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September 30, 2009

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RE: Lamoille Valley Rail Trail
Jurisdictional Opinion #5-06, #6-005(2009), #7-267 (Reconsideration)
Motion for Reconsideration by Kate Scarlott and Rob McLeod

Dear Stephanie and Stephen:

On June 1, 2009, the Coordinators for Act 250 Districts 5, 6 and 7 issued the above-referenced joint Jurisdictional Opinion and concluded that the proposed multi-season recreational Lamoille Valley Rail Trail (LVRT) did not require a land use permit because the proposed improvements along the 93 mile corridor between St. Johnsbury and Swanton qualified for the "repair and maintenance" exemption from jurisdiction under Act 250. On July 1, 2009, a motion for reconsideration was filed on behalf of Kate Scarlott, Rob McLeod and others by means of electronic transmission. In summary, the petitioners contended in their motion that the conclusion stated in the Jurisdictional Opinion that the proposed physical action within the 93 mile right-of-way qualified as "repair and maintenance" work was incorrect and that the physical action will constitute "construction of improvements", which is "development" requiring a land use permit. Response positions were then filed on July 22, 209 by landowner Vermont Agency of Transportation (VTRANS) and developer Vermont Association of Snow Travelers (VAST). In summary, VAST contended that the motion was untimely and procedurally flawed. VAST also urged that the conclusions stated in the Jurisdictional Opinion be affirmed. The three District Coordinators discussed the filings on August 28, September 2, 18, 22 and 29, 2009.

As explained below, this decision on the motion for reconsideration reverses the original Jurisdictional Opinion and concludes that a land use permit is required for the development of the LVRT.

Procedural Issues Involving the Motion to Alter

VAST contended that the petitioners' motion should be dismissed as being untimely and that the motion was not properly served upon all parties. In addition, VAST argued that the motion should be dismissed because the petitioners failed to request party status and would not be able to demonstrate any potential impacts to a particularized interest.

Timeliness of the Motion

Act 250 Rule 3(B) states that:

> *Persons who qualify as parties pursuant to 10 V.S.A. Section 6085(c)(1)(A) through (E) may request reconsideration from the district coordinator within 30 days of the mailing of the opinion.*

Counsel for the petitioners submitted the motion for reconsideration by means of electronic transmission to the three district coordinators on the afternoon of July 1, 2009. The Jurisdictional Opinion had been issued on June 1, 2009. A "hard copy" of the motion was then received via US mail by the three district coordinators on July 2, 2009.

Until July 10, 2009, when the Natural Resources Board promulgated amended rules, Rule 10(E), which governs the filing of applications with District Commissions, was silent on the electronic filing of submittals. However, the Natural Resources Board was encouraging the increased use of electronic submittals for some time prior to the formal adoption of an amended Rule 10(E) and it had been the practice of district offices to accept electronic filings of submittals such as replies to hearing recess orders and proposed findings of fact. In addition, District Commission offices had likewise been encouraged by the Natural Resources Board to issue Commission decisions and other documents by means of electronic distribution. It is noted that the LVRT Jurisdictional Opinion itself was issued by electronic transmission to several parties and persons (See Certificate of Service dated June 1, 2009). Amended Rule 10(E) now requires electronic filings. While counsel for VAST is correct that the prior version of Rule 10(E) was silent on electronic filings, the rule did not prohibit use of this form of communication with district offices.

Even though the motion to alter arrived in the district offices on July 1, 2009 by electronic transmission rather than by US mail, it was a tangible filing received in each office in a timely manner by the deadline set out in Rule 3(B).

Service of the Motion for Reconsideration

Counsel for VAST argued that the petitioners failed to properly serve the motion in accordance with the Act 250 rules. Rule 12(H) specifies the serving of all documents upon the attorneys or representatives of record and all parties, and that they shall be accompanied with a certificate of

service. In the matter at hand, counsel for the petitioners indicated on the certificate of service accompanying the motion copy filed on July 2nd that it was provided only to the district coordinators and VAST's attorney. In addition, a memorandum of law submitted on July 6th separately from the motion was unaccompanied with a certificate of service. The district coordinators provided statutory parties with copies of the motion as an enclosure to their July 6th memorandum announcing receipt of the motion and indicating that copies of the memorandum of law were available upon request.

As concluded above, the motion was timely filed. The purpose of service is to provide persons with notice of the document which was done in this matter, albeit by the district coordinators. At a minimum, counsel for the petitioners did serve the motion on counsel for VAST. It is also noted that, in the prior transactions and communications concerning the issuance of the Jurisdictional Opinion itself, no statutory party filed positions or otherwise demonstrated an interest in participation.

