Natural Resources Board
District Environmental Commission #1 & 8
440 Asa Bloomer State Office Building
Rutland, VT 05701

October 18, 2017

Lawrence Slason, Esq.
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Subject: Jurisdictional Opinion #2-308; Snowstone, LLC, Cavendish, Vermont

Dear Mr. Slason:

I write in response to your request dated May 24, 2017, for a Jurisdictional Opinion, as provided for in 10 V.S.A. § 6007 ("the request"). My opinion follows.

I. Summary of Opinion

In summary (and for reasons outlined in more detail below), it is my opinion that the proposed extraction of earth resources constitutes development for a commercial purpose on more than one acre of land in Cavendish, Vermont – a "one-acre town" for Act 250 jurisdictional purposes. Accordingly, an Act 250 Land Use Permit is required prior to commencement of construction. 10 V.S.A.§ 6001 et seq. (Act 250).

II. Burden of Proof

The legal burden of proof that a development is exempt is upon the person(s) seeking the exemption.[1] In this case, those parties are landowners Justin and Maureen Savage and quarrier Snowstone, LLC.

[1] See, for example: "The burden of proving that a development is exempt from Act 250 is on the person claiming the exemption." *Re: Vermont RSA Limited Partnership,* DR #441, FCO at 6 (10/20/05), ***aff'd,*** *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23 (2007); *Re: Hale Mountain Fish and Game Club, Inc.,* DR #435, MOD at 5 (9/27/04); *Re: Thomas Howrigan*, DR #358, FCO at 9 (8/30/99); *Re: Applewood Corporation Dummerston Management*, DR #325 (9/28/96). "Owner/operator of pre-existing quarry bears burden of producing evidence of pre-1970 and post-1970 extraction rates on issue of substantial change, and failure to meet that burden may justify dismissal." *Re: Vermont Verde Antique International, Inc.*, DR #387, DO at 8-9 (2/2/01), *red, on other grounds*, *In re Vermont Verde Antique International, Inc.,* 174 Vt.

III. The Fundamental Legal Question

In summary, the request proposes a future conveyance from landowners Savage of title to .64 acres and a "right-of-way easement" of .29 acres (total .93 acres) to purchasers Snowstone, LLC – the principals of which are identified as Jason and Kristy Snow. The underlying tract owned by the sellers is 176.18 acres in size. Because Act 250 jurisdiction does not attach to development on a tract or tracts of less than one acre, the legal question is whether or not the proposed conveyance and easement are legally effective in eliminating Act 250 jurisdiction from the proposed commercial extraction of stone from the .64-acre tract.

IV. Facts and Documents

In reaching the conclusion outlined in Section I above, I relied upon various facts as recited in the request above, and in the arguments proffered in the case by interested parties, both of which are enumerated in the attached exhibit list and referred to in detail below. In addition, I conducted a site visit with the parties on September 8, 2017. Readers may refer to the attached Exhibit List for further reference.

V. The Argument for Exemption – Mr. Slason

Readers Note: I've elected to quote below the salient parts of both the argument for exemption (Slason – Section V) and for jurisdiction (Bent – Section VI). First, the argument for exemption, as presented in pertinent part, by Mr. Slason:[2]

> Our office represents Snowstone, LLC, a domestic Limited Liability Company organized on May 2, 2010 and its sole members, Jason and Kristy Snow, husband and wife, who reside at 227 Craigue Hill Road, Springfield, Vermont.
>
> This Verified Request for Jurisdictional Opinion is in substitution of the earlier request for Jurisdictional Opinion submitted by this office on behalf of Snowstone, LLC on March 23, 2017.
>
> Snowstone, LLC requests a Jurisdictional Opinion pursuant to 10 V.S.A.§6007(c), seeking a final determination whether its proposal to purchase less than one acre of land in Cavendish, Vermont and to operate a commercial dimensional stone quarry on that land is exempt from the requirement to obtain an Act 250 permit. A request for Jurisdictional Opinion would customarily be determined by the District Coordinator in the Environmental District where the project is located. We understand that this particular request for Jurisdictional Opinion has been referred to you for determination.

[2] The attachments, if any, as cited in the arguments below, may be found in the attached exhibit list.

