Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-120

MARCH TERM, 2006

In re Appeal of Eric and Geraldine Cota	}	APPEALED FROM:
	}	
	}	
	}	Environmental Board
	}	
	}	
	}	DOCKET NO. 425

In the above-entitled cause, the Clerk will enter:

Petitioners Eric and Geraldine Cota appeal from an Environmental Board determination that the construction of a garage on their property for use in an excavation and landscaping business required an Act 250 permit. Petitioners contend the garage does not constitute a Adevelopment@ requiring a permit under the Act because: (1) it involves less than one acre of land; and (2) it is not used for a commercial purpose. We affirm.

The material facts may be briefly summarized. Petitioners own two adjacent parcels of land in

Montgomery Center. The first parcel, which they acquired in 1972, is less than one acre and contains their primary residence. The second, which they acquired in 1988, is about sixteen acres. Petitioners have cleared and graded portions of the sixteen-acre parcel to create a working surface, and have erected several structures for use in connection with two businesses. Geraldine Cota owns and operates Cota Nursery. Petitioners have constructed two greenhouses, as well as a half greenhouse connected to an office building, for use in the nursery business. Eric Cota runs an excavation and landscaping business known as Eric=s Excavation and Finish Landscaping. He constructs driveways, excavates cellars and septic systems, and lays gravel, sand, and topsoil for customers. Portions of the sixteen-acre parcel are used to store gravel, sand, and topsoil. In 2000, petitioners constructed a steel-frame garage to store and repair vehicles and equipment used in the excavation and landscaping business. The vehicles and equipment stored in the garage vary over time, but have included a front-end loader, a bulldozer, a small excavator, and several dump trucks. A sign along the road in front of the sixteen-acre parcel advertises both businesses.

In July 2003, Michael and Michaela Ledden, neighbors of petitioners, filed a request for a jurisdictional opinion from the District 6 Environmental Commissioner as to whether the construction of improvements, including the greenhouses and garage, for use in connection with petitioners= businesses represented Adevelopment@ requiring an Act 250 permit. See 10 V.S.A. ' 6081(a) (prohibiting development without a permit). The Commissioner determined that a permit was required. Petitioners appealed that ruling to the Environmental Board, which conducted a site visit and held an evidentiary hearing. Following the hearing, the Board issued a written decision, concluding that the greenhouses do not require a permit because they fall within the Act 250 exemption for improvements for farming purposes. See id. ' 6001(3)(D)(i) (providing that Adevelopment@ does not include A[t]he construction of improvements for farming . . . purposes@).

The Board further concluded, however, that the garage was an improvement for a Acommercial@ purposeCthat is, storing and maintaining vehicles used in connection with Eric Cota=s landscaping and excavation businessCand therefore did constitute development. See id. ' 6001(3)(A)(ii) (defining Adevelopment@ to include A[t]he 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@). In so holding, the Board rejected petitioners= argument that the garage was not used for a commercial purpose

because the principal business activityClandscaping and excavationCoccurred off site. Accordingly, it ruled that an Act 250 permit was required. This appeal followed.

Petitioners= first two claims are addressed to jurisdictional issues that were not raised below. First, petitioners assert that the garage was not used for commercial purposes Aon more than one acre of land,@ as required by ' 6001(3)(A)(ii). Petitioners argue that the area of the land involved in the commercial activity should be measured solely by the scope of the building footprint, which in this case is much smaller than one acre. This argument was not raised with the Board, and therefore was not preserved for review on appeal to this Court. See id. ' 6089(c) (ANo objection that has not been urged before the board may be considered by the supreme court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.@); In re White, 172 Vt. 335, 343 (2001) (AWe have been particularly solicitous regarding [the preservation] requirement in the context of appeals from the Board, given that preservation is statutorily required as part of the Act 250 scheme.@).

Petitioners also assert that the Board erred in applying the definition of development set forth in ' 6001(3)(A)(ii), instead of that set forth in ' 6001(3)(A)(i). The former, as noted, defines development as the construction of improvements for commercial purposes on more than one acre of land Awithin a municipality that has not adopted permanent zoning and subdivision bylaws.@ 10 V.S.A. ' 6001(3)(A)(ii). The latter contains a similar definition but requires that such construction occur on a tract Ainvolving more than 10 acres of land . . . in a municipality that has adopted permanent zoning and subdivision bylaws.@ Id. ' 6001(3)(A)(i). Petitioners argue that the Board erred in finding that A[t]he Town of Montgomery has not adopted zoning and subdivision regulations,@ and therefore erred in applying the one-acre rather than the ten-acre requirement. Again, petitioners did not raise this issue below. Indeed, although the Leddens= proposed findings of fact specifically averred that A[t]he [T]own of Montgomery is a one-acre town because it has not adopted permanent zoning and subdivision bylaws,@ petitioners did not contest the point in their response to the Leddens= proposed findings or raise the issue in their own proposed findings of fact and conclusions of law. Accordingly, the claim was not preserved for review on appeal. In re White, 172 Vt. at 343.

Petitioners next contend the Board erred in rejecting their claim that the garage was not constructed for a commercial purpose because no commercial Abusiness@ is transacted therein; it is used only to store and maintain equipment employed for landscaping and excavation jobs elsewhere. The Environmental Board Rules define Acommercial purpose@ as Athe provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object having value.@ Environmental Board Rule 2(L) (2004). Applying this definition, the Board concluded that the storage and maintenance of vehicles, equipment, and materials used for a commercial purpose was part of the Aprovision of services@ within the meaning of the rule. As the Board observed:

> There is no dispute that business activities occur on the Project site: business vehicles and equipment are stored and maintained; excavation and landscaping materials are sifted, sorted and stockpiled; a sign advertising the business is present, and landscaping and excavation customers visit on occasion. There is no question that the garage is used for commercial purposes.

The Board=s construction and application of the rule governing commercial activity was well within the scope of its expertise, and therefore is entitled to substantial deference. In re Stokes Communications Corp., 164 Vt. 30, 35 (1995). Petitioners offer no persuasive arguments to demonstrate compelling error in the Board=s reasoned judgment that the garage is used to facilitate the provision of goods and services, in this case excavation and landscaping, to Cota=s customers in return for payment. Accordingly, we discern no basis to disturb the judgment on this basis.

Finally, petitioners appear to argue that they should be exempt from Act 250 jurisdiction because theirs is not a large scale enterprise. As we have explained, however, A[u]nder Act 250 and environmental board rules, any construction activity, no matter how minute, triggers Act 250 jurisdiction.@ In re Audet, 2004 VT 30, & 11, 176 Vt. 617 (mem.); see also In re Rusin, 162 Vt. 185, 191 (1994) (A10 V.S.A. ' 6081(a) mandates a land-use permit before commencement of any construction on a development@). Accordingly, the size of petitioners= business was not relevant to the Board=s decision.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice