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Peter Keibel, Coordinator
District #4 Environmental Commission
111 West Street
Essex Junction, VT 05452

Re: Town of Shelburne Request for Jurisdictional Opinion
Land Use Permits #300004 and #4C0828

Dear Peter:

This letter is filed on behalf of The Nature Conservancy ("TNC"). As set forth below, TNC requests that you proceed with the March 15, 2016 jurisdictional opinion request by the Town of Shelburne with respect to the non-preempted portions of the project undertaken by Vermont Railway, Inc. ("VTR") on the land which is subject to Act 250 LUP #300004 and #4C0828.

In summary, VTR purchased the property from Northern Vermont Financial Corporation ("NVFC") on December 28, 2015. On December 31, 2015, VTR commenced construction of improvements under a plan of development that included facilities for the benefit of Barrett Truck. The commencement of construction of improvements by VTR involved tree cutting on the property, including the cutting down of 8.5 acres of mature, Valley Clayplain Forest. While VTR, apparently, has modified its development plan so that the only activities are pre-empted transload activities, the tree cutting by VTR in furtherance of a development plan for non-preempted activities triggered Act 250 jurisdiction as of December 31, 2015.

The two controlling decisions regarding (a) tree harvesting, and (b) the circumstances under which jurisdiction may be waived due to an abandonment of the development plan, are, respectively, *In re Green Crow*, 2007 VT 137, 183 Vt. 33, and *In re Audet*, 2004 VT 30, 176 Vt. 617. These decisions are discussed below relative to the facts of this opinion request.

In *Green Crow*, the Supreme Court denied the application of Act 250 jurisdiction to *bona fide* logging below 2,500 feet in elevation. In making this ruling, however, the Court was clear that not all logging below 2,500 feet is exempt. Rather, the Court stated:

> Furthermore, we take care to note that we do not hold that Act 250 may never impose permit conditions limiting the cutting of trees below 2,500 feet. For example, Act 250 may certainly impose permit conditions limiting tree-cutting activities associated with a subdivision or other low-altitude development. See, e.g., *McLean Enters.*, Declaratory Ruling No. 428, slip op. at 6 n.2 (July 22, 2005); *In re Capital Heights Assocs.*, Declaratory Ruling No. 167, slip op. at 3 (Mar. 27, 1985) ("[T]he cutting of trees and construction of logging roads may constitute 'commencement of construction' of a development, rather than ... logging."). The Legislature's intent was to allow bona fide logging projects below 2,500 feet to proceed without the "substantial administrative and financial burdens" of complying with the Act.

Green Crow., 2004 VT 30 ¶ 18, 183 Vt. at 41.

It is significant that the Court emphasized "bona fide logging projects" in connection with its ruling in *Green Crow*. The Court concluded that Green Crow's activity was bona fide logging based on the evidence that Green Crow was in the business of managing forest and timberlands, including tree harvesting.[1]

In contrast, VTR engaged in tree cutting as part of its plan of development. The plan of development included some activities which were not pre-empted under the Interstate Commerce Commission Termination Act ("ICCTA").

Judge Session's June 29, 2016 decision, *Vermont Railway, Inc. v Town of Shelburne*, Docket No. 2:16-cv-00016-wks, Opinion and Order, at page 5, footnote 2, states:

> In addition, on December 23, 2015, VHB provided the Town with a copy of the Notice of Intent form that it had submitted to the Vermont Department of Environmental Conservation ("DEC") as part of its application for a NPDES Discharge Permit GP 3-9020 for Stormwater Runoff from Construction Sites ("Construction General Permit"). The Notice of Intent form identified the planned

[1] The Green Crow website (http://www.greencrow.com/) states as follows: "Green Crow Corporation is a privately owned company specializing in the timberland and wood products industries. We provide full-service timberland investment management services to institutional, family and individual investors. These services include advisory, due diligence, deal flow, property management, strategic planning, forest products marketing, modeling, valuation, engineering, environmental services, and accounting. We are located in the U.S. Pacific Northwest and Northeast, and in New Zealand."