Party Status and Particularized Interest

As stated above, Rule 3(B) allows "persons who qualify as parties pursuant to 10 V.S.A. 6085(c)(1)(A) through (E)" to request reconsideration of a Jurisdictional Opinion. Section 6085(c)(1)(E) includes adjoining property owners as potential parties.

The facts in the overall submittals in this matter demonstrate that Kate Scarlott and Rob McLeod are adjoining property owners to the LVRT corridor. A plain reading of the Scarlott and McLeod submittals shows that their concerns about the proposed project fall within the subject of aesthetics, at a minimum. "Particularized interest" has been held by the Environmental Court as involving an adequate showing of a potential impact on one's interest that is more than an impact on the general public. It is reasonable to infer that Kate Scarlott and Rob McLeod would qualify for a grant of party status by a district commission under at least criterion 8 due to potential impacts from noise. Because two of the petitioners would qualify as parties, it is not necessary to address the potential for party status by the other petitioners.

In conclusion, the motion for reconsideration was timely filed by persons who would qualify as parties under 10 V.S.A. 6085(c)(1)(E).

"Repair and Maintenance" or "Construction of Improvements"

As explained in the Jurisdictional Opinion, a threshold consideration for whether a project requires a land use permit under Act 250 is whether it will involve "construction of improvements" as defined in Rule 2(A). If a project will involve "construction of improvements" for a commercial or industrial purpose on a sufficiently large tract, or if the project is for a state purpose and will disturb more than 10 acres, then a land use permit is required for the development unless adequate proof is shown for an exemption from jurisdiction. [See Western Island Ventures Declaratory Ruling 169 (1985)].

Over time, the former Environmental Board recognized that "repair and maintenance" of existing development is not "construction of improvements" and, therefore, is not subject to jurisdiction. Petitioners Scarlott et al point out in their motion that most projects reviewed by the Environmental Board had not been excluded from jurisdiction under the "repair and maintenance" exemption and that the narrow exemption should not apply to the VAST proposal.

The facts presented by the proposed LVRT project are difficult to interpret under the jurisdictional provisions of Act 250 due to the interface with applicable federal statutory provisions, as was discussed in the Jurisdictional Opinion. Those circumstances resulted in a conclusion, which stands, that the railroad project did not meet the statutory standard of "development" under Act 250 for purposes of analyzing "substantial change to a pre-existing development". With that conclusion in mind, it is nevertheless necessary to utilize the term "development" below in discussing the Board's tests for evaluating the applicability of the "repair and maintenance" exemption.

The Board held that the following principles are pertinent to a "repair and maintenance" analysis:

1. "In-kind replacement" can fall within the parameters of the "repair and maintenance" exemption [Windsor Correctional Facility Declaratory Ruling 151 (1984) at page 5]

2. Work that does not "upgrade" an existing development "beyond its historic condition" is "repair and maintenance" (Productions Ltd. Declaratory Ruling 168 (April 10, 1985) at page 4 and See Town of Wilmington Declaratory Ruling 258 (June 30, 1992) at page 13].

3. Applying new pavement, placement of guardrails and the elimination or decrease in pulloffs on a state highway is not "repair and maintenance" [Agency of Transportation - Route 73 Declaratory Ruling 298 (May 19, 1995) at page 4].

4. "Repair and maintenance... does not alter the existing development. Rather, it prevents or eradicates alteration to an existing development which has occurred or would otherwise occur over time through normal wear and tear...". "Repair and maintenance" is not "designed to change" the underlying existing development and is "focused on the original condition, character or make-up" of the existing development [Vermont Agency of Transportation (Preliminary Planned Projects) Declaratory Ruling 296 (also citing from the Rock Ledges Third Revision Decision) (November 2, 1998) at pages 8 and 9].

5. Consideration of "the *purpose* (emphasis in original) of a proposed development is appropriate when determining whether development falls within the repair and routine maintenance exemption". [Nextel Communications Declaratory Ruling 362 (November 18, 1998) at page 21].

The record in the present matter demonstrates that substantial infrastructure was put in place approximately 130 years ago for purposes of supporting the operation of a railroad. By 1972, two years following the enactment of Act 250, the railroad had effectively ceased operation and ownership was assumed by the State. Lessees then operated the railroad with infrequent use. Most rail traffic ended by the 1980's and operations ceased completely in 1995.

While much railroad infrastructure remains in place, substantial portions of infrastructure have been destroyed by floods or washouts. All rails and ties were removed in 2005. The "existing development" that had supported operation of a railroad has, over time, ceased.

