STATE OF VERMONT
ENVIRONMENTAL COURT

Land Use Panel of the Vermont Natural Resources Board, Petitioner,	
v.	**Docket No. 214-10-08 Vtec**
Sisters & Brothers Investment Group, LLC, Respondent.	

Judgment Order

This matter came on for a merits hearing at the Costello Courthouse in Burlington on September 30, 2009, Judge Thomas S. Durkin presiding. Present at the hearing were Melanie Kehne, Esq., staff attorney for the Land Use Panel of the Vermont Natural Resources Board ("NRB"), Joseph Handy, a principal of Sisters and Brothers Investment Group, LLP ("SBI") and David H. Greenberg, Esq., SBI's attorney.

At issue in this matter is the propriety of the Administrative Order that NRB filed with the Court against SBI on October 2, 2008, concluding that SBI had constructed "improvements to a road in a rare and irreplaceable natural area" on land owned by SBI that was already subject to Act 250 Permit #4C0927-R[1] and its amendments. The NRB further concluded in its Administrative Order that the improvements SBI caused to have done on its tract of undeveloped land were so substantial as to require that SBI first obtain an amendment to the Act 250 permit that encumbered its property. SBI contests these conclusions and therefore filed a timely request for a hearing pursuant to 10 V.S.A. § 8012(a). The Court is directed to conduct such hearings within thirty days, pursuant to 10 V.S.A. § 8012(c), unless the respondent requests further time and specifically waives its right to an expedited hearing. SBI made such a waiver at the initial conference the Court conducted on October 8, 2008.

The Court conducted a site visit with the parties and counsel on the afternoon before the merits hearing. The site visit provided context for the evidence introduced at trial the following day.

[1] This "R" denotes that the Act 250 permit was issued based upon a revised and reconsidered application; the original application was denied. Act 250 Permit #4C0927-R has been the subject of several amendments, none of which have a material impact on these proceedings. A copy of Permit #4C0927-R was admitted as Exhibit 1.

At the merits hearing, once all parties had a full opportunity to present testimony and other evidence, the Court took a brief recess and then returned to the bench to announce its Findings of Fact on the record of the merits hearing. Based upon those Findings, the Court also announced its Conclusions of Law, which included its determination that the NRB Administrative Order should be upheld, save only for a modification to the monetary penalty to be imposed against SBI.[2] For purposes of clarity, the Court provides the following brief summary of its Findings of Fact and Conclusions of Law:

1. SBI's property consists of approximately 26 acres of undeveloped land, sometimes referred to as the "Hill Parcel", which was once part of a much larger tract of land, consisting of 92± acres that included a significant portion of the peninsula that is referred to locally as "Malletts Head." The eastern border of Malletts Head forms the westerly shore of a portion of Malletts Bay in the Town of Colchester.

2. The entire 92± acre parcel was the subject of a commercial and residential development governed by Act 250 Permit #4C0927-R, although no actual development was proposed on the 26± acre portion that was later subdivided from the original parcel and acquired by SBI. However, because SBI's parcel constituted a portion of the land involved in the original permit proceeding, it has remained subject to the original state land use permit.

3. A path or woods road winds through the SBI parcel, ending on the northwesterly edge of Malletts Head, at a beautiful overlook known as "Pirates' Lookout." Because of its beauty, nearby residents and others often travel over SBI's property, many without permission and while ignoring notices not to enter, to reach Pirates' Lookout and other areas on Malletts Head.

4. SBI's principal, Joseph Handy, testified in a convincing manner that SBI has no current development proposals for its property on Malletts Head. Nonetheless, sometime in 2007, SBI hired local contractor William Russell to make certain improvements to the path or woods road that travelled over the SBI property.

