

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

Re: Donald & Arlene Gurney
Land Use Permit #2S0923-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal filed by Donald and Arlene Gurney (the Permittees) from Land Use Permit #2S0923-EB (the permit) and supporting Findings of Fact, Conclusions of Law, and Order issued by the District #2 Environmental Commission on March 19, 1993. For the reasons explained below, the Board has determined that the Permittees did not create a subdivision when they sold a lot to Douglas Gurney and did not commence construction on a subdivision when a house and -roadway were constructed on the land. The Board has also granted the Permittees' request to void the permit.

I. BACKGROUND

On February 19, 1993, an application for an Act 250 permit was filed by the Permittees for the creation of a 10-lot subdivision and two deferral lots, and for the construction of a 710-foot road, on a tract of land of approximately 25 acres located off Route 11 in the Town of Springfield (the site). The District Commission held a hearing and took a site visit. At the site visit, the District Commission observed that construction had already occurred at the site, to wit: the section of the property next to Route 11 had received substantial fill, a portion of the access road was constructed, and a house was built on a lot identified as Lot 1 on the site plan for the 10-lot subdivision. Because of this construction and other factors, the District Commission determined that the Permittees had formed an intent to create a subdivision and had commenced construction on the subdivision when the house on Lot 1 and the road were constructed. Accordingly, the District Commission concluded that the permit would include the construction that had already taken place, that it was issuing an "after-the-fact" permit, and that the permit had already been "used."

Concluding that the project, as proposed, would have an undue adverse effect on aesthetics unless three lots were eliminated, the District Commission issued a permit for a seven-lot subdivision, two deferral lots, and a 710-foot road at the site.

On April 7, 1993, the Permittees filed an appeal, raising a number of issues. A prehearing conference was held and a prehearing conference report and order was issued

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on June 16, 1993. The only party at the prehearing conference was the Permittees, represented by C. Daniel Hershenson, Esq. The Permittees stated that they would like the Board to address the issues of whether the District Commission exceeded its authority by approving seven rather than ten lots and whether the permit should be declared void. They agreed that the Board should first determine whether the **Permittees'** construction of a house and roadway constituted commencement of construction on a subdivision before addressing other issues raised in the notice of appeal.

The Permittees stated that they would file sworn affidavits to support their position that at the time they undertook construction of the house and road they did not intend to create additional lots on the property. The Permittees also stated that they would stipulate to the truth of the facts on pages two and three of the District Commission's decision, and that the Board could take notice of District Commission Exhibits 7, 15, and 16. The Permittees agreed to submit a memorandum of law, and that following submission of the aforementioned documents, the Board would hold oral argument, at which all affiants would be present and available for questioning by the Board.

On July 8, the Permittees filed a memorandum of law and affidavits of John Bruno, Douglas Gurney, and Donald Gurney.

The Board convened a public hearing on July 14, 1993. Mr. Hershenson represented the Permittees. John Bruno, Douglas Gurney, and Donald Gurney were present and answered questions from the Board. Their affidavits were entered into the record.

The Board deliberated concerning this matter on July 28 and October 29, 1993. On October 29, 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. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUES

1. Whether the Permittees created a subdivision when they conveyed a lot to Douglas Gurney and therefore commenced construction on a subdivision when a house and roadway were constructed on the site in February 1991.

2. Whether the Board will void Land Use Permit #2S0923.

III. FINDINGS OF FACT

1. In September 1989 Donald and Arlene Gurney purchased an approximately 25-acre tract of land off Route 11 in Springfield, Vermont. Donald Gurney was interested in purchasing this land as a place to deposit fill from other construction projects of his and, after the land was improved by the fill, perhaps to subdivide or develop the property.
 2. Prior to purchasing the property, during the summer of 1989, Donald Gurney met with John Bruno and asked him what would be involved in either developing or subdividing the land. Mr. Bruno advised him as to the permits that would be needed and suggested that Mr. Gurney do some preliminary investigation with respect to the site to determine if it could be developed or subdivided. Mr. Bruno further advised him that they should perform preliminary testing to determine whether septic systems could be built on the site and whether the site contained any primary agricultural soils.
 3. At the time of Mr. Gurney's conversation with Mr. Bruno, Mr. Gurney had no plans or intentions to do anything with the land other than determine whether it could be developed or subdivided in the future. He had never subdivided land and was not familiar with permit processes and had never been an applicant for a subdivision permit or an Act 250 permit.
 4. After the meeting between Mr. Gurney and Mr. Bruno in the summer of 1989, Mr. Bruno dug approximately eleven test pits on the site and advised Mr. Gurney that the soils looked all right for septic disposal. Mr. Gurney told Mr. Bruno he was not in a hurry to do anything.
 5. Approximately one year later, Mr. Bruno reminded Mr. Gurney that they had not checked the agricultural soils on the site. Mr. Gurney told Mr. Bruno that he still had no plans for the land, but if Mr. Bruno thought they should investigate the primary agricultural soils, he should go ahead.
 6. Bruce Boedtger, who works for Mr. Bruno, contacted the Vermont Department of Agriculture. On December 12, 1990, Mr. Boedtger received a letter from Amy Jestes,
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Agricultural Land Use Planner for the Department of Agriculture. In the letter Ms. Jestes stated she reviewed the SCS soils map and a site plan for the "proposed Gurney/Cutler subdivision" and believed that the soils are not primary agricultural soils as defined by Act 250. (Board Exhibit #B1)

