ADA

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

RE: Black Willow Farm
J. Graham Goldsmith by
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Findings of Fact,
Conclusions of Law
and Order
Declaratory
Ruling #202

I. SUMMARY OF PROCEEDINGS

On October 8, 1987, the Environmental Board issued Land Use Permit Amendment #4C0685-1-EB to J. Graham Goldsmith (the Permittee). This permit amendment revised conditions of Land Use Permit Amendment #4C0685-1 issued by the District #4 Environmental Commission on April 27, 1987, which authorized the Permittee to construct a six-lot subdivision on the property known as Black Willow Farm located off Lake Road Extension in Charlotte, Vermont. This construction is known as the Black Willow Farm project, Phase II. In the decision, the District Commission also asserted jurisdiction over the previous subdivision of nine lots by the Permittee at the Black Willow Farm (Phase I).

In the proceedings before the Board relating to this permit amendment for Phase II, the Permittee challenged the jurisdiction of the Board and District Commission over Phase I. The Board disagreed with the District Commission that jurisdiction existed over Phase I because of improvements to a road but believed there might be jurisdiction because Phase I and Phase II may be one project. In its October 8, 1987 decision, the Board directed that the District #4 Coordinator render an advisory opinion on whether jurisdiction existed over Phase I by virtue of Phase II.

The District #4 Coordinator rendered an advisory opinion on this issue on March 14, 1988. The Coordinator found jurisdiction over Phase I of the project on two separate bases, each pursuant to Act 250's definition of subdivision: (a) the Phase I and II projects were really one project, together having enough lots to trigger jurisdiction; and (b) the Permittee, at the time the lots forming the Phase I project were created, controlled additional lots within the appropriate geographical area which when added to the Phase I lots exceeded the ten-lot jurisdictional threshold.

The Permittee appealed this advisory opinion to the Executive Officer of the Board on April 11, 1988. At the suggestion of the Executive Officer, the Permittee agreed on May 17, 1988 to pursue this appeal as a declaratory ruling rather than an executive officer opinion. An administrative

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hearing panel convened a public hearing on this matter on August 2, 1988 in Williston, Vermont, Chairman Leonard U. Wilson presiding. Parties appearing at the hearing were:

J. Graham Goldsmith by Michael Furlong, Esq.
The Charlotte Planning Commission by Kate Bortz.
Kenyon Smith, who owns property which adjoins the property at issue.

At the hearing, the parties stipulated to the facts contained in the Coordinator's March 14, 1988 opinion, except that the Permittee did not stipulate to facts 1 and 2 therein. After hearing argument and taking testimony, the panel recessed pending submission of certain documents by the Permittee and evidence by Kenyon Smith, review of the record, and preparation of a proposed decision.

No evidence was submitted by Mr. Smith, but the Permittee submitted a number of documents relating to this matter on August 12, 1988. A proposed decision was issued by the hearing panel on April 4, 1989. The parties were given an opportunity to submit written objections and request oral argument before the full Board. The Permittee filed on April 12 a statement that it agreed with the result of the proposed decision. On April 13, Mr. Smith filed a request with the Board to reopen the taking of evidence and to subpoena Mr. Paul Ferland of Essex Junction. The Permittee filed an opposition to this request on April 18. On May 3, the Board issued a decision granting Mr. Smith's request and subpoenas to Mr. Ferland and the Permittee. An administrative hearing panel of the Board convened an additional hearing in this matter on May 23 and, after taking evidence from Messrs. Ferland and Goldsmith, determined on that day not to recommend revision to the initial proposed decision.

The Board deliberated concerning this matter on June 13, 1989. On that date, following a review of the proposed decision and the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based exclusively on the record developed at the hearings.

II. ISSUES IN THE DECLARATORY RULING

The issue in this appeal is whether, pursuant to Act 250's definition of "subdivision," the Board and District Commission had jurisdiction over Phase I at the time it was subdivided. This issue will be analyzed with regard to two

sub-issues. First, the Board will evaluate whether jurisdiction existed over Phase I at the time Phase I was created by reason of the existence of lots external to Phase I which, when counted with the Phase I lots, exceed the jurisdictional threshold. Second, the Board will analyze whether jurisdiction arose because of an intent on the part of the Permittee at the time of the Phase I subdivision to subdivide the parcel which became Phase II.

