

AA

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

RE: Mr. & Mrs. Joseph **Gagnon**
and Kenneth **Gagnon** by
John D. Hansen, Esq.
Corsones & Hansen
1 Nickwackett St.
Rutland, VT 05701-4017

MEMORANDUM OF DECISION
Declaratory Ruling Request
#173

On March 26, 1986, a petition for a Declaratory Ruling was filed with the Environmental Board ("the Board") by Stephen Alan Dardeck, Esq. on behalf of Mr. and Mrs. Joseph **Gagnon** and Kenneth **Gagnon** from Executive Officer Advisory Opinion EO-85-91 dated March 17, 1986, concerning the applicability of Act 250 to the disposal and storage of slab wood in the "West Field" of the **Gagnon's** property in Pittsford, Vermont.

On April 1, 1986, the Board notified the parties of its intent to designate its Chairman to act as administrative hearing officer in this matter pursuant to Board Rule 41 and 3 V.S.A. § 811. Having received no objection to the use of this procedure, the Board convened a public hearing on the Petition on May 9, 1986, in Pittsford, Vermont, with Chairman Darby Bradley acting as hearing officer. The following participated as interested parties at the hearing:

Mr. and Mrs. Joseph **Gagnon** by John D. Hansen, Esq.
Mr. and Mrs. Vincent Kratz by Theodore **Parisi**, Esq.

Mr. and Mrs. Kratz were allowed to participate as interested parties because they own property and reside directly across Stevens Road from the so-called "West Field" on which the slab wood from the sawmill operation has been deposited. Their residence is approximately 900 feet westerly of the intersection of Corn Hill Road and Stevens Road, and the **Gagnon** property in question is clearly visible from their property.

Mr. James Temple, also represented by Theodore **Parisi**, Esq., was not allowed to participate as an interested party at this hearing. The Chairman reserved judgment on Mr. Temple's status until more information is provided regarding any interest that he may have in this proceeding.

After the presentation of preliminary legal motions by the petitioner and rulings on these motions by the Chairman, the hearing was continued so that the Chairman's rulings could be reviewed and final rulings made by the full Board. The Chairman conducted a brief site visit after the hearing was recessed.

3/86
DR 173M

The Environmental Board considered the Proposed Memorandum of Decision of the Hearing Officer, together with the memoranda of law submitted by the parties. The full Board convened a public hearing on June 11, 1986, to hear oral arguments of the parties. This Memorandum of Decision is based upon the record developed at the hearings.

Findings of Fact

1. Mr. and Mrs. Joseph **Gagnon** have operated a sawmill for commercial purposes on their property off Corn Hill Road in Pittsford, Vermont since at least the 1960s. The tract of involved land exceeds ten acres in size.
2. Until at least 1969, the sawmill operation was small in nature and was concentrated on their property in the area near their farm buildings.
3. Since 1970, various changes have apparently occurred in the sawmill operation, including the storage and/or disposal of slab wood on the so-called "West Field" adjoining Stevens Road and across from the Kratz residence. No findings are made at this time as to whether these changes would constitute "substantial changes" under 10 V.S.A. § 6081(b) and Board Rule #1(G).

Legal Issues

The parties have asked the Environmental Board to decide three issues before the Hearing Officer proceeds with the taking of evidence in this case. The issues are:

1. Does the issuance of an Advisory Opinion by the Executive Officer under Board Rule 3(C) become final and binding upon the parties if no appeal is filed within 30 days, as required by the Rule?
2. After a declaratory ruling proceeding has been commenced, and a hearing duly warned and held, does the person petitioning for the ruling have an absolute right to withdraw his petition, even over the objection of another party?
3. Where a commercial development is exempt under **10 V.S.A. §6081(b)** because it was in existence prior to June 1, 1970, who carries the burden of proof in showing that a "substantial change" has, or has not, occurred?

Effect of an Advisory Opinion. An Advisory Opinion is a formal interpretation of the law by a District Coordinator or the Executive Officer. The Advisory Opinion process was

adopted by the Board under Rule 3(C) to provide the parties with a convenient method by which jurisdictional questions could be answered. A District Coordinator may render an Advisory Opinion simply upon the statements of one party and without notice to other parties. At the Executive Officer level, the statutory parties are usually notified of the request for an Advisory Opinion and invited to submit written statements or other evidence. Rarely, if ever, does a District Coordinator or the Executive Officer conduct a formal hearing. It is clear from Rule 3(C) that the Advisory Opinion process is optional, and that any party may proceed directly to the Board with a petition for a Declaratory Ruling.

Because Advisory Opinion proceedings are optional with no requirement of notice or opportunity for a hearing, they are advisory only and cannot be considered as binding jurisdictional determinations. See Davis, Administrative Law 265-67 (1970). Nevertheless, they do serve notice on a person that Act 250 jurisdiction may apply, and they may be used in subsequent enforcement proceedings to show knowledge or intent to violate the law. See 10 V.S.A. § 6006. That is, if an Advisory Opinion concludes that an Act 250 permit is required and the person conducting the activity in question neither appeals the Advisory Opinion nor obtains a permit, that person is clearly subjecting himself to a possible enforcement action. The question of Act 250 jurisdiction could then be litigated in the context of the enforcement action if raised as a defense. Thus, in this case, the Advisory Opinions of the District Coordinator and the Executive Officer do not constitute final determinations of Act 250's jurisdiction over the Gagnon sawmill operations.

By contrast, the procedure for obtaining Declaratory Rulings is more formal. The authority to act upon petitions for declaratory rulings rests solely in the Environmental Board. Board Rule 3(A). The proceedings are treated as a "contested case" under the Administrative Procedure Act. 10 V.S.A. § 6002. Notice is given to statutory parties and published in the newspaper. Board Rule 3(E). A hearing is conducted in which testimony is given by sworn witnesses under the rules of evidence. The decision of the Board is final, unless appealed to the Supreme Court.

