

STATE OF VERMONT  
ENVIRONMENTAL BOARD  
10 V.S.A. CHAPTER 151

RE: William Dibbern  
Box 427  
Barre, Vermont 05641

Findings of Fact and  
Conclusions of Law  
Land Use Permit Amend-  
ment #5R0194-1-EB

This is an appeal from Land Use Permit Amendment #5R0194-1 granted by the District #5 Environmental Commission on May 8, 1981 to the applicant, William Dibbern. The permit amendment allows the applicant to change the use of Lot #3 from a single family residence to a water and sewer systems servicing eight units of family housing located on adjacent property in Williamstown, Vermont. Stephen Woodruff, an adjoining property owner, and the Felicity Rural Preservation Association filed this appeal on May 22, 1981.

The appeal raises the underlying issue of Act 250 jurisdiction over the proposed construction of eight units of family housing located on property adjacent to the permitted subdivision. The following issues are presented:

1. The applicant has presented two procedural motions:
  - (a) A motion to deny party status to appellant Stephen Woodruff, the adjoining property owner; and
  - (b) A motion to dismiss the appeal because it was not filed within thirty days of the District Commission's preliminary order on jurisdiction and scope of review.
2. The notice of appeal and the applicant's response present two distinct, substantive jurisdictional questions:
  - (a) Whether the District #5 Environmental Commission should have reviewed the construction of the eight units of family housing because its water and sewer system will be located on one of the lots of a previously permitted subdivision; and,
  - (b) Whether the construction of eight units of family housing and maintenance of an existing private residence, and a single apartment, is a "housing project" of ten or more units within the meaning of 10 V.S.A. §6001(3) and is therefore subject to Act 250 review wholly apart from its connection to the adjacent subdivision.

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A public hearing on this appeal convened at 10:30 a.m. on June 23, 1981 at the Tavern Motor Inn, Montpelier. The Board granted appellants' request to recess the hearing until 1:30 p.m. In response to applicant's motion to deny party status, Stephen Woodruff withdrew his appeal as an individual, but remained a party as a member of the Felicity Rural Preservation Association. The Board then heard testimony and oral argument on the motion to dismiss and on the substantive issues of jurisdiction. Our Findings of Fact and Conclusions of Law, below, are based upon the record developed at that hearing.

### Findings of Fact

#### A. Procedural Issue

1. On May 20, 1980 William Dibbern submitted to the District #5 Environmental Commission an application for an amendment to Land Use Permit #5R0194, originally granted to Eri Martin in 1973. The amendment application requested permission to change the use of Lot #3 from the previously permitted single family residence to a water and sewer system servicing eight units of public housing located on property adjacent to the permitted subdivision. On May 21, 1980 the District Coordinator issued a project review sheet advising the parties that the Commission's scope of review under the applicable criteria of 10 V.S.A. §6086(a) would be limited to the change in use of Lot #3. The project review sheet states that if any party disagrees with the District Coordinator's opinion, an appeal "should" be filed within thirty days of the advisory opinion date.
2. On June 25, 1980 the District Commission held a hearing to consider the proper scope of review of this amendment request; and on July 11, 1980 the Commission issued an order confirming that the scope of review would be limited to the amendment as indicated in the District Coordinator's advisory opinion.

#### B. Substantive Issues

1. Applicant intends to construct eight units of public housing on a parcel of land (Parcel C, Exhibit #3) adjacent to a previously permitted subdivision (Land Use Permit #5R0194, granted to Eri Martin on October 25, 1973). The applicant, owner of Lot #3 in the permitted subdivision, proposes to change the use of that lot from a single family residence to a water and sewer system servicing eight units of public housing on the adjacent land. The applicant owns a third parcel (Parcel A, Exhibit #3), also adjacent to the permitted subdivision,

on which he maintains a pre-existing private residence containing an apartment, currently occupied by his daughter. Lot #3, Parcels A and C are all located within a five mile radius of each other.

2. We find that the financing of the proposed eight units of public housing is to be provided by the Vermont Housing Finance Agency; the units will be leased by the Vermont Housing Authority. We find that the applicant has no intention to include his house and apartment in the subsidy or lease agreements pertaining to the eight unit project.
3. Aside from the water and sewer system facilities to be located on Lot #3, there is no physical or functional relationship between the permitted subdivision and the proposed eight units of public housing. Nor do we find a functional relationship between the pre-existing house and apartment and the proposed eight units of public housing.

