



Natural Resources Board
District #4 Environmental Commission
111 West Street
Essex Jct., Vermont 05452

October 5, 2009

David Burke.
O'Leary-Burke Civil Associates, PLC
1 Corporate Drive, Suite #1
Essex Junction, VT 05452

RE: Jurisdictional Opinion #4-221
Bugbee Subdivision, Jericho Vermont

Dear David:

This jurisdictional opinion is written pursuant to your written request dated September 11, 2009, regarding whether the 7-lot subdivision ("*Phase II*") by Robert and June Bugbee ("Bugbees") trigger Act 250 review as a "subdivision" under 10 V.S.A. § 6001(19). I have based my review on documents provided by you, the files with the Agency of Agriculture, previous opinions written on this project at this office and the file from application #4C1202. I have concluded that unless all municipal approvals for *Phase II* are withdrawn then *Phase II* can be counted as a subdivision and that brings the Bugbees' lot count greater than 10. In that case, Act 250 jurisdiction has been triggered and an Act 250 permit is required before a lot in *Phase II* is offered for sale.

Facts

1. Robert and June Bugbee purchased the 50-acre parcel in 2001 and created a 6-acre lot to sell to their daughter. In 2002, the Bugbees had their home constructed on the remaining 44 acres.
2. On February 6, 2003, you requested review by Marian White of the Agency of Agriculture of the then proposed Bugbee subdivision. This proposal was for 13-lots clustered within two open areas. Based upon a site visit by the Agency of Agriculture on February 3, 2003, they concluded that the Project would impact 100% of the on-site Primary Agricultural Soils. A second site visit on February 27, 2003 confirmed that these soils are Prime agricultural soils and 100% of the soils would be impacted. In a follow-up letter dated April 7, 2003, Steven Kerr, Commissioner of the Department of Agriculture, agreed with the assessment by Marian White that the soils on the site are Primary Agricultural soils and all will be impacted. The Site Plan submitted for this review is identical to those of *Phase I* and *Phase II* (see below), placed together.
3. On April 24, 2003, Bugbees requested a Jurisdictional Opinion whether a proposed 10-lot subdivision consisting of: six (6) residential lots, the existing farmhouse lot, one retained lot for future development and one road lot needed an Act 250 permit. In their request, the requesters



stated that if the Project triggered an Act 250 permit because of the road lot (10th lot), they would reduce the Project by one lot. They also stated that the retained lot will likely be developed into six more lots following five years or purchase by another developer. The submitted Plan is titled "Bugbee Subdivision Sketch Plan" ("*Sketch*") and is dated 4/23/03. The alternate option plan eliminates Lot #8 and bears the same title and date. In a Project Review Sheet dated April 28, 2003, the District Coordinator determined that an Act 250 permit was required as the Project constituted subdivision pursuant to EBR 2(B).