PROPOSED PROJECT

Snowstone, LLC intends to purchase a stone-quarry parcel of 0.64 acres located off Tierney Road in Cavendish, Vermont. The parcel is to be subdivided from a 176.18-acre parcel owned by Justin and Maureen Savage. Access to the stone quarry from Tierney Road will be provided by a right-of-way easement for ingress and egress over an existing access road 16' wide and 799' in length. Snowstone, LLC does not intend to make any physical changes or improvements to the existing access road. See: Subdivision Plat "Subdivision in Cavendish Windsor County Vermont for Justin P. T. & Maureen A. Savage" prepared by Rose Land Surveying, dated April 11, 2017, attached.

Snowstone, LLC proposes to use the 0.64-acre parcel for extraction and processing of dimensional stone. Some of the dimensional stone will be stored within the quarry. Other stone will be taken to a stockpiling area at the Gold River Industrial Park in Chester, Vermont owned by Gold River, LLC. The storage area in Chester is subject to Land Use Permit #2S0498-9A. The permit authorizes storage of stone on the Chester site. A copy of that permit is included.

OPERATIONAL PLAN

Snowstone, LLC will operate on a seasonal basis, generally from April 1 through December 1 of each year. Jason Snow, principal member of Snowstone, LLC, and one full-time employee, will work at the quarry site in Cavendish. A third part-time employee will work at the storage area at the Gold River Industrial Park in Chester, Vermont. That employee will finish the stones and place them on pallets for sale to local landscapers and contractors. Snowstone, LLC has developed a reputation for high-quality, hand-finished stone highly desirable for patios, steps, walkways, and walls.

The stone quarry in Cavendish is located in a remote area ideally suited for a two-person operation which generates little noise and very little traffic. A site plan has been prepared showing the proposed stone extraction area plan. See: "Proposed Stone Extraction Area Plan in Cavendish, Windsor County, Vermont for Snowstone, LLC" prepared by Rose Land Surveying, dated April 11, 2017.

The stone extraction operation involves use of a CAT 312 excavator and one tractor bucket loader. The stone is moved by the excavator to a leveled area where the stone can be worked by hand. The stone craftsmen then use a three-pound hammer and chisel to split the rock and process each stone by hand. After several slabs of stone have been separated and chiseled, they are moved by the bucket loader to a pile to be trucked off-site.

The majority of trips on Tierney Road will use Snowstone, LLC's F550 pickup. Snowstone anticipates making no more than four trips per day with the pickup. Snowstone may occasionally use a sixteen-yard dump truck to reduce the number of daily trips. Snowstone does not expect that the dump truck will make more than one trip

per day, and no more than four trips per week. The dump truck will customarily arrive at the site after 9:00 AM and leave the site by 4:00 PM. On some days no stone will be removed from the site.

The stone will be taken to the Gold River Industrial Park in Chester, Vermont owned by Gold River, LLC. The stockpile site is located within a small area to the rear of the premises of M&M Excavating, Inc. in Chester.

THE PROPOSED PROJECT IS NOT A *"DEVELOPMENT"* SUBJECT TO ACT 250 JURISDICTION

We understand that the Town of Cavendish has not adopted permanent zoning and subdivision bylaws and is thereby considered for the purpose of Act 250 jurisdiction as a "one-acre town". 10 V.S.A. §6001(3)(A)(ii) defines development in one-acre towns as follows: "The construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality that has not adopted permanent zoning and subdivision bylaws."

The proposed project is not subject to Act 250 jurisdiction because the construction of improvements will occur entirely within the 0.64-acre parcel and is therefore not a jurisdictional "development" under 10 V.S.A. (3)(A)(ii).

THE PROPOSED PROJECT DOES NOT INCLUDE *"INVOLVED LAND"* IN EXCESS OF THE JURISDICTIONAL THRESHOLD

In municipalities that have adopted permanent zoning and subdivision bylaws (ten-acre towns), Act 250 jurisdiction is triggered by development “involving more than ten acres of land within a radius of five miles of any point on any involved land." See: 10 V.S.A. §6001(3)(A)(i).

It is significant to note that the statutory definition of development in one-acre towns does not make any reference to "involved land." It is a well-recognized rule of statutory construction that all language is drafted advisedly. A term which appears in one portion of a statute and which is omitted in another section of the same statute is presumed to have been omitted purposefully. Town of Williston Road Improvements, DR #381, Vt. Envtl. Bd., Findings of Fact, Conclusions of Law and Order (January 13, 2000).