> earth disturbance activities on the Property. DEC later issued the Construction General Permit on February 24, 2016.

Id.

Thus, the plan of development on December 23, 2015, five days *before* VTR bought the property from NVFC, was the VTR/Barrett Trucking plan, and David Wulfson, President of VTR, confirmed that this was so before Judge Sessions.

On May 17, 2016, VTR President David Wulfson testified that the tree cutting was for both preempted and non-preempted activities. Shelburne Town Attorney Safar asked Mr. Wulfson whether the 19-acre site had been cleared in December just for railway purposes, or had been cleared to serve the non-railway purposes of Barrett Trucking. The following exchange occurred:

> Q. And so you were doing a clearing at that time in December. Is it your testimony that you were doing that clearing for the purposes of the limited proposal that is now before the Court?
>
> A. No. I'm doing it for the build-out.
>
> Q. Okay. So you were doing it with some of Barrett's buildings in mind, correct?
>
> A. Possibly, but not a hundred percent.

Mr. Wulfson then realized what he had just admitted and he tried to retract the admission. Mr. Wulfson testified that "I'm not even sure if we would have room to put in any kind of a Barrett building by the time we're done here" and "We [the railroad] need the room." He concluded that none of the clearing was done for Barrett's buildings. Testimony of David Wulfson, 5/17/2016, tr. pp. 851-852.

In fact, the plans which are approved by Notice of Authorization No. 7514-9020 (2/24/2016) included substantial areas outside of the core railway project that Judge Sessions determined is protected from state regulation by ICCTA preemption. While VTR's plans have changed, the fact is they did not change until *after* VTR commenced construction of improvements for a commercial purpose on more than 10 acres of land for activities and land uses which are not preempted under ICCTA.

Accordingly, under *Green Crow*, VTR cannot use the Act 250 logging exemption as to the non-ICTAA activities which were part of the development plan on December 31, 2015. Rather, on December 31, 2015, VTR triggered Act 250 jurisdiction as to the non-preempted activities when it commenced tree cutting under a plan of development for commercial purposes on a tract of land greater than 10 acres. 10 V.S.A. § 6001(3)(A)(i).

In addition, VTR's tree cutting on December 31, 2015, and thereafter, constituted a material change to Land Use Permits #300004 and #4C0828 in violation of Act 250 Rule 34(A)("Commencement of construction on a material change to a permitted development or subdivision without an permit amendment is prohibited.").

The only remaining issue is whether VTR can now avoid jurisdiction because it has, evidently, abandoned the non-preempted activities which it commenced on December 31, 2015.

The controlling precedent on the issue of when the abandonment of an activity can negate jurisdiction is *In re Audet*, 2004 VT 30, 176 Vt. 617. In *Audet* the Court ruled jurisdiction could be negated only under a very limited, narrow exception:

> Generally, as noted by the environmental board dissenters here, once a change of statewide impact occurs to land, Act 250 jurisdiction attaches and it cannot be undone by later events such as a cessation of the development activity. This case, however, raises a separate question: where a change in land utilization involves a change in use but no construction, physical change to the land, or other lasting impact, whether ceasing and abandoning the change of use may, if supported by sufficient evidence, negate the change in land utilization and thus the need for Act 250 review.

Id., 2004 VT 30 ¶ 13, 176 Vt. at 620.

The exception recognized in *Audet* is limited to where the new activity was a change in use that did not result in any construction, physical change to the land, or other lasting impact. VTR does not meet the exception.

Regardless of whether there has been a change in use, VTR conducted extensive tree cutting which has resulted in extensive physical changes to the land, and lasting impacts to the land, including the elimination of 8.5 acres of mature, Valley Clayplain Forest. VTR cannot claim that *Audet* shields its non-preempted activities from Act 250 jurisdiction.

Accordingly, TNC request that you proceed to issue a jurisdictional opinion as VTR's commencement of construction with respect to activities not exempted from Act 250 under ICCTA and Judge Session's June 29, 2016 decision.

Thank you for your consideration of these matters.

Sincerely,

David L. Grayck

David L. Grayck, Esq.

Cc: Client
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