A re-examination of the salient facts associated with the proposed construction for the LVRT indicates the following physical actions will be undertaken:

1. repair and installation of culverts
2. clearing and grubbing of the corridor
3. grading and compaction of ballast
4. restoration of drainage ditches
5. application of fine gravel atop the ballast to form a suitable trail surface
6. signage and mile marking
7. installation of 9 bridges or bridge sections
8. replacement of bridge decking
9. installation of guardrail
10. replacement of right-of-way fencing

If one assumes that an "existing development" is in place along the corridor, then the Board's tests of "upgrade" and change of "purpose" need to be applied. It is reasonable to conclude that the proposed construction is an upgrade of a defunct railroad infrastructure corridor into a four season, multi purpose recreational trail. Likewise, the purpose of the corridor will be different under VAST's control, even though as concluded in the Jurisdictional Opinion, the potential for future restoration of an operating railroad remains intact under federal law. The physical action proposed to create the LVRT exceeds the narrow "repair and maintenance" exemption established by the Environmental Board. Therefore, the physical action constitutes "construction of improvements" under Rule 2(A).

10 V.S.A. §6001(3)(A)(v) provides that "development" includes "*construction of improvements on a tract of land involving more than 10 acres that is to be used for municipal, county or state purposes. In computing the amount of land involved, land shall be included that is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings*".

In the original Jurisdictional Opinion (at pages 19-22), an evaluation was made as to whether the LVRT project qualified as a "state purpose" under the provisions of Act 250. The conclusion was reached that the LVRT will be for a "state purpose". The Jurisdictional Opinion then considered whether the proposed physical actions within the LVRT corridor would physically

involve more than 10 acres of land. The Jurisdictional Opinion concluded that less than 10 acres would be involved because the majority of the proposed improvements had been backed-out of the jurisdictional analysis as "repair and maintenance" work. Based upon the conclusions stated above with respect to "repair and maintenance", it is necessary to re-assess the facts relevant to the calculation of involved acreage.

The Environmental Board considered how to identify the scope of "involved land" for a state / municipal purpose project in Declaratory Ruling #220, issued July 19, 1990, for a linear transportation project located in the City of Montpelier. The Board held, in pertinent part that

> "*Consistent with Resource Recovery [Re: City of Burlington. Resource Recovery Project, Declaratory Ruling #125 (March 11, 1981)], the Board rules that land is-not 'incident to the use' of a state, county or municipal project unless it will somehow be changed because of the project. The Board believes this result is necessary because government entities often own a great deal of land which could be considered 'incident to the use' under a broader interpretation of that phrase, leading to unmanageable extensions".*

The LVRT project includes construction of physical changes along the 93 mile corridor. The construction work will involve a varying width of disturbance along the length of the corridor, ranging in width up to a maximum of 66 feet (full width of the available right of way, in limited areas where rail embankment slope erosion repair is needed). The exact average disturbance width is not known, however it can reasonably be expected that the average width of disturbance will not be less than 10 feet. Applying an estimated 10 feet average disturbance width yields a computed area of physical disturbance of 112 acres (93 miles x 5,280 feet x 10 feet ÷ 43,560 square feet). The computed "involved land" area is in the order of 100 acres, (i.e. exceeds the 10 acre jurisdictional standard.) In conclusion, the construction of improvements for the LVRT state purpose project will physically involve more than 10 acres.

SUMMARY CONCLUSIONS

Based upon the above referenced analyses and conclusions, the construction and use of the Lamoille Valley Rail Trail will require a land use permit under the provisions of 10 VSA Chapter 151 (Act 250). This jurisdictional conclusion must be read in the context of the jurisdictional limitations imposed by federal law and related caselaw, as was discussed on pages 14-16 of the Jurisdictional Opinion.

Please feel free to call if you have any questions or require additional information.

Sincerely,

/s/ Ed Stanak	*/s/ Geoffrey Green**	*/s/ Kirsten Sultan*
Ed Stanak, Coordinator District 5 Commission	Geoffrey Green, Coordinator District #6 Commission	Kirsten Sultan, Coordinator District #7 Commission

Dissenting Opinion

*The process to determine whether proposed physical changes or actions constitute repair or maintenance or construction of improvements is done by comparing the work proposed by LVRT as listed above as items 1-10 to the Board's principles enumerated above. The terms "repair" and "maintenance" are never specifically defined by the Board and therefore assume their accepted and common meaning. The term "repair" means "to restore to sound condition after damage or injury". Webster's II New Riverside University Dictionary at 996. The term "maintenance" means "the work of keeping something in suitable condition". Id at 717.