Even if the concept of "involved land" were to be considered in the one-acre town context, the project remains below the one-acre jurisdictional threshold.
Act 250 Rule 2(C)(5) provides as follows:

"'Involved land' includes: (a) the entire tract or tracts of land, within a radius of five miles, upon which the construction of improvements for commercial or industrial purposes will occur, and any other tract, within a radius of five miles, to be used as part of the project or where there is a relationship to the tract or tracts upon which the construction of

improvements will occur such that there is a demonstrable likelihood that the impact of the values sought to be protected by Act 250 will be substantially affected by reason of that relationship. In the event that a commercial or industrial project is to be completed in stages according to a plan, or is part of a larger undertaking, all land involved in the entire project shall be included for the purpose of determining jurisdiction."

In this case, the easement area of the existing access road is 0.29 acres. The combined acreage of the parcel and access road is 0.93 acres, less than the jurisdictional one-acre threshold. Neither Snowstone, LLC, nor Mr. and Mrs. Snow, own or control any land within a radius of five miles of the project. The Chester, Vermont storage area is more than five miles from the quarry tract and therefore does not constitute "involved land" as defined. See: ANR map showing stockpile location, attached.

THIS IS A SINGLE GOOD FAITH TRANSACTION WHICH IS NOT PART OF A LARGER UNDERTAKING

Jason and Kristy Snow/ Snowstone, LLC have no present plans to develop any other land in the immediate area of the proposed quarry. Act 250 jurisdiction is not triggered until an activity has achieved such finality of design that construction can be said to be ready to commence. In Re Agency of Administration, 141 Vt. 68, 79 (1982). Snowstone, LLC's proposed acquisition of the quarry site is a good faith arm's-length transaction. There is no attempt here by Snowstone, LLC to evade Act 250 jurisdiction by indirectly controlling other properties. See: In Re Eastland, Inc., 151 Vt. 497 (1989); State of Vermont Environmental Board v. Chickering, 155 Vt. 308 (1990). There is, however, a conscious effort to limit the scope of the project to ensure that the construction of improvements occur on less than one acre of land.

With the exception of the access easement, Jason and Kristy Snow and Snowstone, LLC retain no legal interest, easements or rights in the remaining tract owned by the sellers. Neither Jason and Kristy Snow, nor Snowstone, LLC, are affiliated with Justin and Maureen Savage in any ongoing enterprise or joint venture and have no affiliated ownership in any property.

THE PROPOSED PROJECT IS NOT A "SUBDIVISION" SUBJECT TO ACT 250 JURISDICTION

In a one-acre town, "subdivision" is defined as "A tract or tracts of land, owned or controlled by a person, which the person has partitioned or divided for the purpose of resale into six or more lots, within a continuous period of five years, in a municipality which does not have duly adopted permanent zoning and subdivision bylaws." 10 V.S A. §6001 (l9) (A)(ii).

In this case, neither the sellers nor the buyer have subdivided land within the Town of Cavendish which would trigger Act 250 jurisdiction. Specifically, Jason and Kristy Snow/Snowstone, LLC, nor any other entity owned or controlled by Mr. and Mrs. Snow

or Snowstone, LLC, nor any family member of Mr. and Mrs. Snow, have owned or controlled any land that has been partitioned or divided within the Town of Cavendish.

Furthermore, it is our understanding that with the exception of this single quarry site, Justin and Maureen Savage have not subdivided any land within the Town of Cavendish within the preceding five years. Accordingly, the proposed project is not a jurisdictional "subdivision" as defined by 10 V.S.A. §6001. See: Act 250 Disclosure Statement of Justin and Maureen Savage, attached.

CONCLUSION

Justin and Maureen Savage propose to sell a single subdivided lot to Snowstone, LLC in an arm's-length transaction. The sellers will have no involvement or financial interest in any development that occurs on the parcel following the sale to Snowstone, LLC. Furthermore, with the exception of the access easement, Jason and Kristy Snow/Snowstone, LLC have not retained any property interest in any other lands of the sellers.