#### Conclusions of Law

##### A. Procedural Issue

1. Applicant's motion to dismiss the appeal based on appellants' failure to appeal the District Coordinator's advisory opinion is denied. We conclude that the phrase contained in the May 21, 1980 project review sheet stating an appeal "should" be made within thirty days is not mandatory, nor is the advisory opinion a final order of the District Commission'. Appellants were therefore not required to appeal this opinion within the appeal period set out in 10 V.S.A. 56089.
2. Applicant's motion to dismiss based on appellants' failure to appeal the District Commission's order of July 11, 1980 is also denied. We separate the issue of whether the appeal is timely into two procedural questions, because the appeal raises both a challenge to the District Commission's order regarding the scope of review in the amendment request, and a distinct claim of jurisdiction over the alleged "housing project." In his motion to dismiss, the applicant also addresses both questions, requesting the Board to find: (a) that appellants would have been permitted to appeal the District Commission's order limiting the scope of review only within thirty days of that order, and (b) that the question of independent Act 250 jurisdiction over the proposed eight units of housing is a proper matter for a declaratory ruling and therefore, appellants should not be permitted to address this issue in the form of an appeal.

First, with respect to the Commission's order regarding the scope of review, this Board has stated on previous occasions that we are reluctant to intervene in District Commission proceedings until the Commission has completed its review of the application. Therefore, we will not bar the appeal. See In re Blair Family Trust (#4C0388-EB, November 2, 1979) and In re Developers Diversified, Ltd. (#5W0584-EB, March 18, 1980).

With respect to the jurisdictional issue, we are guided by the decision of the Vermont Supreme Court In re State Aid Highway No. 1, Peru, Vermont, 133 Vt. 4, 328 A.2d 667 (1974). In that case the Court ruled that when District Commission proceedings have been completed, it is improper for the Board to entertain a petition for a declaratory ruling under 3 V.S.A. §808 by the aggrieved party. The proper route of review in such cases is an appeal to the Board under 10 V.S.A. §6089. Because the jurisdictional issue is directly linked to the scope of review question, we believe that an appeal on this issue is proper, and we conclude that the appeal was properly filed within thirty days of the Commission's final order.

B. Substantive Issues

1. We conclude that the District Commission properly limited its scope of review of the amendment application under the applicable criteria of 10 V.S.A. §6086(a) to the change in use of Lot #3. The proposed eight units of public housing are not an extension of the permitted single family subdivision; rather, the public housing is a separate development to be located on land which was never within the subdivision, nor subject to the jurisdiction of the District Commission. As this Board has stated on previous occasions, the scope of review of an amendment to a permit is limited to the change in the pre-existing permitted use. See In re Stanmar, Inc. (#5L0558-1-EB, December 21, 1979) and In re Belvidere Highway Project (#5L0083-2-EB, September 13, 1979).
2. We conclude that the eight units of public housing, together with the applicant's pre-existing private residence and apartment, although located within a five mile radius, do not constitute a "housing project" within the meaning of 10 V.S.A. §6001(3). The facts of this case are distinguishable from those in Burlington Housing Authority (D.R. #124, May 20, 1981). In that decision we held that the development of 35 housing units on four tracts of land owned, constructed and maintained by the Burlington Housing Authority, all within a five mile radius, was a scattered-site "housing project" subject to Act 250 jurisdiction. We consider several factors

in determining whether scattered-site housing units constitute a "housing project", including: retained common ownership or management, common funding, shared facilities, and contiguity in time of development. With the exception of retained common ownership, we find that these factors do not exist in the factual situation of this appeal. As we noted in Burlington Housing Authority; the mere ownership of ten or more housing units does not constitute the construction or maintenance of a "housing project" under §6001(3). We observe, in addition, that the applicant's house with apartment are pre-existing units, not units to be constructed or units to be rehabilitated.- We emphasize that there is no functional relationship between the pre-existing units and the proposed public housing. For these reasons, we conclude that the proposed eight units of family housing is not a "housing project" within the meaning of Act 250 and therefore, no permit is required.

ORDER

Applicant's motion to dismiss for failure to file a timely appeal is denied. With respect to the issues addressed herein, the Felicity Rural Preservation Association's appeal is denied..

On July 2 and July 6, 1981, the Board received communications from counsel for the appellants, objecting to the Board's proposed decision schedule for this matter, and indicating that they may petition the Board for permission to broaden the appeal to address the substantive review of the amendment application under the criteria of 10 V.S.A. §6086(a). A Motion to Reopen the appeal to consider wastewater disposal was filed with the Board on July 14, 1981. Any memoranda or supporting documents in support of or in opposition to this motion must be filed with the Board and served on all parties by July 24, 1981. The parties are requested to indicate whether they wish to present oral arguments to the Board on this motion. If oral argument is requested, a hearing date will be scheduled. In the absence of a request for oral argument, the Board will deliberate on the motion at its next regularly-scheduled hearing, July 28, 1981.

Dated at Montpelier, Vermont, this 16th day of July, 1981.

ENVIRONMENTAL BOARD.

Members voting to issue  
this decision:

Leonard U. Wilson  
Ferdinand Bongartz  
Lawrence H. Bruce, Jr.  
Dwight E. Burnham, Sr.  
Melvin H. Carter  
Warren Cone

Richard H. Cowart  
Richard H. Cowart  
Executive Officer