STATE OF MAINE

Inter-Departmental Memorandum Date August 19, 1974

To William R. Adams, Jr., Commissioner Dept. Environmental Protection

From Jon A. Lund, Attorney General Dept. Attorney General

Subject The Pittston Company - Title, Right or Interest

SYLLABUS:

The Board of Environmental Protection does not, at the present time, have the power to consider the application of The Pittston Company and decide whether such application should be approved or denied under the Site Law, 38 M.R.S.A. §§ 481-488, since Pittston does not have sufficient title, right or interest in the Eastport Municipal Airport.

FACTS:

The Pittston Company proposes to build an oil refinery and marine oil terminal in Eastport, Maine, and has filed an application therefor with the BEP under the Site Location Law, 38 M.R.S.A. §§ 481-488. Encompassed within the proposed development site is the Eastport Municipal Airport.

You have forwarded to us documents on which you have asked us to base this opinion. Those documents indicate the extent of Pittston's "title, right and interest" in the airport. Those documents are as follows:

1. A document entitled "Project Application" from the City of Eastport to the Federal Aviation Administration (FAA) dated October 28, 1958.

2. A document entitled "Grant Agreement" from the FAA to the City of Eastport dated March 20, 1959.

3. A resolution of the Eastport City Council dated March 22, 1968.

4. An option agreement from the City of Eastport to the Metropolitan Petroleum Company, a division of The Pittston Company, dated March 22, 1968.

5. A letter from Philip Kramer of Metropolitan Petroleum Company to the City Manager of Eastport dated February 3, 1969.

6. An affidavit of John L. Morrissey of Metropolitan Petroleum Company dated February 27, 1974.

7. Resolution of the Eastport City Council dated June 3, 1974.

8. A document entitled "Amendment to Agreement" dated June 4, 1974.

9. A letter from G. D. Curtin, Chief, Airports Division, FAA, to the City of Eastport dated July 7, 1974. 1/

QUESTION AND ANSWER:

Does the BEP, on the basis of the documents identified above, have the power to consider the application of The Pittston Company and decide whether such application should be approved or disapproved under the Site Law, 38 M.R.S.A. §§ 481 - 488? No.

1/ We have also reviewed memoranda of law from the parties in this proceeding, which memoranda were submitted to the BEP and forwarded to us for our consideration in preparation of this opinion. Those memoranda contain lengthy appendices with extensive factual materials. While we base this opinion on the above-stated facts, our review of the appendices reveals nothing to contradict the opinion expressed herein. It should also be noted that while Assistant Attorney General Edward Lee Rogers represents Intervenors in the pending administrative proceedings and submitted a memorandum to BEP, he did not participate in the preparation or discussion of this opinion in this office.

REASONING:

Briefly summarized, the documents identified above indicate that the City of Eastport has an agreement to sell the site of land presently occupied by the Eastport Municipal Airport to The Pittston Company when the City obtains unencumbered title thereto. The City of Eastport also has a contractual agreement with the FAA to "operate the Airport as such for the use and benefit of the public" during the "useful life of the facilities" but in any event "not to exceed twenty (20) years" from the date of acceptance by the City of the Grant Agreement from the FAA [i.e., March 20, 1979]. In 1974, Eastport petitioned the FAA for determination that the useful life of the airport had expired. The FAA responded by letter dated July 7, 1974, asserting that the FAA had "preliminarily determined" that such useful life had expired but that a final decision on Eastport's request must "abide considerations and requirements of the National Environmental Policy Act."

On March 26, 1974, this office issued an opinion on a similar issue for the BEP. In the opinion we determined that, consistent with the Law Court decision in Walsh v. Brewer, Me., 315 A.2d 200 (1974), "title, right or interest" by an applicant in a proposed development site was a "necessary jurisdictional prerequisite to any decision by the Board in this or any other case." The opinion further stated that:

> "In order to establish such interest, an application must demonstrate to the finder of fact that he has control over the site and that the site can be developed by the applicant as proposed within a reasonable period of time. Sufficient control would include not only ownership in fee, but also some lesser interest including a contract or option to purchase or other contractual agreement to acquire a right to develop the land, which right is enforceable by way of specific performance." (Opinion of the Attorney General, March 26, 1974.)

In the instant case the applicant, Pittston, has an agreement with the City of Eastport wherein Eastport agrees to convey to The Pittston Company title to the airport when it can do so free of all encumbrances. In view of the fact that Eastport has a contractual commitment to the FAA to operate the airport for public use for the length of its useful life, and in view of the fact that the FAA has not released Eastport from such commitment, we do not believe that Pittston has satisfied the standard of title, right or interest as articulated in our earlier opinion.

Although the FAA has "preliminarily" determined that the useful life of the airport has expired, the FAA letter of July 7, 1974, clearly states that no final determination has been made. The letter states that the final decision by the FAA must abide considerations of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331, et seq. NEPA provides that all federal agencies prepare an environmental impact statement (EIS) for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (2) (c). While the FAA letter on its face does not unequivocally state that preparation of an EIS is necessary in this case, it is apparent that the FAA recognizes this possiblity and will, in due course, assess whether an EIS is needed prior to deciding whether to release Eastport from this obligation. Pending such assessment and possible preparation of an EIS, the FAA has rendered no final decision on the request by the City of Eastport. It is entirely possible that the FAA will conclude that an EIS is necessary before it can release Eastport from its obligation. In the event that an EIS is deemed necessary, the FAA must undertake an objective and comprehensive environmental review of the impact of the release in the manner prescribed by NEPA. 42 U.S.C. § 4332 (2)(c). The review required by NEPA involves a "systematic, interdisciplinary" review of the environmental impact of the proposal, unavoidable adverse effects, alternatives to the proposed action, the relationship of local long-term uses of the environment and the maintenance and enhancement of long-term productivity and any irreversible and unretrievable commitment of resources involved in the proposed action. Clearly, at this stage in the decision making process, it would be pure speculation to anticipate the final decision of the FAA on any of these issues.