The construction of improvements for the dimensional stone quarry will occur on less than one acre of land and is therefore not a jurisdictional "development" under 10 V.S.A. §6001(3)(A)(ii). Furthermore, the subdivision by Justin and Maureen Savage of a single lot within the Town of Cavendish is not a jurisdictional " subdivision" under 10 V.S.A. §6001(19)(A)(ii).

For the foregoing reasons, Snowstone, LLC respectfully requests the issuance of a Jurisdictional Opinion finding that the proposed project, as described above, is not subject to Act 250 jurisdiction and does not require an Act 250 permit.

VI. The Argument for Jurisdiction – Ms. Bent

As presented in relevant part, by Merrill Bent, Esq., on behalf of concerned clients. [3]

Our office represents 22 Cavendish landowners ("Neighbors") who would be affected by the stone quarry development proposed by Snowstone LLC on Tierney Road ("Project"). The following is the Neighbors' comment concerning Snowstone's Request for a Jurisdictional Opinion pursuant to 10 V.S.A. § 6007, in response to your request for comment issued on June 2, 2017.

[3] I conclude that Ms. Bent's clients, as either neighboring or adjoining landowners, have satisfactorily demonstrated "particularized interests" in the outcome of the opinion for a project that is proposed to involve the use of heavy machinery, trucking and blasting activities. These parties will be referred to from time to time as "the opponents".

BACKGROUND FACTS

Justin and Maureen Savage acquired a 176.8+-acre parcel of land in April 2016 for $165,000.00 ("Entire Tract") (Ex. 1, Deed and PTTR for Savage acquisition). The Savages have since proposed a subdivision of the parcel, and Snowstone, LLC is now poised to acquire a 0.64-acre parcel ("Subject Parcel") for the purpose of "extraction and processing of dimensional stone," commonly referred to as quarrying. (See Request for JO, at 2). For the time being, the Savages will retain the contiguous 176.16 acres ("Retained Parcel"), and they will also grant to Snowstone a 0.29- acre right of way over the Retained Parcel for access to the otherwise landlocked Subject Parcel ("Easement").

The purchase and sale agreement between the Savages and Snowstone ("Contract," Ex. G to Request for JO) reflects a purchase price of $100,000.00 for the 0.64-acre Subject Parcel. The Savages are to provide a purchase-money mortgage securing a $95,000.00 promissory note (personally guaranteed by Jason and Kristy Snow), payable in monthly installments at a rate of 3% annual interest over four years. Under the terms of the Contract, the Subject Parcel is to be conveyed to Snowstone subject to a perpetual right of first refusal benefitting the Savages.

EXECUTIVE SUMMARY

As set forth in greater detail below, the commercial development proposed by Snowstone LLC is of precisely the type Act 250 was enacted to regulate, and is subject to the requirement that the developer first proceed through the administrative permitting process.

As structured, the proposed sale of the property to Snowstone amounts to a lease for a term of four years, under which the Savages will receive a beneficial interest in the operation of the quarry in the form of monthly payments of consideration well above the fair market value of the land, and will also retain a beneficial future interest in the property itself. As an easement over the Retained Parcel provides the only access to the Subject Parcel, it is a necessary and integral part of the operation. Insofar as the Savages will retain control over the entire tract of land after the Subject Parcel is conveyed to Snowstone, the acreage of the Retained Lands must be considered to be part of the same tract of land controlled by a single person for purposes of determining Act 250 jurisdiction.

- The Subject Parcel and the Retained Parcel constitute "one or more physical contiguous parcel of land owned or controlled by the same person," and are therefore a single tract of land for purposes of Act 250. 10 V.S.A. § 6001(3)(A)(ii) and (14)(A)(iii); Act 250 Rule 2(c)(12);

- The Retained Parcel is necessary to the proposed operation in that an easement over that parcel provides the only access for ingress/ egress of equipment and vehicles. Act 250 Rule 2(C)(5).

- The transaction is not an arm's-length sale of real estate: The proposed price per acre is 167 times what the Savages paid for the lands in 2016, and the Savages will continue to have a beneficial interest in the Subject Parcel following the sale, and are therefore considered affiliates of Snowstone for purposes of Act 250. 10 V.S.A. § 6001(14)(A)(iii).

