

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

*Re: Vermont Association of Snow
Travelers (VAST)*

Declaratory Ruling Request #430

MEMORANDUM OF DECISION ON MOTION TO ALTER

The Vermont Natural Resources Council (VNRC) moves the Board to alter its decision to deny VNRC's Motion for Summary Decision. As set forth below, the Board grants this request and holds that an Act 250 permit is required for the Project because it involves the commencement of construction for any purpose on land above 2,500 feet in elevation. The Findings of Fact, Conclusions of Law and Order issued on March 11, 2005 shall be altered accordingly and reissued with this decision.

I. PROCEDURAL HISTORY

On October 21, 1986, the District 5 Environmental Commission (Commission) issued Land Use Permit #5W0905 to New England Land Associates d/b/a Ward Lumber (NELA/Ward Lumber Permit) for the subdivision of a 3,425-acre tract of land in the Town of Fayston. The Vermont Department of Forests, Parks and Recreation acquired title to 2,695 acres of the original project tract in 1995, which includes Phen Basin and the current Project site.

On October 31, 2000, the District 5 Environmental Commission Coordinator (Coordinator) issued a Project Review Sheet (PRS) to the Department of Forests, Parks and Recreation (Department) indicating that an amended land use permit was required for physical actions both undertaken and proposed by the Department and other parties within Phen Basin. These physical actions incorporated various recreational trails including VAST trails. The PRS was not appealed to the Environmental Board. The Department subsequently filed applications 5W0905-6 and -7 for the review of the District Commission. The VAST Trails were purposely excluded from those applications due to an independent jurisdictional determination requested by VAST (Jurisdictional Opinion 5-04-1).

On January 29, 2001, the Coordinator issued a 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 request to reconsider, which VAST filed on February 6, 2004. On March 5,

2004, the Coordinator issued a decision denying VAST's 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 Dingleline, 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).

On June 4, 2004, VAST and VNRC each filed a Motion for Summary Decision. The Board deliberated on these motions on July 21, 2004. On July 30, 2004, the Board issued a Memorandum of Decision consolidating VNRC's motion with the merits, and granting VAST's motion in part and denying it in part.

A hearing was held in this case on October 6, 2004. The parties were given an opportunity to file supplemental proposed findings and conclusions, and reply briefs. The Board deliberated on December 15, 2004, February 2, 2005, and February 23, 2005. Based upon a thorough review of the record and related argument, the Board declared the record complete and adjourned.

On March 11, 2005, the Board issued its Findings of Fact, Conclusions of Law, and Order, concluding that a permit amendment was necessary for improvements on the previously permitted project tract, but that the Project did not require an Act 250 permit because it did not constitute development.

VNRC filed a Motion to Alter on March 28, 2005. After allowing time for the parties to reply to VNRC's motion, the Board deliberated on May 18, 2005.

II. DISCUSSION

VNRC challenges the Board's decision on jurisdiction over construction on land that is over 2,500' in elevation. Specifically, the question is whether the Board should apply EBR 2(A)(1)(a), which defines development in relevant part to include construction above 2,500' in elevation "for any purpose," or the statute, which limits jurisdiction to construction for "commercial, industrial or residential use." 10 V.S.A. § 6001(3)(A)(vi).

In the challenged decision, the Board applied the more narrow definition of development that appears in the statute, on the grounds that the rule impermissibly exceeds the legislature's grant of jurisdictional authority. See, *In re Agency of Admin.*, 141 Vt. 68, 76 (1982) ("An administrative agency may not use its rule-making authority to enlarge a restrictive grant of jurisdiction from the legislature.") (cited in *In re Vermont Verde Antique International, Inc.*, 174 Vt. 208, 210-211 (2002) ("It is, of course, axiomatic that an administrative body may promulgate only those rules within the scope of its legislative grant of authority.")). VNRC argues that the Board must apply Vermont Supreme Court precedent which holds that the substance of EBR 2(A)(1)(a) was given the force and effect of statute when it was ratified by the legislature in 1985. *In re Spencer*, 152 Vt. 330 (1989); *In re Barlow*, 160 Vt. 513 (1993); *In re Springbrook Farm Foundation, Inc.*, 164 Vt. 282, 285 (1995).

Although the rules challenged in *Spencer* and its progeny did not appear to exceed the legislature's original grant of jurisdictional authority like the rule in this case does, there is no question that the substance of EBR 2(A)(1)(a) was among the rules ratified by the legislature in 1985. The Board is bound to apply Vermont Supreme Court precedent, so will apply EBR 2(A)(1)(a) as if it had the force and effect of statute.

The Board notes that the Environmental Board Rules, including those ratified in 1985, shall cease to be in effect when the Natural Resources Board and/or Land Use Panel thereof adopts its own rules. See 10 V.S.A. § 6021(a) (creating Natural Resources Board and Land Use Panel); *id.* § 6025(a) (authorizing Natural Resources Board to adopt procedural rules); *id.* § 6025(b) (authorizing Land Use Panel to adopt substantive rules). Without a corrective amendment to the statute to conform to decades of practice, it is difficult to see how Act 250 jurisdiction will continue to be triggered by construction at high elevations that is not for a commercial, industrial or residential purpose. Moreover, should VAST appeal this decision, this would provide an opportunity for the Vermont Supreme Court to answer any question as to the applicability of *Spencer* in this case. In the meantime, however, the Board shall apply EBR 2(A)(1)(a) as if it has the force and effect of statute.

It is undisputed that the Project includes improvements on lands at elevations over 2,500 feet. Accordingly, the Board must conclude that the Project constitutes "development" pursuant to EBR 2(A)(1)(a), and grant VNRC's Motion to Alter. The challenged decision shall be altered to reflect that VNRC's Motion for Summary Decision is granted and that the Project requires an Act 250 permit.

III. ORDER

VNRC's Motion to Alter is GRANTED. The Board's decision of March 11, 2005 shall be altered accordingly and reissued.

DATED at Montpelier, Vermont this 7th day of June, 2005.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden
Patricia Moulton Powden, Chair*
George Holland
Samuel Lloyd
W. William Martinez
Alice Olenick
Richard C. Pembroke, Sr.*
Jean Richardson

Chair Patricia Moulton Powden, joined by Board Member Richard C. Pembroke, Sr., DISSENTS as follows:

I respectfully dissent. While I fully respect the Vermont Supreme Court precedent, I do not believe that *Spencer* and *Barlow* apply in this case. Unlike *Spencer* and subsequent cases applying the legislative ratification principle, this case involves a rule that clearly exceeds the scope of the authorizing statute. Had these decisions been issued by the Board, I would go further and question whether the legislature intended to ratify the content of the Board's rules in 1985, or whether it intended simply to cure any procedural defects that may have occurred in adopting those rules. However, the Board is bound by applicable Vermont Supreme Court precedent. *Spencer* and *Barlow* do not apply here because of the direct conflict between the statute and the rule. I would deny VNRC's Motion to Alter because, in this case, the statute should prevail. I am authorized to state that Board Member Richard C. Pembroke, Sr. joins me in this dissent.