III. FINDINGS OF FACT

1. On June 21, 1985, Elizabeth Flinn as seller and the Permittee as purchaser executed a purchase and sale agreement regarding 416 acres in Charlotte, Vermont. The property is located near the intersection of Thompson Point Road and the Lake Road Extension, near Lake Champlain. This property was and is known as Black Willow Farm. Sale of a small portion of the property was conditioned on the exercise of a right of first refusal held by Benjamin and Jane Price.

2. On August 13, 1985, the Charlotte Planning Commission approved a request by Ms. Flinn to subdivide Black Willow Farm into three parcels. At the meeting of the Planning Commission, the size of this property was represented to be 423.9 acres. Of this acreage, one lot was to consist of 11.25 acres, the second lot of 410 acres, and the third lot of 2.38 acres. The 11.25-acre lot appears to have been physically separate from the 410-acre lot prior to the time of the Planning Commission's subdivision approval. The 11.25-acre lot appears to be located just north of Thompson Point Road and west of the 410-acre lot. Between these two lots are a few other parcels, including lands owned by the Prices.

3. The Planning Commission granted approval for this subdivision to Ms. Flinn based on her representations that the 2.38-acre parcel was to be subject to the Prices' right of first refusal, and that Mr. Goldsmith was in effect the owner of the remainder of the Black Willow Farm property because of the purchase and sale agreement.

4. Ms. Flinn sought the subdivision approval from the Planning Commission in order to consummate her sale of the Black Willow Farm to Mr. Goldsmith while at the same time being able to satisfy the Prices' right of

first refusal. Accordingly, the three-lot subdivision approved on August 13, 1985 was made for the purpose of resale and was a direct result of Mr. Goldsmith's control over the property.

5. On September 4, 1985, Ms. Flinn and Mr. Goldsmith executed a warranty deed. This deed resulted from the purchase and sale agreement of June 21, 1985. The deed conveyed from Ms. Flinn to Mr. Goldsmith two lots created by the August 13, 1985 subdivision of the property which were not subject to the Prices' right of first refusal. The deed stated that the acreage of these two lots was, respectively, 403 (Parcel A) and 11.25 (Parcel B). Parcel B was physically separate from the other parcel and located north of Thompson Point Road. Parcel A was located to the east of Parcel B.

6. On September 10, 1985, the Charlotte Planning Commission reviewed the Phase I subdivision of the Black Willow Farms property. This subdivision was to consist of nine lots.

7. On September 13, 1985, Elizabeth Flinn sold the above-mentioned 2.38 acre parcel to the Prices through a warranty deed.

8. On September 18, 1985, the District #4 Coordinator issued a Project Review Sheet to J. Graham Goldsmith regarding the Phase I subdivision. This subdivision was represented as being the partitioning of approximately 420 acres into eight residential lots totaling 110 acres and one 310-acre retained lot. Seven hundred and fifty feet of road were to be constructed to serve two of the residential lots. Based on these facts, the District #4 Coordinator concluded that the project did not require an Act 250 permit.

9. The Phase I subdivision, as proposed and later constructed, was made entirely from Parcel A.

10. On September 24, 1985, the Charlotte Planning Commission conducted a second hearing on the proposed nine-lot subdivision at the Black Willow Farm property (Phase I). At this meeting, Mr. Goldsmith stated that there were no plans to develop the remainder of Black Willow Farm "at this time," and that "access to the lake could be used by future lot owners on any future development of remainder of [the] farm."

11. On October 8, 1985, the Charlotte Planning Commission conducted a third hearing regarding the Phase I subdivision. At this hearing, Peter Doremus, representing the Permittee, stated that there were "no plans at this time for the remainder of [the] land." (Emphasis supplied.)

12. As of March 14, 1988, seven of the Phase I residential lots had been sold. These included lots number 2, 3, 4, 5, 6, 7 and 8. The earliest lot sold was number 8 on October 29, 1985.

13. On May 13, 1986, the Charlotte Planning Commission conducted a review of a sketch plan for further subdivision of the Black Willow Farms property, known as "Phase II." This plan proposed a 15-lot subdivision of the 310-acre remainder lot and the construction of 4,000 feet of roads. Of these lots, 13 were to be residential lots of approximately ten acres each, one was to be "common land" of about 24 acres and the balance was to be undeveloped.

14. On August 12, 1986, the Permittee filed an application for an Act 250 permit for the Phase II subdivision. On February 11, 1987, an Act 250 permit was issued approving in part the Phase II subdivision, authorizing division into six residential lots and construction of 1,200 feet of road.