- The relationship between the two contiguous parcels of land is such that the impact of the proposed development on the values sought to be protected by Act 250 will be substantially affected due to that relationship. Act 250 Rule 2(C)(5).

- The proposed development would have an adverse impact with respect to multiple Act 250 criteria and is inconsistent with the Cavendish Town Plan. 10 V.S.A. § 6086 (1), (4), (5), (8), and (10).

- Similar attempts at an end-run around jurisdiction and the core purposes of Act 250 have been rejected by the Vermont Supreme Court.

MEMORANDUM OF LAW

I. THE ENTIRE TRACT IS SUBJECT TO ACT 250 JURISDICTION

A. The Entire Tract is Considered One Tract of Land For Purposes of Act 250

As relevant here, 10 V.S.A. § 6001(3)(A) defines "development" as: "(ii) The construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality that has not adopted permanent subdivision bylaws."

The Supreme Court has previously held that "'[i]n determining amount of land involved for jurisdictional purposes, "the area of the entire tract or tracts of involved land owned or controlled by a person will be used."' *In re Stokes,* 164 Vt. 30, 36,664 A.2d 712, 716 (1995).

The Act 250 Rules define "tract of land" as "one or more physical contiguous parcels of land *owned or controlled* by the same person or persons." Act 250 Rule 2(c)(12)[4].

The "ownership" and/or "control" test for purposes of Act 250 jurisdiction has been applied in the context of "one-acre" towns, such as Cavendish. For example, In re Vitale (151 Vt. 580, 563 A.2d 613 (1989)) involved a one-acre jurisdiction town (Rutland, prior to the enactment of its zoning bylaws). In reaching its holding, the Vitale Court defined "control"

[4] Act 250 Rule 2(C)(5) defines "Involved Land" as:
The entire tract or tracts of land, within a radius of five miles, upon which the construction of improvements for commercial or industrial purposes will occur, and any other tract, within a radius of five miles, to be used as part of the project or where there is a relationship to the tract or tracts upon which the construction of improvements will occur such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship...."

as "'[t]o exercise restraining or directing influence over. To regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern.'" Id. at 584 (quoting Black's Law Dictionary 298 (5th ed. 1979)). The Court applied the control test to conclude that two parcels of land were controlled by a single person, and that Act 250 applied.

In its decision in Stokes[5], the Court addressed the issue of "ownership"/"control" in the context of a long-term lease of property. The Court held that because the leaseholder only had "limited ownership interests," the larger tract of land from which the leasehold was granted must be considered for purposes of determining Act 250 jurisdiction. The Court held that the developer's position would allow developers to "circumvent the administrative process by simply leasing parcels which do not exceed the jurisdictional thresholds," and concluded that "[i]n light of the Legislature's goals, [the Court] cannot endorse such a tactic." Id. at 37.

The arrangement between the Savages and Snowstone is effectively the same as the circumstances present in Stokes. The Contract requires Snowstone to grant the Savages "a Right of First Refusal to purchase the [Subject Parcel] upon the same terms as may be offered by Buyer to a bona fide third-party purchaser." Thus, the terms of the proposed transaction impose a restraint on Snowstone's absolute power of alienation and its control over the Property.[6] The Savages retain a non-possessory future interest in the property (similar to the landowner in Stokes), thereby continuing to exert control over the property long after the transaction closes. In restraining the right to alienation, the Savages' retained interest in the property thus serves to "restrain," "curb," "hold from action," "overpower," "counteract," and/or "govern" Snowstone's interest in the property. Vitale, 151 Vt. at 584.

Similar to Stokes, the arrangement proposed by Snowstone would permit would-be developers to circumvent the Act 250 administrative process by entering into multiple above-market transactions with purported third parties for parcels that fall just below the jurisdictional threshold, while retaining a future interest in the parcel. This is a tactic which, if permitted, would undoubtedly pave the way for virtually unregulated development in the hillsides of Cavendish, and throughout the State.

B. <u>The Entire Tract is Treated as Owned or Controlled by a Single Person for Purposes of Act 250</u>

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[5] Although the discussion in *Stokes* occurred in the context of a ten-acre town (Randolph), the principles apply equally here. It is also worth note that this case was decided prior to the enactment of 10 V.S.A. § 6001c, specifically addressing communications and broadcast structures.