The essential difference between a Declaratory Ruling and an Advisory Opinion is that the former is a binding determination of the parties' contested rights. Brimmer v. Thompson, 521 P.2d 574, 579 (Wyo. 1974). Declaratory Rulings have the same legal effect as decisions made in contested hearings and are binding on both the agency and parties.

The significance of the binding effect of a declaratory ruling is that it is not subject to collateral attack in a subsequent enforcement action. Duffy v. State Department of

Social and Health Services, 585 P.2d 470, 474 (Wash. 1978). Thus, if the person conducting the activity in question neither appeals a Declaratory Ruling to the Supreme Court nor obtains a permit, he is precluded by the principle of res judicata from challenging Act 250 jurisdiction in any subsequent enforcement proceeding brought against him. See United States v. Utah Construction and-Mining Co, 384 U.S. 394, 422 (1966).

Withdrawal of a Petition. Because this Hearing Officer has ruled that the Advisory Opinion is not binding upon the Gagnons, the Gagnons now seek to withdraw their petition for a Declaratory Ruling. The adjoining landowners have objected to a dismissal of the proceedings.

In this case, a petition for a declaratory ruling was filed by the Gagnons as an appeal from the executive officer's Advisory Opinion. Notice was duly given, and a hearing was convened by the Board. The adjoining landowners **Kratz** came to the hearing prepared to present testimony and exhibits in support of their position that there has been a "substantial change" in the operation of the **Gagnon** sawmill, and that Act 250 therefore applies.

Administrative declaratory rulings follow essentially similar procedures as declaratory judgments in the courts. Cavendish v. Vt. Public Power Supply Authority, 141 Vt. 144, 147 (1982). Under Rule 41 of the Vermont Rules of Civil Procedure, a "plaintiff" has an absolute right of dismissal if (1) the notice of dismissal is filed before an opposing party serves an answer or motion for summary judgment, or (2) all parties who have appeared in the action sign the stipulation of dismissal. Otherwise, dismissal is allowed at the discretion of the court. V.R.C.P. Rule 41(a).

The purpose of a Declaratory Ruling proceeding is to determine whether a particular activity requires an Act 250 permit. Given the fact that the issue of whether there has been a "substantial change" at the **Gagnon** sawmill must ultimately be resolved if a similar petition is filed by the Kratzes or if enforcement proceedings are commenced by the Board, common sense and judicial economy dictates that these proceedings should go forward.

The Board declines the request to dismiss the petition.

Burden of Proof. In declaratory judgment actions decided by the courts, the burden of proof normally rests upon the petitioning party. In proceedings where Act 250's jurisdiction is at issue, however, the determination of which party carries the burden of proof should not depend upon whether the determination is sought by **the person** conducting the activity in question or by some other interested party.

When addressing the issue of burden of proof, it is helpful to distinguish between the burden of going forward and producing evidence and the burden of proof. The person who raises the question of jurisdiction has the burden of production; that is, he must provide sufficient evidence to the Board for the Board to be able to find that the particular activity in question meets the definition of "development" or "subdivision" under 10 V.S.A. § 6001 so that it requires an Act 250 permit under 10 V.S.A. § 6081(a). In many Declaratory Ruling **cases** which come before the Environmental Board, there is no "opponent." In these cases, the Board must make its judgment based solely upon the evidence presented by the petitioner and upon the Board's own inquiry.

If the Board finds that a particular activity falls within the definition of "development" or "subdivision," the burden of proof is on the person conducting the activity to show that the activity is nonetheless exempt from jurisdiction under 10 V.S.A. § 6081(b) because it predated the enactment of the law. The person carrying on the activity must establish by a preponderance of the evidence that it was in existence prior to the Act's effective date, or a permit must be secured. See Weston Island Ventures, D.R. 169 (June 3, 1985); Bluto v. Dept. of Employment Security, 135 Vt. 205 (1977).

Once it has been established that a pre-existing development or subdivision is exempt, a permit will nevertheless be required if a "substantial change" has occurred. There is no presumption that a substantial change either has or has not occurred since the enactment of Act 250. In order to assert jurisdiction, the Board must find, by a preponderance of the evidence, that there has been a substantial change.

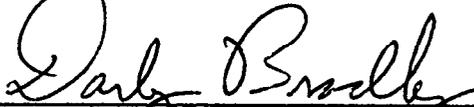
The party who seeks to change the present state of affairs generally has the burden of proof. McCormick, Evidence 949. The burden of production should likewise rest on the person seeking to alter the status quo.

In the case at hand, the preliminary evidence suggests that the **Gagnon** sawmill operation meets the definition of "development" under 10 V.S.A. § 6001(3), and would require an Act 250 permit if it were constructed today. It further suggests, however, that the sawmill operation was in existence prior to June 1, 1970, the effective date of the Act, and may be exempt under 10 V.S.A. § 6081(b). The principal issue to be decided, if this case goes forward on the merits, is whether a "substantial change" has occurred in the operation of the sawmill so that a permit must still be secured.

Insofar as the adjoining landowners **Kratz** hope the Board will find a "substantial change," they will carry the burden of production and the burden of proof on that issue.

Dated at Montpelier, Vermont this 3rd day of July, 1986.

VERMONT ENVIRONMENTAL BOARD



Darby Bradley, Chairman
Ferdinand Bongartz
Lawrence H. Bruce, Jr.
Dwight E. Burnham, Sr.
Elizabeth Courtney
Jan S. Eastman
Samuel Lloyd
Roger N. Miller