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

RE: Eastland, Inc. by Potter Stewart, Jr., Esq.
Kristensen, Cummings, Murtha & Stewart, P.C.
P.O. Box 677
Brattleboro, Vermont 05301-0677

Declaratory Ruling #177

On November 17, 1986, a petition for a declaratory ruling was filed with the Environmental Board (Board) by Eastland, Inc. (Petitioner) on the question of whether certain sales of land by the Petitioner in the Town of Grafton, Vermont, constitute a "subdivision" within the meaning of 10 V.S.A. §§ 6001(19) and 6081(a), and thus require an Act 250 permit.

On January 13, 1987, the Board convened a prehearing conference in Rutland, Vermont. The Board issued a Prehearing Conference Report and Order on January 16, advising the parties of its intention to conduct the hearing by way of an administrative hearing panel pursuant to the procedures set forth in Board Rule 41. No party objected to the use of this procedure. The hearing panel convened a public hearing in the proceeding on February 5. Following the hearing, the parties submitted memoranda on the legal issues raised in this proceeding. The deadline for the submission of briefs was March 20 by agreement of the parties, and was later extended to March 27.

The following parties participated in the public hearing:

Petitioner Eastland, Inc. by Potter Stewart, Jr., Esq. and Robert Bourque
Town of Grafton (Town) and Grafton Planning Commission (Planning Commission), by Richard Schwolsky and (subsequently) Robin Stern
Windham Regional Planning and Development Commission (Windham Commission), by Joan Price

A proposed decision was issued by the Administrative Hearing Panel on April 14. The parties were given an opportunity to submit written objections and request oral argument before the full Board. At the request of the Petitioner, the Board scheduled oral argument on May 14. Following the hearing, the Board conducted a deliberative session, determined that the record was complete, and adjourned the matter. The following findings of fact and conclusions of law are based upon the record developed at the hearings.

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I. ISSUES IN THE APPEAL

The principal issue to be resolved in this proceeding is whether the Petitioner has subdivided ten or more lots within a five-mile radius over a ten-year period, so that an Act 250 permit is required. The Petitioner's position is that he has subdivided only six lots, which were created from a 64 acre parcel purchased from a Dr. Pearson. He claims that he cannot be deemed to have "owned or controlled" a second parcel having 81.9 acres. This parcel was divided into eight lots after the Petitioner had signed a purchase and sale agreement, but before legal title actually passed to the Petitioner.

The Town, Planning Commission and Windham Commission did not initially take any legal position in this proceeding. Following the February 5 public hearing, however, the Town, through its attorney Robin Stern, filed a legal memorandum in support of the assertion of Act 250 jurisdiction.

II. FINDINGS OF FACT

1. On February 5, 1985, Eastland, Inc. purchased 64± acres on Town Highway #25 in Grafton from Dr. Frederick Pearson. The deed for this transaction is recorded in Book 31, Page 305 of the Grafton Land Records.

2. Eastland, Inc. subdivided the 64± acres into six lots. Three of these lots are less than ten acres. Eastland, Inc. applied for and received a Subdivision Permit from the Protection Division of the Department of Water Resources for these three lots (#EC-2-1228).

3. Between May 3, 1985 and June 8, 1985, the six lots from the former Pearson property were sold to six separate parties.

4. On May 2, 1985, Eastland, Inc. entered into a purchase and sale agreement with Norman E. Tuttle for the purchase of "approximately 81.9 acres per survey map drawn by DiBernardo Associates." This property is approximately one mile from Eastland's six-lot subdivision described above. The property had been surveyed by DiBernardo Associates in 1976 (Exhibit #2). The 81.9 acres had not been subdivided at the time the purchase and sale agreement was signed. The purchase and sale agreement did not require the seller Norman Tuttle to subdivide the land prior to its sale to Eastland, Inc.

5. A revised survey map for the Tuttle property was prepared by DiBernardo Associates dated May 20, 1985. The map shows the Tuttle property subdivided into eight lots, all of which are larger than ten acres.