Based upon our review of applicable case law and federal regulations established pursuant to NEPA, we are of the opinion that a release by the FAA constitutes a "major federal action significantly affecting the quality of the human environment." "Federal actions" have been defined to include any decision by a federal agency which permits action by other parties which will affect the quality of the human environment. Zabel v. Tabb, 430 F.2d 199 (5th Cir., 1970) certiorari denied, 401 U.S. 910 (1971); Citizens for Clean Air v. Corps of Engineers, 349 F. Supp. 696 (S.D.N.Y., 1972); City of New York v. United States, 337 F. Supp. 150, 344 F. Supp. 929 (E.D.N.Y., 1972); and Scientists Institute for Public Information Inc. v. Atomic Energy Commission, 481 F.2d 1079 (C.A.D.C., 1973). See also Regulations of the Council on Environmental Quality (the agency created by NEPA to coordinate federal implementation of the Act)

and the U. S. Department of Transportation (of which the FAA is a part), 40 CFR § 1500.5(a)(3) and 36 F.R. 23679-23682, respectively. Under regulations promulgated by the Council on Environmental Quality, significant environmental effects have been construed to include secondary effects such as changes in social or economic activities, growth patterns and natural resources. 40 CFR § 1500.5(b) and 1500.8(a)(3)(ii). Regulations adopted by the U. S. Department of Transportation also define "significant impact" to include, inter alia, actions having a significant adverse impact on natural ecological, cultural or scenic resources, actions generating significant controversy on environmental grounds, or actions that have a significant detrimental impact on air or water quality or ambient noise levels for adjoining areas. We believe, therefore, that an EIS will be required prior to any final decision by the FAA.

The documents submitted to us are not sufficient to sustain a finding that Pittston has "title, right and interest" to the proposed site. The obligation of the City to the FAA, although in the form of an application for a grant submitted to the FAA, constitutes a negative easement which runs from the City to the FAA. 28 C.J.S. Easements § 3(d). Such negative easements are enforcible against the owner of the servient estate through injunctive relief. Davis v. Briggs, 117 Me. 536, 105 A. 128 (1918). In Davis, a Mr. Briggs, pursuant to a contractual agreement with his neighbor, Mr. Davis, installed a water pipe to convey water from a spring on the Briggs' property to a point at which Mr. Davis could connect another pipe thereto. When Mr. Briggs attempted to later disconnect the pipe located at the spring, the Law Court restrained such action. That case is closely parallel to the instant one. In both cases, the grantor of the right undertook to install and maintain a physical facility for the benefit of the grantee. In Davis, the Court restrained the grantor from later unilaterally terminating that agreement. In like fashion, the City is prohibited from using its property in any manner other than for a municipal airport. Without a release from the FAA, The Pittston Company cannot utilize the airport property for a refinery site.

We believe this opinion is consistent with the Law Court decision in Walsh v. Brewer and the rigorous standard established therein regarding the jurisdiction of administrative agencies. In Walsh, the Law Court stated the issue in terms of whether the plaintiff had the kind of relationship to the site which the Brewer ordinance recognized as germane to the scope of the regulation accomplished by the ordinance, thereby conferring upon the plaintiff status as an "applicant." The

Court noted that the ordinance was concerned with the use of land and stated that a person had standing before an agency

> "insofar as he has an independently existing relationship to regulated land in the nature of a 'title, right or interest' in it which confers lawful power to use it or control its use." Walsh v. Brewer, at p. 207.

Despite a stipulation in the record from the adverse parties that Walsh "had authority from . . . [the legal owners] to propose and develop and operate a mobile home park on that site, with all related utilities and appurtenances," the Court expressed doubts as to the revocability and legal enforceability of such "authority" and concluded that there was insufficient evidence to establish Walsh's title, right and interest in the site. We believe that the facts in this case disclose more plainly than did the record in Walsh v. Brewer, that The Pittston Company does not have irrevocable and legally enforceable authority to "propose, develop and operate" an oil refinery on the site in question. As in Walsh, the BEP, under the Site Law, is concerned with regulating the "use" of land. Whether Pittston can use the land for an oil refinery is, at the present time, only speculative. Absent such authority, the members of the BEP would be required to "dissipate their time and energies" in dealing with a hypothetical project, which result directly contradicts the public policy articulated in Walsh v. Brewer.

It should be noted also that Walsh v. Brewer has been strongly reaffirmed in Nichols v. City of Rockland, Me., -- A.2d -- (Law Docket No. KNO-74-12, August 5, 1974). In that case, the Law Court states:

> "It is beyond doubt that only one whose definite and personal legal rights are at stake may act as a plaintiff in a proper legal action. [citations omitted] One who suffers only an abstract injury does not thereby gain standing to sue." Nichols v. City of Rockland, supra, p. 4.

This standard, when applied to administrative agencies as the Court has done through Walsh v. Brewer, confirms the opinion expressed above. Accordingly, we answer your question in the negative.

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