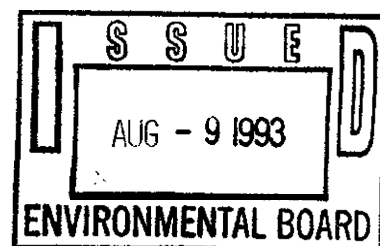

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

Re: Marcel Roberts and Noel Lussier
Application #7R0858-1-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an application by Marcel Roberts and Noel Lussier (the Appellants) for review of four lots which they own under the modified application process set forth at 10 V.S.A. § 6025(c) and Board Rule 60. As is explained below, the Environmental Board denies the request for review under the modified process because the Board is not persuaded that the Appellants are eligible for that process.

I. SUMMARY OF PROCEEDINGS

On December 27, 1989, former District #7 Coordinator Cynthia Cook issued Advisory Opinion #7-071, concerning the so-called Perrault Farm subdivision located in Irasburg and Barton. The advisory opinion states that the subdivision initially consisted of ten lots, with Lot #10 having subsequently been divided into four lots. The opinion states that a permit is required for the subdivision pursuant to 10 V.S.A. § 6081(a).

On September 26, 1991, Marcel Roberts and Noel Lussier (the Appellants) filed an application for an Act 250 permit for a project described as the subdivision of four lots within the so-called Perrault Farm subdivision located west of Town Highway #6 in Barton and Irasburg. The application was filed pursuant to 10 V.S.A. § 6025(c) and Board Rule 60, concerning a modified process for eligible purchasers of lots sold to a purchaser prior to January 1, 1991 without a required Act 250 permit.

The District #7 Commission issued a memorandum of decision on October 12, 1992, concluding that the Appellants are not eligible for the modified process under the above-referenced provisions. On November 2, the Appellants filed an appeal of the memorandum of decision with the Environmental Board.

On November 24, 1992, former Associate General Counsel Eileen Hiney convened a prehearing conference. Issuance of a prehearing conference report was delayed due to Ms. Hiney's resignation. On January 13, 1993, the Appellants filed a letter stipulating that someone other than Ms. Hiney may issue the report. On January 25, 1993, Chair Elizabeth Courtney issued a prehearing conference report and order.

On January 27, 1993, the Appellants filed a letter stating that they did not wish to file a legal memorandum regarding an issue they had raised previously

regarding whether Rule 60 exceeds the language of 10 V.S.A. § 6025(c). During late February and early March, through correspondence between the Chair and the Appellants' attorney, it was agreed that the Appellants stipulated that the findings of fact issued by the District Commission in this matter are true and relevant, that the Appellants would submit legal argument and additional evidence in the form of sworn affidavits, and that the Board would hold oral argument on this appeal rather than an evidentiary hearing.

On April 5, 1993, the Appellants submitted sworn prefiied testimony and affidavits, exhibits, and proposed findings of fact and conclusions of law. On April 21, 1993, the Board convened oral argument in Montpelier with the following parties participating:

Marcel Roberts and Noel Lussier by John R. Ponsetto, Esq.

After hearing argument, and questioning the Appellants' witness Ramon Lawrence, the Board recessed the matter pending further submissions by the Appellants, review of the record, deliberation, and decision. The Board then conducted a deliberative session.

On April 26, 1993, the Chair issued a recess memorandum giving the Appellants an opportunity to submit any documents, created contemporaneously with the sale of the lots in question to the Appellants, containing representations made to the Appellants by John Monette, Esq. concerning the applicability of 10 V.S.A. Chapter 151 (Act 250) to those lots or containing an agreement by the Appellants, the sellers, and Mr. Monette that Mr. Monette would represent both sides with respect to such sale.

On April 30, 1993, the Appellants filed a letter stating that, with respect to documents concerning representations by Mr. Monette as to the applicability of Act 250, the only documents that exist are those previously submitted to the Board as exhibits. The Appellants further stated that, with regard to a written agreement that Mr. Monette would represent both sides, no such agreement exists, and that the common practice in the relevant community is for all parties to a real estate transaction to rely on the sellers' attorney.

On August 4, 1993, following a review of 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

Whether, pursuant to 10 V.S.A. § 6025(c) and Board Rule 60, the Appellants are entitled to the modified application process delineated by the aforementioned statute and rule.