4. Mr. Bugbee in an affidavit submitted on October 1, 2008 wrote "In 2003 in response to potential Primary Agricultural issues we agreed to reduce the subdivision to 6 new lots. With the lot given to our daughter, our lot and the remaining land, the total (9) lots did not trigger Act 250." There appears to be another lot that Mr. Bugbee is counting but I have been able to determine the nature of this lot.
5. On October 23, 2003, the Town of Jericho issued Final Approval for a seven-lot subdivision; six (6) lots for the construction of residential units and one retained lot (Lot #7 - 32 acres) ("*Phase I*"). The Mylar was filed on January 14, 2004. The project received preliminary approval on May 22, 2003.
6. On April 16, 2004, the Wastewater Management Division issued Wastewater System and Potable Water Supply Permit #WW-4-2067 for *Phase I*. The application was made on February 12, 2004. A Project Review Sheet was issued on February 19, 2004 stating that this subdivision does not trigger Act 250 jurisdiction.
7. *Phase II* had their Sketch Plan reviewed on July 27, 2006.
8. On June 2, 2005, the Bugbees, through you, requested a Jurisdictional Opinion that the subdivision of the retained lot (32-acres) into less than 10 lots would not trigger the need for an Act 250 permit and if jurisdiction is triggered would it apply to the existing seven lots. The Plan submitted with this request is titled "Bugbee Subdivision Overall Plan" and is dated 4/23/03 and last revised 5/14/03 - same plan as submitted with the WW-4-2067. The revision note refers to the "addition of a pedestrian easement from cul-de-sac to along rail bed". The plan has the same configuration for lots #4, #5, and #6 as Lots #3, #4 and #5 as shown on *Sketch*. Lots #7 and #8 are combined into the retained lot (#7) and Lot #1 is now subdivided into three lots. It does not show the proposed subdivision of Lot #7. The District Coordinator concluded that Act 250 jurisdiction is triggered by a subdivision created by Bugbees.
9. The Town of Jericho issued preliminary approval for *Phase II* to Bugbees on August 7, 2007. On October 25, 2007, the Town of Jericho issued Final approval for a seven-lot subdivision all for the construction of residential units ("*Phase II*").
10. On February 29, 2008, the Wastewater Management Division issued Wastewater System and Potable Water Supply Permit #WW-4-2067-1 for *Phase II*. The application was made on February 4, 2008 and the Plan submitted with this application is titled "Bugbee Subdivision Overall Plan" and is dated 6/26/06 and last revised 12/27/07. Lots #12 and #13 are the same as Lots #7 and #8 as shown on *Sketch*. In a Project Review Sheet dated March 4, 2008, the District

Coordinator determined that an Act 250 permit was required as the Project constituted subdivision pursuant to 10 V.S.A. § 6001(19).

11. On April 8, 2008, application #4C1202, for *Phase II* was filed for an Act 250 permit. The application was withdrawn at the Applicants' request on October 6, 2008.
12. The Wastewater System and Potable Water Supply Permit #WW-4-2067-1 was revoked at Permittees' request on August 3, 2009.
13. The Bugbees requested that the Town of Jericho rescind only their Final Approval for Phase I. On August 27, 2009, the Town rescinded *Phase II's* Final Approval subject to the following conditions:
 - The Preliminary Approval dated August 7, 2007 shall remain in effect. The applicant shall be bound by all Findings of Fact and Conditions of that decision.
 - The applicant will obtain and abide by the conditions of all other required local and state permits. The project will be constructed and subsequently operated, consistent with all Findings of Fact set forth above and in any other permit obtained by the applicant for this project.
 - Substantial revisions to this plan shall require the review and approval of the Development Review Board at a publicly warned hearing.
 - By acceptance of these conditions without appeal, the applicants confirm and agree for themselves and all successors in interest that the conditions of this permit shall run with the land and shall be binding and enforceable.
14. On September 9, 2009, an application was filed with the ANR Wastewater Management Division for *Phase II*.
15. On September 10, 2009, the Bugbees filed a revised Mylar with the Town of Jericho, depicting the current lot conditions.
16. At all relevant times the Town of Jericho had duly adopted permanent zoning and subdivision regulations and is considered a "10-acre" town for purposes of Act 250 jurisdiction.

Issue

Do the additional seven single family lots [Phase II] at the Bugbees property off Lee River Road trigger Act 250 Review?

Analysis & Conclusion

Act 250 jurisdiction is triggered by either development or subdivision. Act 250 defines "subdivision" (10 V.S.A. § 6001(19)) 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. In determining the number of lots, a lot shall be counted if any portion is within five miles or within the jurisdictional area of the same district commission.”

We consider the Bugbees to be a person, pursuant to 10 V.S.A. 6001(14) and all involved parcels are located within five miles of each other. The remaining trigger is the number of lots associated with the Bugbees.