In comparing the ten broad physical-action categories proposed by VAST with the principles laid down by the Board, it is my jurisdictional opinion that all the proposed physical changes constitute repair, replacement or maintenance and therefore the project does not constitute a development. The change of use or purpose analysis discussed in Nextel is a factor, not the exclusive factor in determining whether the physical changes constitute repair and maintenance or construction of improvements. At best it is a consideration, or factor that should be considered. The meaning of "purpose" and "use" are not synonymous and therefore are not interchangeable. The "purpose" of a proposed development is its goal or its existence. Its "use" is how the purpose is effectuated or implemented. In this case, the purpose or goal of the transportation corridor is to convey something from one place to another. Historically, that goal was achieved by railroad use, and in the future that may change to trail use – but the purpose remains the same, namely to offer a transportation corridor for transit of goods, services or people.

Other factors that should be evaluated in the repair-maintenance exemption analysis include the following:

1. Are the changes an in-kind replacement?
2. Will the changes maintain the historic condition of the transportation corridor?
3. Will the changes "prevent or eradicate alteration to the transportation corridor which has occurred or would otherwise occur overtime through normal wear and tear"?
4. Are the changes consistent with the overall purpose of the transportation corridor?

In reviewing the ten enumerated physical actions in this case, it is my opinion that they all satisfy the repair and maintenance exemption.

1) The repair and installation of culverts is an in-kind replacement that does not result in an up-grade, will prevents changes that would otherwise occur over time through wear and tear and does not result in a change of purpose. The installation of new culverts may also be considered repair and maintenance because from time to time drainage patterns may change as a result of upstream land use changes and appropriate action is needed to prevent damage or deterioration to the corridor.

2) Clearing and grubbing of the corridor must take place in order to keep the corridor in suitable condition for any use. If these activities did not take place the corridor would soon be overtaken.

3) The grading and compaction of ballast is a maintenance practice that is not new to the corridor and caused by normal wear and tear from its use. The grading and compaction of ballast has only minimally been maintained since the 1970's. Although generally compacted, the ballast has eroded in places. Grading and compacting are necessary to return it to its properly functioning condition. Such work will not result in an upgrade over its historic condition, and will continue to deteriorate over time if action is not taken.

4) The restoration of drainage ditches has deteriorated over time from normal wear and tear and is a practice that must occur to maintain the corridors use and function.

5) The application of fine gravel atop the ballast to form a suitable surface for accessible (ADA) non-motorized use has not historically occurred in the past. However, the application of course gravel to maintain the rail bed has occurred regularly throughout the history of the transportation corridor. The addition of a finer material to provide a surface for ADA accessible use is consistent with the purpose of the transportation corridor.

6) Signage and mile marking has always been a part of the transportation corridor and over time needs to be replaced in order to protect the corridor and general public from any hazardous conditions that may occur.

7) The installation of nine bridges is a significant and costly undertaking. Many of these bridges were previously removed or washed out and need to be replaced. Several of the bridges are unsafe and will require complete reconstruction or replacement. Primarily these bridges will be replaced within their existing alignment within the transportation right-of-way, except for the bridge replacement in Walden. The less costly option, although not required, for the Walden Bridge would be to acquire an additional 0.10 acres of land outside the right-of-way in order to achieve a better bridge alignment. These bridges are in-kind replacement of bridges that have historically been located along the transportation corridor. I note that the replacement bridges do

not have the weight capacity for train usage, and therefore do not represent an upgrade over the corridor's historic condition but rather replace what has deteriorated through wear and tear over time.

8) Bridge decking deteriorates over time and must be replaced in order to keep the corridor in working condition.

9) The installation of guardrails or fencing systems, such as chain link fencing, will occur at a height sufficient for safe equestrian use across many of the bridges, cattle passes, culverts, and concrete structures. This is necessary to provide a safe crossing for many of the corridors users. This is not a new use as similar measures have been historically taken along the corridor to protect rail use from hazardous conditions.

10) The replacement of right-of-way fencing is necessary because much of the old fencing has not been maintained over the last several decades and remains necessary to maintain the safety of the users.

In summary, the change from rail to trail is an adaptive re-use of something that already exists. The preponderance of the evidence shows that the proposed changes will not alter the purpose of the transportation corridor but is undertaken to maintain the historic condition and character of the corridor for trail use. It is for these reasons that I conclude the proposed physical changes constitute repair and maintenance.

This is a jurisdictional opinion issued pursuant to 10 V.S.A. §6007(c) and Natural Resources Board Rule 3. Reconsideration requests are governed by Natural Resources Board Rule 3 and should be directed to the district coordinator at the above address. Any appeal of this decision must be filed with the clerk of the Environmental Court within 30 days of the date of issuance, pursuant to 10 V.S.A. Chapter 220. The appellant must also serve a copy of the Notice of Appeal in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings. For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. The address for the Environmental Court is: Environmental Court, 2418 Airport Rd., Suite 1, Barre, VT 05641-8701. (Tel. # 802-828-1660).