

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

RE: Greg Gallagher
15 Bagley Street
St. Johnsbury, VT 05819

Findings of Fact, Conclusions
of Law and Order
Land Use Permit #7R0607-EB
and #7R0607-1-EB

This decision pertains to a question raised by Greg Gallagher about whether jurisdiction should have been asserted over the replacement of five rental cabins in 1985, pursuant to 10 V.S.A. Chapter 151, for which he received an Act 250 permit. For the reasons explained below, the Board concludes that an Act 250 permit was not required and voids the permit.

I. HISTORY OF PROCEEDINGS

In 1985, Greg Gallagher applied for and obtained an Act 250 permit to rebuild five of twenty-two rental cabins that he owns on a 3.4 acre parcel of land located between Lake Willoughby and Route 5A in the Town of Westmore, Vermont. Neither the assertion of jurisdiction over this property nor the land use permit was appealed. In 1986, Mr. Gallagher applied for and obtained a permit amendment authorizing the conversion of the twenty-two rental cabins into condominiums. The Town of **Westmore** appealed the permit amendment to the Board. At the prehearing conference, Mr. Gallagher questioned whether Act 250 jurisdiction applies to the change in use of the cabins when no physical alterations would take place. The Board decided to address this issue before proceeding to the substance of the appeal. After the parties submitted briefs and presented oral argument to the Board, the Board concluded that the conversion from rental cabins to condominiums was neither a substantial nor a material change, and therefore no permit was required. The Board also determined that Act 250 jurisdiction did not apply to the seventeen cabins that had not been altered but only to the five cabins that were to be rebuilt.

The Town of **Westmore** appealed the Board's decision to the Vermont Supreme Court. In April, 1988, the Supreme Court remanded the case to the Board for an evidentiary hearing "to determine whether the proposed condominium conversion constitutes a 'substantial' or 'material' change . . .". In re Grea Gallaaher, 150 Vt. 53 (1988).

402.

II. ISSUE IN THE APPEAL

At the prehearing conference held to discuss the issues to be raised at the hearing, Greg Gallagher questioned whether Act 250 jurisdiction applied to the rebuilding of the five rental cabins for which he received a permit in 1985. The parties agreed that the Board would first determine whether the question of jurisdiction over the cabin rebuilding can be raised at this time and, if it reaches an affirmative conclusion, to hold a hearing to determine whether the construction of five new cabins constituted a substantial change to a pre-existing development. If the Board concludes that the cabin rebuilding was a substantial change for which a permit was required pursuant to 10 V.S.A. sec. 6081(b), it will then have **to hold** an evidentiary hearing to determine whether the proposed conversion of the cabins to condominiums requires a permit amendment pursuant to Rule 34 because it "might result in a significant impact on one or more of the Act 250 **criteria.**" If, on the other hand, the Board concludes that Act 250 jurisdiction did not apply to the construction of the five cabins because such construction did not constitute a substantial change, then the Board must hold a hearing to determine whether the conversion to condominiums constitutes a substantial change to a pre-existing development, pursuant to 10 V.S.A. sec. 6081(b).

The issue for the Board to determine in this proceeding is whether the rebuilding of five rental cabins in 1985 constituted a substantial change to a pre-existing development so that an Act 250 permit was required.

III. CURRENT PROCEEDINGS

On August 15, 1989, an administrative hearing panel of the Environmental Board convened a public hearing in Westmore, Chairman Leonard U. Wilson presiding. The following parties participated in the hearing:

Greg Gallagher
Town of **Westmore** by Charles **Hickey**, Esq.

After taking testimony, the panel recessed the hearing pending preparation of a proposed decision.

In addition to the evidence submitted at the hearing, the Applicant submitted a jurisdictional memorandum on July 31 and the Town of **Westmore** filed a hearing outline on August 10.

Greg Gallagher

Application #7R0607-EB and #7R0607-1-EB

Findings of Fact, Conclusions of Law and Order

Page 3

A proposed decision was sent to the parties on October 6, 1989, and the parties were provided an opportunity to file written objections and to present oral argument before the full Board.

On October 25, 1989, the Town of **Westmore** filed a statement that it does not object to the proposed decision. On November 8, 1989, following a review of the proposed decision, the evidence presented in the case, and the written objections, legal memoranda and oral arguments of the parties, the Board declared the record complete and adjourned the hearing. This case is now ready for decision. The following findings of fact and conclusions of law are based exclusively upon the record developed at the hearing.

IV. FINDINGS OF FACT

1. The property is located in the Town of **Westmore** between Lake Willoughby on the west and Route 5A on the east. As of 1985, the development consisted of 22 rental cabins plus three storage cabins on 3.4 acres. Greg Gallagher had purchased the property, including the 22 cabins, in 1977. The cabins were constructed at least 50 years ago.
2. On or about May 9, 1985, Greg Gallagher filed an application for an Act 250 permit with the District #7 Environmental Commission. The application sought approval for "**construction** or renovation of eleven existing cabins by combining some cabins' capacity, but NOT to increase the total existing capacity or occupancy use." (Emphasis as in original.) During the application process, the Applicant amended his application to tear down and rebuild only five cabins.
3. Land Use Permit #7R0607 was issued on July 15, 1985, authorizing the replacement of rental cabins "**with** new larger cabins with no increase in capacity." The permit incorporated the conditions of the Certification of Compliance #7R0607 issued by the Agency of Environmental Conservation (now Agency of Natural Resources) on July 10, 1985. That Certification, which approved the construction of five new cabins to replace five existing cabins, contained the following conditions:
 6. The total occupancy of cabins 2 and 3 shall not exceed 4 and cabins 4, 5 and 6 shall not exceed 5.