15. All the lots proposed in the Phase I and Phase II subdivisions are within five miles of each other.

IV. CONCLUSIONS OF LAW

Act 250 requires submission of permit applications for "subdivisions." The Act prohibits the sale or offer for sale of an interest in, or commencement of construction on, a subdivision without a permit. 10 V.S.A. § 6081(a). The Act also states that it does not prohibit the sale, mortgage or transfer of subdivided land unless done to circumvent the purposes of the Act. Id.

In order to determine whether Act 250 jurisdiction exists over Phase I, the Board must initially evaluate legal issues which have been raised regarding the statutory and regulatory definitions of "subdivision" and then address the applicability of these definitions to the facts of this case.

A. "Subdivision"

1. 10 V.S.A. § 6001(19)

The current language of Act 250 defines "subdivision" 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 10 or more lots within a radius of five miles of any point on any lot, or within the jurisdictional area of the same district commission, within any continuous period of five years.

10 V.S.A. § 6001(19).

This definition was enacted on July 1, 1987, after the time during which the Permittee alleges he first conceived of either Phase I or Phase II of the Black Willow Farm subdivision. Prior to July 1987, the definition of subdivision read:

> "Subdivision" means a tract or tracts of land, owned or controlled by a person, which have been partitioned or divided for the purpose of resale into 10 or more lots within a radius of five miles of any point on any lot, and within any continuous period of 10 years after the effective date of this chapter.

1973 Vt. Laws, No. 85 (Adj. Sess.) § 8.

In the March 14, 1988 advisory opinion, the District #4 Coordinator applied the existing definition of "subdivision" in concluding that jurisdiction existed over Phase I. The Permittee argues that the prior definition of "subdivision" should be the definition applied in this case because the pivotal facts in determining jurisdiction occurred prior to July 1987. The Board concludes that the prior definition is the one that should be applied in this case because the questions raised here involve whether the Permittee should have applied for an Act 250 permit in 1985 or 1986 for the whole of Phases I and II.

2. Board Rule 2(B)

The Board has adopted Rule 2(B), which interprets the statutory definition of "subdivision" and provides guidance

on when a partitioning or division of a tract of land may be deemed to occur. Rule 2(B) states:

> "Subdivision" means a person's partitioning or dividing a tract or tracts of land into ten or more lots including all other lots which that person has created through subdivision within a five mile radius of any point of subdivided land, within any continuous period of ten years after April 4, 1970. Subdivision shall also mean any material change of an existing subdivision over which a district commission or the board has jurisdiction; and any substantial change to a pre-existing subdivision. A subdivision shall be deemed to have been created with the first of any of the following events:
>
> (1) The sale or offer to sell or lease the first lot within a tract or tracts of land with an intention to sell, offer for sale, or lease 10 or more lots. A person's intention to create a subdivision may be inferred from the existence of a plot plan, the person's statements to financial agents or potential purchasers, or other similar evidence;
>
> (2) The filing of a plot plan on town records;
>
> (3) The sale or offer to sell or lease the tenth lot of a tract or tracts of land, owned or controlled by a person, when the lot is within a radius of five miles of any point on any other lot created by that person within any continuous period of ten years subsequent to April 4, 1970./1/

The Permittee has challenged this rule on the basis that it exceeds the statutory definition of "subdivision." Specifically, the Permittee asserts that the rule exceeds the statute by grounding whether a subdivision has occurred

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/1/ The current Rule 2(B) tracks the definition of "subdivision" as it was prior to the 1987 amendment. The Board is in the process of drafting revisions to Rule 2(B) to make it consistent with the current definition.

on a person's "intention," a word which is not found in the statutory definition. However, the Board has authority to promulgate rules interpreting Act 250. 10 V.S.A. § 6025(a). The definition of "subdivision" in 10 V.S.A. § 6001(19) hinges in part on an act of partitioning or dividing land. The act of partitioning or dividing land necessarily involves the concept of intent, because the act cannot occur without some forethought. Thus, the Board's rule is based on and interprets the partition or division element of the statutory definition. In particular, the rule indicates that partitioning or dividing land can be demonstrated by several types of evidence, including the sale of the first lot within a tract or tracts of land with an intention to sell, offer for sale or lease ten or more lots. Accordingly, the Board determines that Rule 2(B) does not exceed the Board's statutory authority, and it will apply the rule in this case.

