

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

RE: Town Highway #37  
Middlesex, Vermont

Declaratory Ruling #171

On May 7, 1985, a petition for a declaratory ruling was filed with the Environmental Board ("the Board") by David Aseltine appealing Executive Officer Advisory Opinion EO-85-74, dated April 16, 1985, concerning which individuals must be co-applicants in the land use permit proceedings to authorize improvements to a segment of Town Highway #37 ("T.H. 37") in Middlesex, Vermont. A similar petition was filed May 16, by Robert J. Buchholz and Peter L. Domenicali.

On May 17, 1985, the Board notified the parties of its intent to designate its Chairman to act as a hearing officer in this matter pursuant to Board Rule 41 and 3 V.S.A. § 811. Having received no objection, a public hearing was convened on June 17, 1985, in Montpelier, Vermont, with Darby Bradley acting as Administrative Hearing Officer. The following were present at the hearing:

Robert Buchholz by F. Brian Joslin, Esq.;  
Peter Domenicali;  
David and Jeanne Aseltine.

Frank and Ramona Gabaree, through their attorney Gleb Glinka, had submitted comments to the Board by letter, but did not appear at the hearing. The Town of Middlesex and Anne Marie Ferance were given notice of the proceeding, but elected not to appear at the hearing. The Hearing Officer took a brief site visit following the hearing. A proposed decision was forwarded to all parties on June 19, and written comments were filed by Mr. Buchholz on June 28. No party having requested the opportunity to present oral argument to the full Board, the Board conducted a deliberative session on July 10, found the record complete and adjourned the hearing. 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. To the extent that materials filed by the parties may be considered requests to find, and to the extent that the Board found necessary and agreed with any such requests, they have been incorporated herein; otherwise, such requests are denied.

I. ISSUE RAISED BY THE PETITIONS

The sole question raised by the petitions is: which individuals must be co-applicants in the land use permit **proceedings** to authorize the improvements to a segment of T.H. 37 in Middlesex, Vermont?

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II. FINDINGS OF FACT

1. The facts surrounding this case were previously considered by the Board by way of Declaratory Ruling #156 issued on December 19, 1984. Much of the background for the current proceeding is recited in the Findings of Fact for Declaratory Ruling #156, and need not be repeated here. In summary, the Board concluded that the improvement of 1,425 feet of road incidental to the sale of land was a "development" under Board Rule 2(A) (6), and that an Act 250 permit was required.
2. In January of 1983 Anne Marie Ferance conveyed to Peter Domenicali two lots comprising approximately 26 acres, both bordering T.H. 37; a portion of these lands was subsequently conveyed to the Aseltines. See Finding #4, below. Mrs. Ferance retained one 14 acre lot with frontage on T.H. 37, together with 60 acres of backland which can be accessed from T.H. 37 by a right-of-way through the Aseltine lot. Robert Buchholz acquired a five acre lot adjacent to T.H. 37 from one O'Neil in March, 1983.
3. Prior to his purchase, Mr. Domenicali retained a certified site technician to perform perc tests and design on-site sewage systems on the two lots he was purchasing, as well as on the 14 acre lot retained by Mrs. Ferance. A "mini-mound" system was also designed for the Buchholz lot, in consultation with local officials and a representative of the Water Resources Department.
4. David and Jeanne Aseltine purchased one lot containing approximately 14 acres from Mr. Domenicali in November, 1983, several months after completion of road improvements. Mr. Domenicali had not intended to sell the second lot immediately, but found it necessary to do so because the road construction costs increased substantially over budget. The Aseltines were unaware that a violation of Act 250 existed at the time they purchased their lot. The Aseltines have secured a town building permit, and are awaiting a determination on this appeal before constructing a primary residence on their lot.
5. On December 19, 1983, the Town of Middlesex accepted the improved section of T.H. 37 as a Class III road, and is now responsible for its maintenance.
6. The cost of the road construction totalled \$22,000, most of which was paid by Mr. Domenicali. Mr. Buchholz contributed \$4,500 toward the cost. A Mr. Donovan, who owns three acres adjacent to the lower end of the road improvement, contributed \$1,200. Mr. Donovan owned a pre-existing lot and was not involved in any sale of land. In addition, Mrs. Ferance, through a clause in her Purchase and Sale Agreement with Mr. Domenicali, agreed to contribute up to \$2,500 at such time as she either sold the 14 acre lot

which she retained, or constructed a residence on that lot. To date, neither event has occurred, and no payment has yet been made.

### III. CONCLUSIONS OF LAW

The parties have argued that the Board should reconsider Declaratory Ruling #156, and rule that the road improvements do not require an Act 250 permit, even though no party appealed Declaratory Ruling #156. The Board agrees with the general proposition that a court or administrative tribunal must dismiss a proceeding whenever it discovers that it lacks jurisdiction. However, in this case, it must conclude, under the doctrine of res judicata, that once the issue of jurisdiction has been fully litigated, it cannot reopen the proceedings, unless some substantially new fact or circumstance, previously unknown to the parties, indicates that there has been a miscarriage of justice. No such fact or circumstance exists here. Even if the Board had the authority to reopen the issue, it is still convinced, in light of the additional evidence provided at this hearing, that the road improvement was incidental to the sale of land, and thus falls within the scope of Board Rule 2(A)(6). The request for reconsideration must be denied.

