

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

RE: TOFR **Bayside** Associates Findings of Fact, Conclusions
Alburg, Vermont of Law and Order
Declaratory Ruling Request #158

This decision pertains to a Petition for Declaratory Ruling filed with the Environmental Board ("the Board") on June 27, 1984, by Dr. John A. Warden seeking a determination concerning the applicability of 10 V.S.A., Chapter 151 (Act 250) to certain lands owned by John and Theresa Warden located in **Alburg**, Vermont.

On July 31, 1984 the Board notified the parties of its intent to designate its Chairman to act as an administrative hearing officer in this matter pursuant to Board Rule 41 and 3 V.S.A. 6811. Having received no objection, a public hearing was convened on August 20, 1984, in **Alburg**, Vermont, with Margaret P. Garland acting as hearing officer. The following participated as interested parties at the hearing:

Petitioner John A. Warden, M.D.
Town of **Alburg** by Donald Duhamel, Selectman.

The hearing was recessed on August 20, pending preparation of a proposal for decision, a review of the record, and deliberation by the full Board. Parties were provided copies of the proposed decision and were notified of their right to present written or oral argument. No request for hearing having been received, the Board adjourned the hearing on September 26th. This matter is now ready for decision. The following findings of fact and conclusions of law are based upon the record developed at the hearing.

I. ISSUES RAISED BY THE PETITION

Dr. Warden acquired a twenty acre parcel of land from TOFR **Bayside** Associates which was depicted on a plot plan as part of a larger subdivision. TOFR secured a land use permit pursuant to Act 250 for its subdivision subsequent to the conveyance to Dr. Warden. Dr. Warden argues that the terms and conditions of that land use permit do not apply to his lands. He further argues that he should not be required to subject his land to the limitations of the land use permit in order to use the subdivision roadway authorized in the permit.

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II. FINDINGS OF FACT

1. John and Theresa Warden acquired two lots in **Alburg**, Vermont totaling approximately 20.8 acres from TOFR **Bayside Associates ("TOFR")** in September, 1977. Access to the lakeside lots, as described in the TOFR to Warden deed, was to be by one of two alternate means: a 700' long drive terminating in a cul-de-sac adjacent to the Warden property **or**, if clear title to this right of way could not be secured by TOFR, an existing "old town road" would be relocated and improved by TOFR. **Exhibit #3.**
2. On May 5, 1978, TOFR applied to the District **#6** Environmental Commission ("the Commission") for a land use permit authorizing the construction of the **3,650'** relocated town road and the creation of a five lot subdivision. The subdivision plan submitted to the Commission depicted one of the five proposed lots as "Lot 3, J. Warden, 20.8 Acres." However, the Wardens did not sign the permit application, did not participate as parties to the permit proceedings, and were not required by the Commission to act as co-applicants in view of their property interest in the proposed project. The Wardens were notified of the Commission proceedings in their capacity as adjoining property owners.
3. On June 20, 1978 Land Use Permit **#6G0186** ("the Permit") was issued to TOFR approving the road construction and subdivision subject to seven conditions. Only two of the conditions pertain directly to the substantive criteria of 10 V.S.A. **§6086(a)** (conditions **#4** and **#5**); the remainder were procedural in nature. The Wardens were mailed a copy of the Permit.
4. Condition **#4** of the Permit requires the design and installation of each wastewater disposal system under the direction of a registered professional engineer. The Warden tract contains soils which are suitable for the installation of a conventional wastewater disposal system. **Exhibit #6.** Condition **#5** requires that lot purchasers be bound by the restrictions of the MacGregor Point Landowners Association bylaws. The bylaws address such things as minimum lot size, set-backs from Lake Champlain, use of drilled water wells, and maintenance of utility lines. The Wardens are not members of the Association.

III. CONCLUSIONS OF LAW

It is difficult in retrospect to decipher the Commission's intent concerning the applicability of the Permit to the Wardens. The five lots approved by the Commission include the parcel previously purchased by the Wardens and the plans approved by the Commission depict lot #3 as owned by the Wardens. However, the Wardens did not serve as co-applicants in the permit proceedings and did not participate as parties to the proceedings. Furthermore, at the time the Permit was issued, Board Rule 6 concerning permit applications provided:

Applications shall be made in the name or names of all persons who have a substantial interest in the tract of involved land by reason of ownership or control; however, in all instances unless specifically authorized by the board or district commission, the owner of the tract of involved land shall be the applicant or a co-applicant with any other person or persons who have an interest by contract, lease, option or other legal arrangement in the tract of involved land, or some portion thereof, which is related to a proposed development or subdivision.

However, despite the fact that Lot #3 had been previously conveyed to the Wardens and that the proposed access roadway was to pass through Lot #3, the Wardens were not co-applicants.

Commission jurisdiction only attaches to those lands owned or controlled by the permit applicant(s). Current Board Rule 10 (the replacement to Rule 6) is designed to assure the identification of all owners of land involved in the proposed project. Basic principles of fairness and due process require that those whose property interests are to be subject to scrutiny under Act 250 and who will be bound by permit terms and conditions have actual knowledge that their property has come within a Commission's jurisdiction. We must conclude that Commission jurisdiction did not attach to the Warden property and the terms and conditions of Land Use Permit #6G0186 are not binding in respect to that property.

IV. ORDER

The terms and conditions of Land Use Permit #6G0186 do not apply to Lot #3 as depicted on Board Exhibit #1 and Petitioner need not secure further approval from the District Commission to continue use of that land for residential purposes.

Dated at Montpelier, Vermont this 26th day of September, 1984.

VERMONT ENVIRONMENTAL BOARD

BY 
Margaret P. Garland
Chairman

Members participating:

Margaret P. Garland
Ferdinand Bongartz
Dwight E. Burnham, Sr.
Warren Cone
Donald B. Sargent