[6] The mortgage that the Snows will give to the Savages presents a similar problem issue. Even typical, boilerplate mortgage provisions would provide a mechanism for the Savages to continue to exert control over the Subject Parcel. While other development projects may likewise involve a mortgaged property, the unique circumstance here is that the mortgage holder is a contiguous landowner whose lands literally surround the mortgaged property.

The Entire Tract is considered to be owned by a single "person" for purposes of determining Act 250 jurisdiction because the Savages will retain a beneficial future interest in the property, and will continue to receive a beneficial monetary interest in the above-market consideration for the next four years.

"Person" is defined by the act to "include [] individuals affiliated with each other for a profit, consideration, or *any other beneficial interest* derived from the partition or division land." 10 V.S.A. § 6001(14)(A)(iii) (emphasis added)[7]; *In re Shenandoah LLC*, 2011 VT 68, ¶¶ 7-8 190 Vt. 149, 153, 27 A.3d 1078, 1080 (2011). The Vermont Supreme Court has held that the definition used under Act 250 is "'intended to broaden the definition of a "person" owning or controlling land to include those who may not be mentioned specifically in the conveyance, but who may nevertheless derive *some benefit* from partition or division of the land.'" *In re Shenandoah LLC*, 2011 VT 68, at ¶ 8 (quoting *In re Spencer*, 152 Vt. 330, 339, 566 A.2d 959, 964 (1989)). In reaching this conclusion, the Court relied on the "Legislature's express finding that 'to ensure appropriate Act 250 review, it is necessary to treat persons with an affiliation for profit, consideration, or some other beneficial interest derived from the partition or division of land as a single person for the purpose of determining whether a particular conveyance is subject to Act 250 jurisdiction.'" *Id*. (quoting 1987, No. 64, § 1).

The Savages acquired the entire 176.88+-acre tract in April 2016 for $165,000.00 ($932.84 per acre) (See Ex. 1). The Savages are now conveying a 0.64-acre subdivided parcel to Snowstone for $100,000.00 ($156,250.00 per acre or 167 times the per-acre price paid at acquisition just over 1 year ago) (Ex. G to request for JO).

The Retained Parcel will also remain an integral part of the proposed quarrying operation, as an easement over that Parcel provides the sole ingress and egress by trucks and machinery. Without access for trucks, equipment, and machinery, there would be no quarrying operation.

This is not the "arm's-length" transaction that the parties claim it to be. Rather, the Savages would retain an interest in and control over the Snowstone Parcel, and will retain a continuing financial interest in the proposed development, payable in monthly installments under the guise of a purchase-money mortgage. Snowstone will also have a continuing interest in the Retained Parcel, by virtue of its access easement. Because the Savages and Snowstone are "affiliates" for profit, consideration, or other beneficial interest in the proposed development activity, the Entire Tract must be considered for purposes of determining Act 250 jurisdiction.

[7] This definition is distinct from a "partnership…joint venture or affiliated ownership," which is a separate category of "person" for the purposes of the Act, *Compare*10 V.S.A. § 6001(14)(A)(i).

II. CONCLUSION

The purpose of Act 250 is to ensure that development in Vermont is undertaken in a manner that is consistent with the values and goals of the area in which they are proposed, as well as the broader goals behind the regulatory scheme. The development at issue is precisely the type that is meant to be reviewed under this legal framework.

Developers cannot be permitted to circumvent the administrative process by collaborating with others to concoct transactional schemes designed solely to give the technical appearance of meeting an exemption to Act 250 jurisdiction, while providing a contiguous landowner with a continuing beneficial interest in the development and a return on its investment.

VII. Analysis and Conclusion

Having read both legal arguments which are cited in their relevant entirety above, I find Ms. Bent's argument to be overwhelmingly compelling and adopt the cited portions in their entirety by incorporation herein.[8] To the conclusions made in that argument, I would add in closing the following.