Phase II triggered jurisdiction because, as you claimed in your application for Act 250 permit #4C1202, the Bugbees’ lot count at that moment exceeded 10. Due to complications in satisfying Criterion 9B, Bugbees choose to withdraw this application. In order to not trigger jurisdiction in the future Bugbees need to revoke state and municipal permits pursuant to Act 250 Rule 2(B)(2). The Rule states:

A subdivision shall cease to exist if it is found, in a final jurisdictional opinion issued pursuant to Rule 3, to have been retracted or revised below jurisdictional levels at any time prior to the construction of improvements on the subdivision. A demonstration of such action shall include:

- (a) the official retraction or abandonment of all state and local permits which originally approved the subdivision; and
- (b) the filing of a revised plot plan in town land records depicting the final retraction or revision of a subdivision below jurisdictional levels.

According to the information provided to me by you, both the state and municipal **permits** have been withdrawn and a revised plot plan was subsequently filed with the Town of Jericho. The final step is a Jurisdictional Opinion from a District Coordinator.

However, I would be remiss if I ended my Opinion here. There is no definition or case law for what is meant by official retraction or abandonment of all state and local permits. Act 250 Rule 2(B)(1) - counting of lots for the purpose of resale states that for the purposes of counting the number of lots created by a person, occurs with the first of the following events:

- (a) the filing of a plot plan in the town land records depicting the subdivided lot or lots;
- (b) the issuance of any required municipal approval for the subdivided lot or lots that becomes final;
- (c) the issuance of a waste water system and potable water supply permit for the subdivided lot or lots by the Agency of Natural Resources or delegated municipality; and
- (d) in the absence of any of the above, the conveyance of a lot or lots created by a person.

A general rule of statutory construction is that the use of certain words in one instance by the legislature, and different words in another instance, indicates that different results were intended. *Southwestern Vermont Health Care Corp.*, #8B0537-EB, Findings of Fact, Conclusions of Law and Order at 56 (Vt. Env. Bd. February 22, 2001). Since the word “permit” is used in 2(B)(2) and the word “approval” is used in 2(B)(1) the assumption is that two different events are indicated. Furthermore, the modifier *any* is used before approval. We must therefore interpret this as the existence of more than one type of approval rather than just a permit, which one may also consider the final approval. Therefore, sketch, concept, preliminary or final approval can be considered the start of a subdivision for the purposes of counting. In determining the meaning of terms used in a statute, one looks first to the statutory definitions; when, however, such terms are not defined, they "are to be given their plain and commonly accepted meaning," *Vincent v. State Retirement Board*, 148 Vt. 531, 535 -36 (1987); *Re: Times and Seasons, LLC and Hubert*

K. Benoit, #3W0839 -2-EB (Altered), Findings of Fact, Conclusions of Law and Order at 64 n.10 (Vt. Env. Bd. November 4, 2005), appeal dktd. (Vt. S. Ct.). I conclude that *any approval* is different from *final approval* consequently, *Phase II* must be included in the lot count for Bugbees because they still retained local approvals.

According to Rule 2(B)(2), *Phase II* should still be counted. Therefore, the only interpretation that makes sense is that the official retraction or abandonment of all local permits must also require the retraction of all municipal approvals. Therefore, I conclude that with the preliminary municipal approvals still in place, the *Phase II* Bugbee subdivision must still be counted when determining the Bugbees' lot count. If a lot is offered for sale, an Act 250 permit must be issued prior to that event.

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. Any appeal of this decision must be filed with the clerk of the Environmental Court within 30 days of the date of issuance, pursuant to 10 V.S.A. Chapter 220. The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Ctr. Bldg., Drawer 20, Montpelier, VT, 05620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. The address for the Environmental Court is: Environmental Court, 2418 Airport Rd., Suite 1, Barre, VT 05641-8701. (Tel. # 802-828-1660)

If you have any questions regarding this jurisdictional determination, please call me at (802) 879-5658.

Sincerely,

/s/Peter E. Keibel
District #4 Coordinator

cc: Lou Borie, Chief Coordinator, Natural Resources Board
John Hasen, General Counsel, Natural Resources Board