III. FINDINGS OF FACT

1. On June 27, 1988, surveyor Norbert Blais created a survey entitled "Plan of Land Located in Irasburg & Barton, Vermont, Being a Portion of the Gerard & Angeline Perrault Farm" (the Survey). The Survey shows the land as consisting of approximately 577 acres and divided into 10 lots numbered one through ten.

2. The Survey shows the Perrault Farm property as being bounded on the eastern side by Town Highway #5. The Survey shows Town Highway #28 leading into the property from Town Highway #5 to Lot #7. The Survey also shows Town Highway #5 as ending on Lot #7 and shows another road (the Road) running west out of Lot #7 over Lots #8 and #9 to an adjacent tract owned by Roy W. Ingalls. The Road appears to be a private right-of-way.

3. At a point in the Road that is approximately the mid-point of Lot #8, the Survey contains the following notation about the Road: "Existing Road & R/W (Portions Not Clearly Defined in Field)."

4. At a point in the Road not far from the above-described notation, the Survey shows two roads intersecting with the Road. One of these roads runs north to Lot #2. The other road runs south to a camp on a pond located on Lot #9.

5. The length of the Road prior to its intersection with the two roads described immediately above is well over 800 feet, as is the total length of the Road. The length of each of the two intersecting roads exceeds 800 feet.

6. The only road access to Lots #2 and #9 shown on the Survey consists of the Road and the intersecting roads described immediately above. The Survey shows Lots #2 and #9 as not being adjacent to any town highways.

7. On June 30, 1988, Gerard and Angeline Perrault conveyed Lot #4 to Jean Paul Bonneau and Daniel Maclure, and Lot #10 to Daniel Maclure.[1]

8. In May 1989, Mr. Maclure approached Marcel Roberts about trading real estate. Mr. Maclure was interested in trading parcels of land he and Mr. Bonneau had acquired from the Perraults. At that time, Mr. Roberts and Noel Lussier were about to auction off 12 condominium units located in Newport. Mr. Maclure told Mr. Roberts that he intended to bid on a number of the units and he suggested that, if he were the successful bidder, he trade for the unit by conveying lots he and Mr. Bonneau had acquired from the Perraults.

9. The auction of the condominium units was held on May 27, 1989 and Messrs. Maclure and Bonneau were the successful bidders on one of the condominium units.

10. During June 1989, shortly after the auction, Mr. Maclure and Mr. Roberts visited the Perrault Farm property. At that time, Mr. Maclure showed Mr. Roberts the Survey. The copy of the Survey that Mr. Maclure showed Mr. Roberts included a sketch drawn on Lot #10, showing that lot as being further divided into three lots.

11. On July 13, 1989, Messrs. Maclure and Bonneau conveyed Lot #4, consisting of approximately 10.3 acres, of the Perrault Farm property to Messrs. Roberts and Lussier. On that same date, Mr. Maclure conveyed three lots created out of Lot #10 to Messrs. Roberts and Lussier. The acreage of those three lots was 19.5, 10.7, and 10.8 acres. These lots were conveyed in return for the conveyance to Messrs. Bonneau and Maclure of the condominium unit then owned by Messrs. Roberts and Lussier.

12. Mr. Lussier was not personally involved in the transaction for the conveyance of Lot #4 and the three lots created out of Lot #10. Mr. Roberts handled the entire transaction, including the choice of lots and negotiation of price, on behalf of both Messrs. Lussier and Roberts.

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[1] *It is possible that the Perraults conveyed other lots to Messrs. Bonneau and Maclure on June 30, 1988. However, only the above-mentioned lots are relevant to the issues in this proceeding.*

13. John Monette, Esq. represented Messrs. Maclure and Bonneau with respect to the conveyances of Lot #4 and the three lots created out of Lot #10. By agreement of the parties, Mr. Monette prepared all of the documents required for those conveyances.

14. Among the documents prepared by Mr. Monette in connection with the conveyances were the following:

    a. A property transfer tax return with respect to Lot #4, signed by the parties to the transaction on July 13, 1989. This return states that the conveyance of Lot #4 does not result in the partition or division of land and cites the letter "B" from the instruction booklet for the return, indicating that the conveyance is therefore exempt from Act 250.

    b. A property tax return with respect to each of the three lots created out of Lot #10, signed by Messrs. Maclure, Roberts, and Lussier on July 13, 1989. Each of the returns states that the relevant conveyances do result in a partition or division of land and cite the letter "A" from the instruction booklet for the return, indicating that the conveyance is exempt from Act 250 because it does not concern a lot that is one of 10 or more lots created by a person within five years within an environmental district or within five miles.

    c. An Act 250 Disclosure Statement with respect to each of the three lots created out of Lot #10, signed by Mr. Maclure on July 13, 1989. The statements each state that Mr. Maclure had only divided or partitioned two other lots within five years within the environmental district or within five miles and that Mr. Maclure was not affiliated with any other person in the partition or division of land.