7. In the event the existing wastewater disposal system(s) of a professional engineer registered in the State of Vermont shall be engaged to design a replacement system and submit the plans to the Agency of Environmental Conservation for review and approval.
 - a. The wastewater disposal system(s) shall be operated at all times in a manner that will not permit the discharge of effluent onto the surface of the ground or into waters of the state.
4. No changes to the septic systems were intended, although during construction a bulldozer hit an area of the system behind cabin #2 and the existing cedar box septic tank was replaced with cement as a result. A leachfield was also installed for cabin #2. Cabin #3 has a cedar box septic tank and cabins #4, 5, and 6 share a steel tank. All the septic tanks are pumped out in the spring of each year.
5. No problems have been experienced with the septic systems. There have been no odors detected and no evidence of failure.
6. All cabins have toilets, showers, and kitchen sinks. Lavatory sinks were added and a larger pipe was installed from the main system to one cabin.
7. The Applicant wanted to replace the cabins with larger, more attractive structures that would provide more space. The number of bedrooms in the cabins was not increased nor was the capacity for overnight occupants.
 - a. Occupancy of the cabins has not changed. All cabins are occupied from May until the end of October or whenever foliage season ends. In May, June, September, and October the cabins are not all fully occupied; during July and August total occupancy is usual.
 9. The cabins in question each have two double beds. Maximum occupancy in cabins #2 and 3 is four and is five in cabins #4, 5, and 6.
 10. All the new cabins are located between 65 and 75 feet from the lakeshore.

11. Three feet of fill were added to accommodate four-foot posts. The land is now five feet higher than the water level of the lake.

V. CONCLUSIONS OF LAW

An Act 250 permit is required pursuant to 10 V.S.A. sec. 6081(a) before commencing construction on a subdivision or development. A permit need not be obtained, however, for a development that existed prior to June 1, 1970, unless there has been a substantial change in the development. 10 V.S.A. sec. 6081(b). The term "**substantial change**" is defined in Environmental Board Rule 2(G) as follows:

—**"Substantial** change" means any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. section 6086(a)(1) through (a)(10).

In this matter, there is no dispute that construction of the twenty-two rental cabins today would constitute "**development**" as defined in Act 250, but because they existed before the enactment of Act 250 they do not require a permit absent any substantial change.

The Board applies a two-step test in its analysis of whether there has been or will be a substantial change to a pre-existing development. The Board must determine first whether there has been or will be a physical change to the development, and second whether any such change may result in a significant impact affecting the values protected by one or more of the ten criteria of Act 250. This procedure has been upheld by the Vermont Supreme Court. See, e.g., In re H.A. Manosh Corporation, 147 Vt. 367 (1986); In re Orzel, 145 Vt. 355 (1985).

This case is unique in that the Board is being asked to determine whether jurisdiction exists over a project for which a permit has been issued. The analysis for determining whether a substantial change has occurred, however, does not change because of this circumstance.

Applying the first part of the test, it is clear that there have been physical changes to the development: Five cabins were demolished and five new cabins were built in their places.

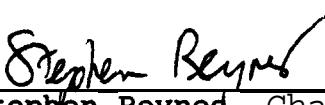
The Board concludes that these changes, however, are not "**substantial**" changes as defined in Rule 2(G), because the potential impacts from the demolition and construction cannot be considered significant. The new cabins are not occupied any more frequently than were the old cabins, and the maximum occupancy of each cabin remains the same as it was, so that no additional demand will be placed on the septic systems or water systems, nor will there be additional traffic. The new cabins are located between 65 and 75 feet from the shore of the lake, so that construction would not likely affect the lake or the shoreline to any extent. From the testimony elicited, it appears that after reconstruction of the five cabins the development has changed very little, except that five of the cabins are newer and somewhat larger. The Board is not able to identify any potential significant impacts that would result from the rebuilding of the five cabins. Therefore, the Board must conclude that no substantial change has occurred or will occur due to this reconstruction, and the permit that was issued is void for lack of jurisdiction.

IV. Order

1. Land Use Permit #7R0607 is void.
2. A hearing will be held by the Board to determine whether the proposed conversion of the rental cabins to condominiums will result in a substantial change to a pre-existing development, unless Greg Gallagher notifies the Board that he no longer intends to convert the cabins to condominiums.

Dated at Montpelier, Vermont this 16th day of November, 1989.

ENVIRONMENTAL BOARD


Stephen Reynes, Chairman
Ferdinand Bongartz
Elizabeth Courtney
Arthur Gibb
Samuel Lloyd
W. Philip Wagner