The problem facing this Board, which is common whenever a development requiring an Act 250 permit is commenced before the permit is obtained, rather than afterwards, is to find a practical solution to the situation. Mr. Domenicali and Mr. Buchholz are prepared to file for an Act 250 permit. However, a portion of the land which must be covered by the permit has already been conveyed to a third party (the **Aseltines**), who are reluctant to sign the application out of concern that they may be liable for any changes which the District Commission may order for the road. At the same time, the **Aseltines** wish to commence construction of their house as soon as possible. In addition, another landowner (Mrs. **Ferance**), who has agreed to contribute to the road cost and who sold two lots to Mr. Domenicali, lives in Massachusetts and may also be reluctant to sign as a co-applicant. **Finally**, the Town as "owner" of T.H. 37 also refuses to participate as co-applicant.

Faced with these circumstances, the Board must fashion a solution that complies with the law, and does not cause any undue hardship or delay for the parties.

Board Rule 10 (A) provides, in part:

The record owner(s) of the tract(s) of involved land shall be the applicant(s) or co-applicant(s) unless good cause is shown to support waiver of this requirement.

Board Rule 2(A) (6) provides, in part:

[The term "development" includes] 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 .... 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.

Applying these principles to this case, we conclude that Act 250 jurisdiction extends to all the lands that were owned by Ferance and O'Neil and bordered on T.H. 37, and that the proper signatories to the application are the following: Peter **Domenicali**, Robert Buchholz, Anne Marie Ferance, David and Jeanne Aseltine, and the Town of Middlesex.

Under Rule 10, the Board may waive the requirement of a co-application if good cause is shown. The Board finds that David and Jeanne Aseltine met their burden of proof in showing good cause, at least at this point in time. Not only were they not part of the agreement for constructing the road (as were Domenicali, Buchholz and Ferance), but Mr. Domenicali has agreed to provide to the District Commission the information needed for an Act 250 permit, including that relating to sewage disposal on the Aseltine lot. However, if the Commission finds that changes may be required relating to the development or use of the Aseltine lot, it may order the Aseltines to become co-applicants. In addition, if subsequent to the issuance of a permit the Aseltines elect to subdivide their lot or make additional improvements which constitute a "material change" under Board Rule 2(P), they shall seek an amendment to the Act 250 permit prior to commencing construction or subdividing the land.

The Board concludes that the Town of Middlesex has good cause, at least at this time, not to be a co-applicant. The road construction appears to have been done in accordance with town standards. If the Commission finds that changes may be required to the road in order to conform with Act 250, it may order the Town to become a co-applicant. In addition, if the improvements to T.H. 37 are extended beyond the point to which it is currently constructed, the Town of Middlesex and any parties involved with such additional improvements may be required to obtain an Act 250 permit prior to commencing **construc**tion.

The Board cannot conclude that Anne Marie Ferance should be excused as a co-applicant, because she was a party to the sale, she agreed to bear a portion of the cost of the road improvement and her property benefited directly from the improvement. However, the proceedings on the permit application need not be delayed pending her signature. The Commission can make final

findings of fact and conclusions of law, and issue a permit if the requirements of Act 250 are met, for the road improvements and any past or proposed development on the lots currently owned by Buchholz, Domenicali and Aseltine. Act 250 jurisdiction will continue to extend over the Ferance lands, and Mrs. Ferance (or her successors and assigns) shall be required to obtain an Act 250 permit before any "material change," including the construction of a dwelling, may take place on her property.

Mr. Donovan need not be joined as a co-applicant because the road improvement, as to his lot, was not incidental to the sale or lease of land, and because it also appeared that he was asked to contribute to the road project only when it appeared that the cost would run substantially over budget.

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ORDER

1. Mr. Buchholz and Mr. Domenicali must secure a land use permit to authorize construction of improvements to the 1,425' segment of T.H. 37 and the present and proposed improvements to the lots owned by Buchholz, Domenicali, Ferance and Aseltine.

2. The Aseltines need not at this time participate as co-applicants. However, the Aseltines shall provide Mr. Domenicali with such information as is necessary for the Commission to evaluate the Aseltine premises under the ten Criteria of 10 V.S.A. § 6086(a), and Mr. Domenicali shall be responsible for presenting said information to the Commission. In the event the Aseltines or their successors substantially or materially change their premises beyond single-family residential use, they shall first obtain Act 250 approval.

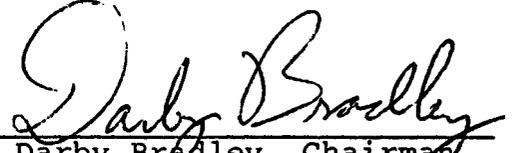
3. Mrs. Ferance shall be joined as a co-applicant to this land use permit. In the event she fails to do so, the Commission shall proceed with consideration of the application as it relates to the improvements to T.H. 37 and the present and proposed improvements on the Buchholz, Domenicali and Aseltine lots. However, no "material change," including the construction of a dwelling, shall be made to the property owned by Mrs. Ferance prior to the issuance of a land use permit for such change.

4. The Commission may join the Town or the Aseltines as co-applicants if it discovers during its proceedings that changes to T.H. 37 or to the Aseltine property will be required. However, in such event, they shall be considered a co-applicant only insofar as the property owned or controlled by them is affected.

Dated at Montpelier, Vermont this 12th day of July, 1985.

ENVIRONMENTAL BOARD

by:

  
Darby Bradley, Chairman  
Ferdinand Bongartz  
Lawrence H. Bruce, Jr.  
Jan S. Eastman  
Roger N. Miller