15. On December 27, 1989, former District #7 Coordinator Cynthia Cook issued Advisory Opinion #7-071, concerning the so-called Perrault Farm subdivision. The advisory opinion states that the subdivision initially consisted of ten lots, with Lot #10 having subsequently been divided into four lots. The opinion states that a permit is required for the subdivision pursuant to 10 V.S.A. § 6081(a). The basis for this conclusion is that "the partnership of Mr. Maclure and Mr. Bonneau controlled the subdivision of the subject parcel into fourteen lots." The opinion also states that Mr. Bonneau had previously created 27 lots within the same environmental district within five years.

16. Messrs. Roberts and Lussier are licensed real estate brokers. They regularly buy and sell real estate in Vermont.

17. Licensed real estate brokers must complete a training program approved by the Real Estate Commission and pass a broker's examination. The course work and examination cover all aspects of Vermont real estate law, including Act 250.

18. Prior to 1989, Mr. Roberts had substantial experience with the Act 250 process, having filed at least eight Act 250 applications. Mr. Lussier also had experience with the Act 250 process, having filed one Act 250 application. Most of the applications with which Messrs. Roberts and Lussier were involved were applications for subdivisions.

19. Messrs. Roberts and Lussier are familiar with the general jurisdictional provisions of Act 250. Mr. Roberts possesses a detailed understanding of the jurisdictional thresholds for the applicability of Act 250.

20. Messrs. Roberts and Lussier were not involved in the creation of lots on the Perrault Farm property and did not have an ownership interest in, or control over, the property at the time the Survey was created.

21. It is customary in the area in which Messrs. Roberts and Lussier do business for all parties to a real estate transaction to rely on the same attorney.

IV. CONCLUSIONS OF LAW

In relevant part, 10 V.S.A. § 6081(a) prohibits the sale or offer for sale of any interest in, or commencement of construction on, a subdivision, or commencement of construction on a development, without a land use permit. 10 V.S.A. §§ 6083-6085 delineate a process for applying for a permit, and 10 V.S.A. § 6083(a)(2) states that the application must include a plan of the proposed subdivision or development. 10 V.S.A. § 6086(a) sets out the environmental criteria against which such an application is judged, stating that, before issuing a permit, the Board or district commission must find that the subdivision or development meets the criteria. 10 V.S.A. § 6086(c) authorizes the issuance of conditions in permits and 10 V.S.A. § 6087 provides that applications may be denied.

10 V.S.A. § 6001(19) defines subdivision as follows:

> [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 addition, Board Rule 2(A)(6) (the Road Rule) defines development to include:

> The construction of improvements for a road or roads, incidental to the sale or lease of land, to provide access to or within a tract of land of more than one acre owned or controlled by a person. In municipalities with both permanent zoning and subdivision bylaws, this jurisdiction shall apply only if the tract or tracts of involved land is more than ten acres. For the purpose of determining jurisdiction, any parcel of land which will be provided access by the road is land involved in the construction of the road. This jurisdiction shall not apply unless the road is to provide access to more than five parcels or is to be more than 800 feet in length. For the purpose of determining the length of a road, the length of all other roads within the tract of land constructed within any continuous period of ten years commencing after the effective date of this rule shall be included.

Accordingly, Act 250 contemplates a procedure whereby, prior to sale or offer for sale of any interest in a subdivision, or commencement of construction on a subdivision or development, the person creating the subdivision or development will submit an application for the entire project. The entire project will be reviewed for compliance with the criteria and the application for the permit may be denied.

