arguments. Act 250 should apply evenhandedly, regardless of the intent of the parties. Summary decision unfavorable to VAST is warranted on these issues.

This ruling against VAST on its arguments related to boundaries and logging roads may mean that a site visit is no longer necessary. However, the parties should be given an opportunity to file requests for a site visit, to include what the party wants the Board to observe on the record during the site visit, how a site visit is relevant and helpful to resolution of an issue or issues on appeal, and a proposed itinerary for the site visit, including where the parties want the Board, parties and public to meet and when, where to go from there and by what mode of transportation, and how much time they anticipate that the site visit might take. The Chair shall issue a revised scheduling order cancelling the site visit and allowing parties to make filings as described above.

IV. ORDER

A. VNRC's Motion for Summary Decision is consolidated with the merits to allow the parties an opportunity to brief the legal issues and present any relevant evidence.

B. VAST's Motion for Summary Decision is DENIED in part because disputes of material fact remain, and summary decision against VAST is GRANTED on the issues of application of the 2003 statute, and policy arguments including GPS technology.

C. The Chair shall issue a Revised Scheduling Order consistent with this decision.

DATED at Montpelier, Vermont this 30th day of July, 2004.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland
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