7. Sometime in the fall of 1990 Donald Gurney contacted John Bruno's office and said he would like to create one lot at the site for his son Douglas to build a house on. On January 11, 1991, Donald Gurney submitted an application to the State Environmental Conservation Department for a one-lot subdivision and on January 25, 1991 a subdivision permit was issued. After the lot was subdivided Donald Gurney conveyed it to Douglas Gurney. In February, 1991, Douglas Gurney built a home on the lot and a driveway from the town road to the new house was constructed. During this time Donald Gurney did not have any intention to develop or further subdivide the property.
8. In September, 1991 Donald Gurney's two sisters were visiting from out of state and expressed a desire to some day return to Vermont to live. As a result of these conversations, Donald Gurney decided he would further subdivide the site and create lots for his sisters adjacent to the lot on which his son had built a house.
9. Donald Gurney contacted John Bruno's office in the late fall of 1991 and inquired as to what he needed to do to create an approved subdivision on the site. He met several times with Bruce Boedtke to review the subdivision potential of the site and the costs associated with subdivision. They determined that the break-even point would be approximately nine new lots if they sold for \$25,000 each. Mr. Gurney estimated that the total cost of putting in roads, utilities, and improvements, plus the costs for engineering, would be approximately \$215,000. He therefore did not intend to make any money from the sale of lots but would benefit by providing two lots for his sisters and by having an area to put fill from his other construction jobs.
10. On February 19, 1993, Donald and Arlene Gurney filed an application for a 10-lot subdivision with the District Commission.
11. Donald and Arlene Gurney do not wish to proceed with

the subdivision and want the Board to void the permit.

IV. CONCLUSIONS OF LAW

The Permittees raised a number of issues in their appeal. Since we conclude below that a subdivision was not created with the sale of a lot to Donald Gurney, the other issues are moot and are therefore not addressed in this decision.

A. Creation of a Subdivision/Commencement of Construction on a Subdivision

10 V.S.A. § 6081(a) states, in pertinent part:

No person shall sell or offer for sale any interest in any subdivision located in this state, or commence construction on a subdivision of development, or commence development without a permit.

"Subdivision" is defined at 10 V.S.A. § 6001(19), in pertinent part, 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.

The question for the Board's resolution is whether Donald Gurney created a subdivision when he sold a lot to Douglas Gurney and whether he therefore commenced construction on a subdivision when a house and roadway were constructed on the lot.

Board Rule 2(B) states that a subdivision is 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 an environmental district or within a five mile radius of any point on any other lot created by that person within any continuous period of five years after April 4, 1970.

Board Rule 2(C) defines "commencement of construction" as:

the first improvement on the land or to any structure or facility located on the land including work preparatory to construction such as clearing, the staking out or use of a right-of-way or in any way incidental to altering the land according to a plan or intention to improve or to divide land by sale, lease, partition, or otherwise transfer an interest in the land.

Under Rule 2(B)(1), a subdivision is deemed to be created when there is a sale or offer to sell or lease a lot along with an intention to sell or offer to sell or lease at least 10 lots. Rule 2(B)(2) does not apply because at the time that Donald Gurney sold the lot to Douglas Gurney, no plot plan had been filed in the town records. Rule 2(B)(3) is not relevant to this situation. Thus the question to be answered is whether, at the time that Donald Gurney sold the lot to Douglas Gurney, Donald Gurney intended to sell, offer to sell, or lease 10 or more lots, thereby creating a subdivision.

Eased upon the testimony that the Board heard from John Bruno, Donald Gurney, and Douglas Gurney, and from their affidavits, it appears that at the time that Donald Gurney sold the lot to Douglas Gurney, Donald Gurney did not have an intent to sell, offer to sell, or lease an additional nine lots. According to Donald Gurney, he did not form an intent to create additional lots until the fall of 1991 after his sisters visited and expressed a desire to move back to Vermont. He then consulted with John Bruno's office concerning the creation of a subdivision on the site, and in February 1993 filed an application for an Act 250 permit.

Accordingly, the Board concludes that a subdivision was not created when Donald Gurney sold a lot to Douglas Gurney and that commencement of construction on a subdivision did not take place when the house and roadway were constructed on the lot.

B. Voiding of the Permit

The Permittees stated that they no longer wish to proceed with the subdivision for which they received land Use Permit #2S0923, and they request the Board to void the permit. We have concluded that the sale of a lot to Douglas Gurney did not create a subdivision, and that commencement of construction on a subdivision did not take place when the house and roadway were constructed. Since the Permittees have not commenced construction on a subdivision, and do not intend to commence construction on a subdivision, we conclude that the permit has never been "used" within the meaning of 10 V.S.A. § 6091(b). Accordingly, we will void the permit.

V. ORDER

Land Use Permit #2S0923 is void. Any plot plans of the subdivision authorized by Land Use Permit #2S0923 shall be destroyed and shall not be used as the basis for any future creation of lots on the property.

Dated at Montpelier, Vermont this 2nd day of November, 1993.

ENVIRONMENTAL BOARD

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