In 1991, the General Assembly amended Act 250 to provide relief to purchasers of lots that were sold in violation of 10 V.S.A. § 6081(a). The relief the General Assembly chose to provide was to mandate the creation of a modified application process that would enable such purchasers to obtain permits for less than the entire subdivision. The General Assembly also placed limitations on the purchasers who would be able to take advantage of this modified process. 10 V.S.A. § 6025(c) provides:

> (c)(1) This subsection shall apply to lots within a subdivision:
>
> (A) that were created as part of a subdivision owned or controlled by a person who may have been required to obtain a permit under this chapter, and
>
> (B) with respect to which a determination has been made that a permit was needed under this chapter, and
>
> (C) that were sold to a purchaser prior to January 1, 1991 without a required permit.
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> (2) The rules shall provide for a modified process by which the sole purchaser, or the group of purchasers, of one or more lots to which this subsection applies may apply for and obtain a permit under this chapter that shall be issued in light of the existing improvements, facts, and circumstances that pertain to the lots; provided, however, that the requirements of this chapter shall be modified only to the extent needed to issue those permits, For purposes of these rules. a ourchaser eligible for relief under this subsection must not have been involved in creating the lots. must not be a person who owned or controlled the land when it was divided or partitioned. as a person is defined in this chapter. and must not have known at the time of purchase that the transfer was subject to a permit reauirement that had not been met.

(Emphasis added.)

Pursuant to the legislative directive in 10 V.S.A. § 6025(c), the Board has promulgated Rule 60. Rule 60(D) provides:

> Eligibility Requirements For Applicants. The purchaser must demonstrate eligibility for relief under 10 V.S.A. § 6025(c). A purchaser eligible for relief under this rule must have purchased the lot or lots and the deed or deeds must have been conveyed prior to January 1, 1991; must not have been involved in any way with the creation of the lot or lots; must not be a person who owned or controlled the land when it was divided or partitioned as a person is defined in 10 V.S.A. § 6001(14)(A) and (19); and did not know or could not reasonablv have known at the time of purchase that the transfer was subiect to a oermit reauirement that had not been met. In making the determination whether the purchaser had knowledge

> of the illegality of the subdivision, the district coordinator will take into consideration any advisory opinions, declaratory rulings, or judicial determinations which conclude that the purchaser sold or offered for sale any interest in, or commenced construction on, any subdivision in the state without a required Land Use Permit. The board or the district commissions may decide the jurisdictional and purchaser eligibility questions if properly raised during a public hearing on an application under this rule.

(Emphasis added.)

The Appellants have made arguments in this matter based on Act 250 Disclosure Statements and Property Transfer Tax Returns they have placed in the record. With respect to disclosure statements, at the time of the conveyances of Lot #4 and the three lots created out of Lot #10 to the Appellants, 10 V.S.A. § 6007(a) provided as follows:

> Prior to the division or partition of land, the seller shall prepare an "Act 250 Disclosure Statement." The seller shall provide the buyer with the statement within 10 days of entering into a purchase and sale agreement for the sale or exchange of land, or at the time of transfer of title, if no purchase and sale agreement was executed. Failure to provide the statement as required shall, at the buyer's option, render the purchase and sales agreement unenforceable. If the disclosure statement establishes that the transfer is or may be subject to 10 V.S.A. chapter 151, and that information had not been disclosed previously, then at the buyer's option the contract may be rendered unenforceable.

With respect to the relationship of Act 250 Disclosure Statements and Property Transfer Tax Returns, 32 V.S.A. § 9608 provides:

> (a) Except as to transfers which are exempt pursuant to section 9603(17) of this title, no town clerk shall record, or receive for recording, any deed to which has not been affixed an acknowledgment of return and tax payment under section 9607 of this title and a certificate in the form prescribed by the environmental board and the commissioner of the department of taxes signed under oath by the seller or the seller's legal representative, that the conveyance of the real property and any development thereon by the seller is in compliance with or exempt from the provisions of chapter 151 of Title 10 [Act 250]. The

> certificate shall indicate whether or not the conveyance creates a partition or division of land. If the conveyance creates a partition or division of land, there shall be appended the current "Act 250 Disclosure Statement," required by 10 V.S.A. § 6007. ... A person who purposely or knowingly falsifies any statement contained in the certificate required is punishable by fine of not more than $500 or imprisonment for not more than one year, or both.
>
> (b) A person who makes a false certification under this section shall be liable for damages caused by that false certification, in addition to any existing liability created under the common law.

Subsection (b) was added in 1991. 1991 Vt. Laws No. 111 § 9.

Having set forth the applicable legal provisions, the Board turns to applying them to the present case. The main issue is whether the Appellants are eligible for the modified process under 10 V.S.A. § 6025(c) and Rule 60. In this respect, the burden of proof is on the Appellants because they are the parties seeking to be declared eligible. Cf. Nader v. Toldenado, 408 A. 2d 31, 48 (D.C. 1979), cert. denied, 444 U.S. 1078 (1980) (party pleading an issue has burden of proof).