5. SBI had previously been put on notice that its Malletts Head parcel was home to limestone-based, cedar-dominated forests, as well as "wildlife habitat[s], and rare plants that are associated with this rare natural community." Corresp. of Eric R. Sorenson, Community

[2] Once a respondent has requested a hearing, the Court is authorized to affirm, modify or vacate and remand an administrative order. 10 V.S.A. § 8012(b). Subsection 8012(b)(4) vests the Court with the specific authority "to review and determine anew the amount of a penalty by applying the criteria set forth in subsections 8010 (b) and (c)."

Ecologist for the Vermont Agency of Natural Resources ("ANR"), dated January 20, 2006, a copy of which was admitted as Exhibit 2. Mr. Sorenson had visited the SBI property with the prior permission of Mr. Handy.

6. During SBI's ownership of the property, the woods road or path had become overgrown, washed out in places and restricted by downed trees and branches. The work to the woods road that SBI caused Mr. Russell to complete included the removal of dead or dying trees and branches, the cutting of several healthy trees, and work with an excavator to move gravel, stones and boulders from the woods road and its shoulders. Some of the work extended beyond the existing margins of the woods road, into and at times beyond its shoulders. It was unclear from the evidence presented whether some of this work may have damaged a portion of the wildlife habitat and rare plants to which Mr. Sorenson referred in his January 20, 2006 letter. Mr. Sorenson provided convincing testimony at trial that evidence of the rare plants, and the profusion of invasive species, appeared along or next to the area where the work on the woods road occurred.

7. No fill or rock was brought onto the SBI land from off site.

8. SBI did not secure an amendment to the Act 250 permit encumbering its property prior to causing this road work to occur. The road work was conducted in the vicinity of environmentally sensitive, rare and irreplaceable natural areas and had the potential for causing significant or material impacts to one or more of the environmental attributes that Act 250 seeks to protect, including aesthetics and rare and irreplaceable natural areas pursuant to Act 250 criteria 8 (10 V.S.A. § 6086(a)(8)).

9. As of the date of the merits hearing, SBI had still not applied for an amendment to its Act 250 permit. Its principals continued to believe that they had merely caused road maintenance work to occur and that the work did not rise to the level of requiring a permit amendment. Based upon the evidence presented, the Court concluded otherwise.

10. The Court appreciates that the work actually performed at SBI's direction may not have caused permanent harm, given the care taken by SBI's principals and contractor. But the potential for serious harm is supported by the facts presented by NRB at trial, particularly those facts put into context by the site visit. Further, testimony by NRB witnesses confirmed that for all property owners who are uncertain whether the work they intend to perform will require an Act 250 permit or amendment, the NRB has established an efficient means of reviewing facts

from the property owner and issuing jurisdictional opinions, upon which a property owner may rely.[3] Act 250 Rule 3.

11. In consideration of the care with which SBI caused the actual road work to be accomplished, the continued care with which SBI has held this unique and naturally beautiful parcel of undeveloped land, and because SBI caused the work to cease immediately upon notice from NRB staff, and in consideration of the eight factors relative to the appropriateness of administrative penalties contained in 10 V.S.A. § 8010(b), the Court determined anew that the appropriate administrative penalty against SBI is Two Thousand, Five Hundred Dollars ($2,500.00).

In summary, the Court concludes that Sisters and Brothers Investment Group, LLP must obtain an amendment to Act 250 Permit #4C0927-R, conform to any and all conditions contained in any final determination on its permit amendment application, and pay an administrative penalty of $2,500.00 to the Land Use Panel of the Vermont Natural Resources Board. Interest shall accrue upon this administrative penalty once it has become final.

In all respects other than the amount of the administrative penalty, the Administrative Order of September 22, 2008, filed with the Court on October 2, 2008, shall remain in full force and effect.

This completes the current proceedings on this matter in this Court.

Done at Newfane, Vermont this 20th day of October, 2009.

Thomas S. Durkin, Environmental Judge

[3] The Court notes that jurisdictional opinions are only reliable when based upon an accurate and complete disclosure of the proposed work or development.