B. Jurisdiction over Black Willow Farm

The definition of "subdivision" to be applied in this case has seven elements. To be a subdivision, there has to be:

(a) a tract or tracts of land
(b) owned or controlled by a person,
(c) which had been partitioned or divided for purpose of resale,
(d) into ten or more lots
(e) within a radius of five miles from any point on any lot,
(f) within any continuous period of ten years,
(g) after the effective date of Act 250.

Few of these elements are disputed in this case. All the lots involved in this case are within five miles of each other. They result from subdivisions of tracts of land within a continuous period of ten years after the effective date of Act 250. The tracts were divided into these lots for the purpose of resale. Instead, the jurisdictional questions in this case center on the elements of "ownership and control" and "ten lots." These questions will be analyzed in light of the division of Black Willow Farm by Flinn and the intent of the Permittee to subdivide the 310-acre remainder lot into Phase II at the time of his Phase I proposal.

The Flinn subdivision. The Board concludes that the division of the Black Willow Farm by Ms. Flinn did not

create a lot which should be counted with the Phase I lots, and that therefore Act 250 jurisdiction is not triggered by the Flinn subdivision.

The Board makes these conclusions despite the following facts: (a) the Board believes the Flinn subdivision occurred due to Mr. Goldsmith's control: (b) two of the lots resulting from the Flinn subdivision were conveyed to Mr. Goldsmith, one being approximately 11 acres and the other 410 acres; and (c) the 11-acre lot remained under Mr. Goldsmith's control and was not used in either the Phase I or Phase II subdivisions. However, even though this 11-acre lot still exists and could be counted along with Phase I's nine lots, the 11-acre lot was in fact physically separate from the parcel which became Phase I at the time that Ms. Flinn obtained subdivision approval from the Planning Commission. Thus, the 11-acre lot did not result from an actual "division" of land. Re: New England Land Associates, Declaratory Ruling 175 at 5 (August 8, 1987). Consequently, the Board does not find jurisdiction based on the Flinn subdivision.

Intent to subdivide the 310-acre remainder lot. The Board concludes that the evidence on the record does not permit it to find that Mr. Goldsmith intended at the time of Phase I to further subdivide the 310-acre lot to become Phase II.

As earlier stated, Rule 2(B)(1) deems subdivisions to have been created on the sale or offer to sell or lease the first lot within a tract or tracts of land with an intention to sell, offer for sale, or lease ten or more lots. Rule 2(B)(l) lists a number of ways in which a person's intention to create a subdivision may be inferred. These methods of inference are not intended to be exclusive. Instead, the Rule lists examples and then qualifies these examples with the phrase "or other similar evidence." The word "similar" refers to whether such other evidence tends to show the intent of a person to create a subdivision. The Board interprets the phrase "other similar evidence" to include statements made to a town commission and the circumstances of an application to a government authority.

On the basis of the evidence presented, the Board cannot determine that Mr. Goldsmith intended to subdivide the 310-acre remainder lot when he made the Phase I proposal. For example, at the time of Mr. Goldsmith's first sale of a Phase I lot on October 29, 1985, Mr. Goldsmith and

his attorney had already made ambiguous statements to the Charlotte Planning Commission which could be read as demonstrating an intent to further subdivide the 310-acre remainder lot. See Findings of Fact 10 and 11 above. However, these statements could just as likely be read as not demonstrating such an intent. Similarly, Mr. Goldsmith's application for Phase II approval from the Planning Commission, a mere eight months after requesting Phase I approval, could indicate that Mr. Goldsmith was simply waiting for a seemly interval to pass before proceeding with further subdivision. But the Board does not believe that intent can be established merely by an inference drawn from the chronology of events without additional evidence to confirm the inference. In this regard, the record does not contain evidence suggesting that Phase I was referred to as "Phase I" at any time prior to the submission to the Planning Commission for Phase II approval. If such evidence existed, the Board could reach an opposite result in this case.

The Board finds it difficult to believe that any developer would not have formed plans at the time of purchase to subdivide a parcel such as that which became Phase II. However, the Board is unable to so conclude on the basis of the record in this case, and therefore finds that an Act 250 permit was not required for Phase I.

V. ORDER

On the basis of the foregoing, Act 250 jurisdiction does not exist over Phase I of the Black Willow Farms property subdivision.

Dated at Montpelier, Vermont this 30th day of June, 1989.

ENVIRONMENTAL BOARD

By: Leonard U. Wilson

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