The Board is not persuaded that all the requirements for eligibility are met. Specifically, 10 V.S.A. § 6025(c) requires that, to be eligible, a purchaser "must not have known at the time of purchase" of the permit requirement. Interpreting this provision, Rule 60(D) requires that the purchaser "did not know or could not reasonably have known at the time of purchase" that Act 250 applies. To determine whether a purchaser "must not have known," it is reasonable to inquire into whether, under the circumstances, the purchaser did not know and could not reasonably have known of the permit requirement.

The Board is not persuaded that the Appellants did not know or could not reasonably have known of the permit requirement.[2] They are experienced real estate brokers with knowledge of Act 250 jurisdiction and experience with the Act 250 process. Appellant Roberts, acting on behalf of himself and Appellant

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[2]*In the absence of the language of Rule 60(D), the Board would still reach the same conclusion, because for the same reasons it is not persuaded that the Appellants "must not have known" of the permit requirement.*

Lussier, was presented with a plan of a ten-lot subdivision (the Survey) on which was sketched the further division of one of those lots into three lots. Further, the Survey shows roads exceeding 800 feet in length, both individually and collectively, and indicates that at least one of those roads might require improvement in order to provide access to Lots #2 and #9. Under such circumstances, persons with the Appellants' knowledge and experience must be considered to have reason to believe that the Perrault Farm property might constitute an Act 250 subdivision under 10 V.S.A. § 6001(19) or a development subject to the Act under Rule 2(A)(6).[3]

The Appellants argue that they relied on representations of the sellers' attorney that an Act 250 permit was not required for the lots they purchased and request that the Board so find. However, the Board declines to make such a finding because it is not persuaded that the attorney made a representation or gave an opinion to the Appellants concerning the applicability of Act 250. The Board has given the Appellants an opportunity to file any documents containing such a representation or opinion and in response the Appellants have referred the Board to the Property Transfer Tax Returns and Act 250 Disclosure Statements described in the Findings of Fact.

However, under 10 V.S.A. § 6007(a) and 32 V.S.A. § 9608(a), these documents do not constitute opinions by the preparing attorney concerning the applicability of Act 250. Instead, they constitute representations of the seller to the purchaser concerning the Act. While they may be prepared by an attorney based on what the seller tells the attorney, such preparation does not elevate the documents into a legal opinion intended for the purchaser. Rather, the language of 10 V.S.A. § 6007(a) and 32 V.S.A. § 9608 makes clear that the purpose of these documents is to force disclosure by sellers of the facts pertinent to the applicability of Act 250.

Further, even if the documents did constitute a legal opinion by the attorney intended for the Appellants, the Board would find that, under the specific circumstances of this case, reliance by the Appellants on the sellers' attorney was unreasonable.

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[3]*The Board imputes Mr. Roberts' knowledge to Mr. Lussier under basic principles of the law of agency.*

There are two separate and independent reasons for this conclusion. First, if a representation concerning the applicability of Act 250 can be inferred from the tax returns and disclosure statements, such a representation pertains only to the creation of three lots out of Lot #10 and not to the prior 10-lot subdivision and road.

Second, while it may be customary in the area in which the Appellants do business for all parties to rely on the same attorney, in this case the Appellants, experienced real estate brokers with knowledge of Act 250, were faced with a survey that gave rise to substantial questions concerning whether an Act 250 permit was required pursuant to the definition of subdivision (10 V.S.A. § 6001(19)) and the Road Rule (Rule 2(A)(6)). Under such circumstances, the Appellants should have sought an independent opinion, from the District #7 Coordinator or from an attorney not associated with Messrs. Maclure and Bonneau, as to whether a permit was required.

Accordingly, the Board concludes that the Appellants are not eligible for the modified process under 10 V.S.A. § 6025(c) and Rule 60. The Appellants' request for that modified process is therefore denied.

V. ORDER

The Appellants' request for the modified application process set forth at 10 V.S.A. §6025(c) and Rule 60(D) is denied.

Dated at Montpelier, Vermont this 9th day of August, 1993.

ENVIRONMENTAL BOARD

Elizabeth Courtney, Chair
Darby Bradley
Terry Ehrich
Lixi Fortna
Arthur Gibb
Anthony Thompson
Steve E. Wright

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