6. On June 4, 1985, DiBernardo Associates issued Invoice No. 2794, on account to Mr. Norman Tuttle for the subdivision survey.

7. An undated, handwritten note along the margin of the purchase and sale agreement between Eastland, Inc. and Norman Tuttle indicates that the buyer, Eastland, Inc., increased the purchase price to include the cost of the survey by DiBernardo Associates.

8. On June 12, 1985, Norman Tuttle conveyed the entire 81.9± acres to Eastland, Inc. in one deed. The deed was recorded on June 17, 1985 in Book 31, Page 340 of the Land Records of Grafton. An attachment to the deed, Schedule A, described the eight lots illustrated on the May 20, 1985 survey.

9. The Property Transfer Tax Return was prepared by counsel for Eastland, Inc. This document identifies the land being conveyed as 81.9 acres and it does not indicate that a subdivision was being conveyed.

10. Eastland, Inc. has sold all eight lots. The first was conveyed on June 28, 1985. The seven remaining lots were sold between July 17, 1985 and September 4, 1985.

The following persons purchased the eight lots:

Ralph & Carmen Saro	Lot #1
Robert A. & Christine Carpin	Lot #2
Ronald L. Rivers	Lot 3 or 4
Nicolas A. & Rina C. Rodriquez	Lot 3 or 4
Albert R. Gregoire and Sandra Shields	Lot #5
Louis & Linda Cutler	Lot #6
Leonard F. & Jane E. Gigliotto	Lot #7
William H. Rolls	Lot #8

11. Eastland, Inc. had previously subdivided six lots within a 5 mile radius of the Tuttle property.

III. CONCLUSIONS OF LAW

Section 6001(19) of 10 V.S.A., Chapter 155 (Act 250) defines the term "subdivision" as follows:

> "Subdivision" means a tract or tracts of land, owned or controlled by a person, which have been 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, and within any continuous period of 10 years after the effective date of this chapter. In determining the number of lots, a lot shall be counted if any portion is within five miles.

There is no disagreement among the parties that most of the elements of this definition have been met: The two tracts at issue here are within five miles of each other; the two divisions of land occurred within a ten year period and were for the purpose of resale; the Petitioner owned and controlled the Pearson parcel at the time of its division into six lots; and the Petitioner did not own the Tuttle parcel at the time of its division in eight lots.

The only element in the definition of "subdivision*' over which there is any disagreement among the parties is whether the Petitioner is deemed to have "controlled" the Tuttle parcel, for purposes of Act 250 jurisdiction, at the time it was divided. The Petitioner places great weight on the,fact that the May 2 purchase and sale agreement did not require the seller to subdivide the parcel, and that the buyer could not have compelled the seller to do so. The argument is that unless the seller had a legal obligation to subdivide the land, the buyer cannot be deemed to be in control of the subdivision.

The Board agrees with the Petitioner that a person who enters into a written contract to purchase land does not thereby acquire all the attributes of legal ownership and control over thatproperty. Unless specifically provided for in the purchase and sale agreement, the prospective buyer does not, for example, have the right of possession, the right to harvest timber or cut hay, the right to collect rent, or even the right to apply for an Act 250 permit without the signature of the owner (see Board Rule 10(A)). All of these rights are held in abeyance until, and are contingent upon, the closing of the sale and the passing of title.

The fact that the purchaser has not yet obtained all of the attributes of ownership until closing, however, does not mean that the signing of the purchase and sale agreement has no legal significance. In fact, Vermont case law supports the position that a purchase and sale contract operates as a conveyance to the purchaser of equitable title, a form of

legal ownership. Troy v. Hanifin, 132 Vt. 76, 81 (1974); Black River Assoc., Inc. v. Koehler and Dion, 126 Vt. 394 (1967). With the execution of that agreement, the purchaser obtains many elements of control over the property. He can, for example, prevent the owner from selling the property to a third party, assuming that party has actual or constructive notice of the first agreement. He can prevent the owner from causing "waste" to the property. He can prevent the owner from subdividing the property./l/ And, most importantly, he can compel the owner, through court proceedings if necessary, to convey the property to the purchaser, provided he has complied with all the terms and conditions of the agreement.

