

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

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

Memorandum of Decision
Land Use Permit #7R0607-EB
and #7R0607-1-EB

The Supreme Court remanded this matter to the Environmental Board to hold a hearing "to determine whether the proposed condominium conversion [of rental cabins] might result in a significant impact on one or more of the Act 250 criteria." At the prehearing conference held on August 11, 1988, **Greg** Gallagher questioned whether there is Act 250 jurisdiction over the rebuilding of five rental cabins for which he received a permit in 1985. The parties agreed that the Board must first determine whether the issue **of jurisdiction** can be raised at this time, and agreed to file briefs on this question.

In the Prehearing Conference Report dated August 30, 1988, the issues and procedures to be followed were set out. The parties agreed that if the Board determines that the question of jurisdiction over the construction of the five rental cabins can be raised at this time, it will first hold a hearing on whether such construction constituted a substantial change to a pre-existing development before holding a hearing on whether the change of use of the rental cabins **requires an** Act 250 permit.

On September 13, 1988, Greg Gallagher filed a jurisdictional memorandum in which he argued that jurisdiction over subject matter may be raised at any time. The Town of **Westmore** filed a memorandum in which it stated that it does not dispute the principle that subject matter jurisdiction can be raised at any time, but that Mr. Gallagher is **precluded** from raising the issue now because the District **Commission** already determined that a permit is required, and that determination was not appealed.

The Board understands that the question whether a **permit** was required for the construction of the five cabins was never raised at the District Commission. However, the issuance of a permit does not necessarily mean that jurisdiction exists. The issue of the existence of jurisdiction of Act 250 calls into question the power of the Board to regulate Mr. Gallagher's project and may be raised by anyone at any time. See generally Wright & Miller, **Federal Practice & Procedure Civil: § 1393, at 863-68 (1969)**. The Board believes that Mr. Gallagher may therefore **seek** to have the Board make such a determination at this **time**.

The parties have indicated that the decision whether the construction of the cabins required an Act 250 permit can be made based upon previous filings and existing

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permits. However, upon reviewing the record in this matter, we are unable to discover facts on which the Board can base a jurisdictional ruling regarding the construction of the cabins. Accordingly, **the Board** will hold an evidentiary hearing.

In order for the Board to make its decision, the parties must produce evidence on the following issues:

- 1) Whether construction of the original 22 cabins would have been a "development" within the meaning of 10 V.S.A. § 6001(3) had it taken place after July 1, 1970.
- 2) If construction of the 22 cabins would have been "development," whether replacement of five of those cabins with five new cabins constituted a "substantial change" within the meaning of 10 V.S.A. § 6081(b) and Board Rule 2(G). In determining this question, the Board will first determine whether there has been any change to a pre-existing development. If any changes are found, the Board will then determine whether those changes may result in a significant impact under one or more of the ten criteria of Act 250 (10 V.S.A. § 6086(a) (1)-(10)). See In re H. A. Manosh Corporation, D.R. #164 (April 17, 1985) aff'd. 147 Vt. 367 (1986). The Board therefore needs evidence on the specific construction activities that took place and the potential environmental impacts resulting from such construction activities.

Town of Westmore's request for information and documents

On August 3, 1988, on behalf of the Town of Westmore, Attorney Charles Hickey filed with the Board a request for a discovery order or subpoena. Mr. Hickey requested from Mr. Gallagher information necessary to prepare his case on the second jurisdictional question, and apparently received no response from Mr. Gallagher. The Board notes that 3 V.S.A. § 809(h) authorizes attorneys to subpoena the attendance of witnesses and the production of documents.

ORDER

1. An administrative hearing panel of the Environmental Board will convene a public hearing on Tuesday, August 15, 1989 at 9:30 a.m. at the Westmore School House in Westmore, Vermont. The issues to be addressed at the hearing are described above.

2. Greg Gallagher shall submit a statement explaining the basis for his **contention** that the construction of the five cabins was not a substantial change within the meaning of the statute and rules and shall file prefiled testimony on or before July 19, 1989.
3. The Town of **Westmore** shall file prefiled testimony on or before August 2, 1989.
4. Prefiled testimony for any rebuttal witnesses shall be filed on or before August 10, 1989.
5. On or before August 10, 1989, parties shall file final lists of witnesses and exhibits.

No individual may be called as a witness in this matter if he or she has not been identified above or identified in a supplemental witness list. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. If prefiled testimony has not been submitted by the date specified, the witness will not be permitted to testify. Instructions for filing prefiled testimony are attached.

The Board may waive the filing requirements upon a showing of good cause, unless such waiver would prejudice the rights of other parties.

Please note that you are required to file only lists identifying those exhibits you intend to present, rather than the exhibits themselves. Exhibits must be made available for inspection and copying by any parties prior to the hearing.

Parties shall file an original and ten copies of prefiled testimony, legal memoranda and any other documents with the Board, and mail one copy to each of the parties listed on the attached Certificate of Service.

The hearing will be recorded electronically by the Board or, upon request, by a stenographic reporter. Any party wishing to have a stenographic reporter present or a transcript of the proceedings must submit a request by August 4. One copy of any transcript made of proceedings must be filed with the Board at no cost to the Board.

Pursuant to Board Rule 16, this Order will be binding on all parties unless there is a timely objection to, a showing of cause for, or fairness requires that a requirement of this Order be waived.

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After the hearing, a proposed decision will be prepared by the panel and circulated to all parties for their comments. Oral argument will be held before the full Board if so requested by any party. See Rule 41.

Dated at Montpelier, Vermont this 6th day of July,
1989.

ENVIRONMENTAL BOARD


Leonard U. Wilson, Chairman

Attachment

MD 7R0607-EB (ap120)