As Vermont Supreme Court Justice Peck once put it, "[i]t is a truism that it is entirely proper, legally as well as morally, to 'avoid' a law but not to 'evade' it." See dissent in *In re Vitale*, 151 Vt. 580, 563 A.2d 613 (1989). With the Vermont Environmental Board's 1993 ruling in *Northern Ski Works, Inc. and Lori Budney,* Declaratory Ruling #281 (October 18, 1993), it became clear that one could, under the correct circumstances, lawfully subdivide their way out of Act 250 jurisdiction. To do so effectively, however, is heavily fact dependent and reliant upon the concept of an "arm's-length transaction" between subdivider (seller) and buyer. In the instant case, subdividers Savage propose to sell to buyer Snow a .64-acre tract along with a .29-acre easement for a purchase price of $100,000. The contract for sale specifies that the deed will be restricted such that "there shall be no further development of the parcel." (Contract, p. 1). Seller will act as the mortgage lender to buyer for $95,000 of the purchase price. The contract further specifies that "[a]t closing, BUYER shall execute in recordable form an appropriate instrument granting SELLER a Right of First Refusal to purchase the quarry parcel upon the same terms as may be offered by BUYER TO A BONA FIDE third-party purchaser."

[8] Except for references made in Section II. of Ms. Bent's memorandum (herein omitted) to the potential environmental impacts of the proposed quarry and Town Plan conformance, which are technically irrelevant to my consideration here. The subject matter of this jurisdictional opinion, unlike the majority of such requests, is unrelated to the scope or extent of impacts (as they would under a material or substantial change analysis) but is, instead, narrowly confined to the factual and legal questions presented here. As Mr. Slason has correctly pointed out, environmental considerations will be subject to full review by the Act 250 District Commission upon their receipt and review of a complete application for an Act 250 Land Use Permit.

Mr. Slason correctly argues that the fact that sellers retain the mortgage is made statutorily irrelevant to my consideration of whether or not buyers and sellers here can be the same person – affiliated for profit – citing 10 V.S.A. § 6001(14)(B)(iii).

That does not, however, end the inquiry into whether or not buyers and sellers in this case have proposed a truly arm's-length transaction. I conclude, as does counsel for the opponents, that they do not. Upon due consideration of the facts here: that seller controls the ability to reacquire the .64-acre tract upon conclusion of the quarrying and that seller has secured that right on "terms as may be offered by buyer to a bona fide third-party purchaser" I conclude that the sellers maintain sufficient control of the land to be conveyed such that seller and buyer remain effectively affiliated for profit in the nature of a joint venture under 10 V.S.A. §6001(14). Accordingly, the jurisdictional acreage to be applied is not limited to the combined .93 acres proposed to be conveyed here but to the entire 176-acre tract owned by seller.

I reach this conclusion, with respect to the practical considerations suggested by the Supreme Court in the majority ruling in *In re Vitale* cited above. Namely, the .64-acre parcel here, like the .58-acre parcel cited in *Vitale,* will be "useless" once the extraction is completed. As stated above, the landlocked .64-acre tract will be deed restricted such that no further development can occur. Moreover, at the site visit, it was stated that there was no requirement for reclamation of the pit. Accordingly, I conclude that the market value to a "bona fide third-party purchaser" of a land-locked .64 acre physically disturbed un-reclaimed quarry hole to more likely than not be close to zero. Accordingly, seller's legal right to reacquire the land is unfettered by any suggestion that the repurchase price will be anything but nominal. Piercing the veil of this opaque arrangement, I conclude that the primary motivation evidenced here is one to evade and not to avoid Act 250 jurisdiction. It is my opinion that that effort fails on the facts, and that an Act 250 Land Use Permit is required prior to the commencement of extraction for commercial purposes from the .64-acre tract proposed herein.

VIII. Reconsideration or Appeal

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(B). Reconsideration requests are governed by Act 250 Rule 3(B) and should be directed to the district coordinator at the above address. As of May 31, 2016, Act 250 Rule 3(C) (Reconsideration by the Board) is no longer in effect. Instead, any appeal of this decision must be filed with the Superior Court, Environmental Division (32 Cherry Street, 2nd Floor, Ste. 303, Burlington, VT 05401) within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (VRECP). The appellant must file with the Notice of Appeal the entry fee required by 32 V.S.A. § 1431 and the 5% surcharge required by 32 V.S.A. § 1434a(a), which is $262.50. The appellant also must serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Center Building, Montpelier, VT 05620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

Sincerely,

/s/ William T. Burke
William T. Burke
District Coordinator

Attached: Exhibit List
Certificate of Service