

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

Re: Peter and Carla Ochs  
George and Carole Trickett

Declaratory Ruling #437

**MEMORANDUM OF DECISION**

Peter and Carla Ochs (Petitioners) petition for declaratory ruling to determine whether their apple packing and distribution facility and apple orchard on over 300 acres of land in Orwell, Vermont, at the intersection of Sanford Road, Mutton Square Road and Conkey Hill, (Project) requires a land use permit pursuant to 10 V.S.A. Ch. 151 (Act 250). This decision addresses a motion for summary decision filed by adjoining property owners George and Carole Trickett.

**I. PROCEDURAL HISTORY**

On July 7, 2004, the District 9 Environmental Commission Coordinator (Coordinator) issued Jurisdictional Opinion #9-04-01(JO) in which he determined that the Project requires an Act 250 permit.

On September 14, 2004, the Coordinator issued a Reconsidered JO, again concluding that the Project requires an Act 250 permit. On September 21, 2004, Petitioners filed a Petition for Declaratory Ruling with the Environmental Board (Board) appealing the JO and the Reconsidered JO pursuant to 10 V.S.A. § 6007(c). The Petitioners contend that the Project does not require an Act 250 permit.

On October 15, 2004, Board Chair Patricia Moulton Powden convened a Prehearing Conference with the following participants:

Petitioners, by Frank Langrock, Esq., with Carla Ochs  
The Tricketts, by Paul Gillies, Esq. and Janet Currie  
The Vermont Farm Bureau, by Clark W. Hinsdale, III

The Town of Orwell filed a letter with the Board stating that they may be interested in participating in this proceeding, but were unable to attend the prehearing conference. The Tricketts filed a petition for party status and the Vermont Farm Bureau also filed a petition the date of the prehearing conference.

The Chair issued a Prehearing Conference Report and Order on October 18, 2004 (PCRO). Among other things, the PCRO set the schedule in the case, identified issues, and allowed the parties an opportunity to reply to the party status petitions. On October 20, 2004, the Addison County Regional Planning Commission entered an appearance, but did not file any reply to the party status petitions.

The Board deliberated on preliminary issues on November 17, 2004. On November 22, 2004, the Board issued a Memorandum of Decision granting party status to George and Carole Trickett pursuant to EBR 14(A)(5), and non-party participant status to the Vermont Farm Bureau pursuant to EBR 14(E).

On December 16, 2004, the Tricketts filed a Motion for Summary Decision pursuant to EBR 23. After the Petitioners' reply was filed, the Board deliberated on February 2, 2004.

## **II. ISSUE**

The issue on appeal is whether the Project requires an Act 250 permit. Included in the merits issue is the question of whether the Project constitutes "farming" pursuant to 10 V.S.A. § 6001(22), which may include further subissues such as what percentage of apples come from the Ochs' farm, whether the apples grown on leased lands constitute apples "produced on the farm," pursuant to 10 V.S.A. § 6001(22), and if so, under what circumstances agricultural products produced on leased lands constitute products "produced on the farm," pursuant to 10 V.S.A. § 6001(22).

## **III. DISCUSSION**

George and Carole Trickett move for summary decision pursuant to EBR 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). Under Rule 23 the Board has discretion to deny summary judgment and proceed to hearing, even if the undisputed facts indicate that one party or another should prevail on a legal issue. *Id.*

It is undisputed that Petitioners own at least 300 acres in Orwell, Vermont, on which they operate an apple orchard and a packing and distributing facility at the corner of Sanford Road, Mutton Square Road, and Conkey Hill in Orwell. It is also undisputed that some of the apples processed in the packing plant come from orchards leased by Petitioners. The Tricketts argue that the Project is not "farming," as defined in Act 250, because it involves leased orchards and the use of public roads for transporting apples to and from those leased lands. Petitioners counter that the Project is "farming" as defined at 10 V.S.A. § 6001(22), and as such is exempt from Act 250 under 10 V.S.A. § 6001(3)(D).

“Farming” is defined to include, in relevant part: “the cultivation or other use of land for growing food, fiber, Christmas trees, maple sap, or horticultural and orchard crops,” and “the on-site storage, preparation and sale of agricultural products principally produced on the farm.” 10 V.S.A. § 6001(22)(A) and (E). The undisputed facts establish that Petitioners use both the 300-acre parcel and the leased lands for the cultivation of apples, an orchard crop. However, the farming exemption does not apply unless the apples processed at Petitioners’ packing plant are “principally produced on the farm.” *Id.* § 6001(22)(E).

The requirement that the agricultural products be “principally produced on the farm” is satisfied “if the majority of the weight or volume of the ingredients in the finished product comes from” the farm. *Re: Scott Farm, Inc.*, Declaratory Ruling #413, Findings of Fact, Conclusions of Law, and Order at 8 (Jan. 13, 2003)(emphasis omitted). Like any exemption, the farming exemption should be “read narrowly and only found to apply when the facts clearly support the exemption’s application.” *Re: Josselyn*, Declaratory Ruling #333, Findings of Fact, Conclusions of Law, and Order at 5 (Feb. 28, 1997). The party claiming an exemption ordinarily bears the burden of proof, *Re: Commercial Airfield, Cornwall, Vermont*, Declaratory Ruling 368, Findings of Fact, Conclusions of Law, and Order at (Jan. 28, 1999)(citing *Re: Weston Island Ventures*, Declaratory Ruling 169, Findings of Fact, Conclusions of Law, and Order at 5 (Jun. 3, 1985); *Bluto v. Employment Security*, 135 Vt. 205 (1977)), but in deciding this motion for summary decision the question is whether there are sufficient undisputed facts to entitle the moving party to judgment as a matter of law. EBR 23.

A key issue in this case is whether most of the apples processed at the Ochs’ plant are produced “on the farm.” 10 V.S.A. § 6001(22)(E). The Tricketts allege only that “considerable numbers” of apples are produced on the leased lands. (Tricketts’ Statement of Material Facts, #4.) Petitioners do not dispute that they have grown apples on lands leased from others from time to time, but the undisputed facts do not establish quantities of apples that come from each parcel of land, or any other factual basis for the Board to decide the merits issue in this case. In other words, material facts remain in dispute.

Therefore, the Board cannot grant summary decision. This matter must be set for hearing.

**IV. ORDER**

1. The Tricketts' Motion for Summary Decision is DENIED.
2. The Chair shall set this matter for hearing.

DATED at Montpelier, Vermont this 23<sup>rd</sup> day of February, 2005.

ENVIRONMENTAL BOARD

*/s/Patricia Moulton Powden*\_\_\_\_\_  
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