In this case, the actions taken by the Petitioner demonstrate that the Petitioner exerted direct control over the creation and sale of this subdivision. At the time that Eastland, Inc. entered into a contract to purchase the 81.9 acre property, the land had not yet been subdivided. At the request of the Petitioner, the seller agreed to have his land surveyed into an eight-lot subdivision before closing if the Petitioner would pay for the survey. The cost of the survey was added to the purchase price, as indicated by an undated, handwritten note in the margin of the purchase and sale agreement, and paid for by Eastland, Inc. Moreover, when the Petitioner's attorney prepared the Property Transfer Tax Return, he described the property as an 81.9 acre parcel, with no reference to an existing subdivision. This supports the position that Tuttle conveyed the parcel in its entirety to Eastland, Inc., who then conveyed the subdivision (individual lots) to separate owners.

When a statute is clear and unambiguous on its face, the Board must apply the plain meaning of the statute. However, when a statute is capable of more than one reasonable interpretation, the Board must seek to discover the interpretation that most closely conforms with the Legislature's intent in adopting the statute. The question here is whether the Petitioner's interpretation of the word "control" is consistent with and achieves the goals which the Legislature intended in enacting Act 250.

/1/ During the public hearing, the Hearing Panel asked whether the Petitioner could have prevented Mr. Tuttle from dividing the parcel into twelve lots, instead of onlv eight, with the result that Mr. Tuttle's successors and assigns would have been subject to Act 250 jurisdiction. The Petitioner's attorney answered that the Petitioner could have compelled the seller to convey the entire 81.9 acres as a single parcel without subdivision. We agree.

It seems likely that if this Board did adopt the Petitioner's view, few, if any, divisions of land in the future would require Act 250 review, unless the subdivision happened to be a "development' under 10 V.S.A. § 6001(3). The procedures which the Petitioner followed in this case would become routine, with sellers agreeing orally, but never in writing, to subdivide land on behalf of buyers prior to the closing. The real party in interest here--the person who suggested subdividing the property, decided how many lots would be created, directed where the survey lines would be drawn, and paid for the survey--is the Petitioner. While the Petitioner may not have possessed all of the attributes of ownership of the parcel prior to the time of closing, the Board concludes that the Petitioner possessed enough of these attributes to be deemed to have "controlled" the land for purposes of 10 V.S.A. § 6001(19) and § 6081(a).

10 V.S.A. § 6081(a) requires that a permit be obtained before a person sells or offers for sale any interest in any subdivision but exempts from this requirement "the sale, mortgage or transfer of all, or an undivided interest in all, of a subdivision unless the sale, mortgage or transfer is accomplished to circumvent the purposes of this chapter." (Emphasis added)

The Petitioner had previously subdivided six lots within a five mile radius of the Tuttle property. It was therefore limited to subdividing only three more lots before it would have to obtain an Act 250 permit to subdivide additional lots. The Board believes that the circumstances of this case--where a buyer (who would be subject to Act 250 jurisdiction were he to subdivide additional lots) directs the seller of a property to subdivide the property before closing, for the direct benefit of the buyer who intends to sell the lots--is just the type of situation contemplated by the Legislature when it included the prohibition_ against the circumvention of the purposes of Act 250.

At the hearing on May 14, the Petitioner requested the Board, if it concludes that the Petitioner must obtain a permit, to allow the purchasers of the lots to reconvey their interests to the Petitioner. The Board believes that once certain actions have been taken that trigger Act 250 jurisdiction over a parcel of land, "undoing" those actions does not change the fact that there is now jurisdiction over the property. Therefore, the Board will require the Petitioner and the legal owners of the eight lots in this subdivision to apply for an Act 250 permit.

ORDER

In view of our conclusion that Eastland, Inc. has created a "subdivision" of the former Tuttle property, a Land Use Permit pursuant to 10 V.S.A. § 6081(a) must be secured from the District #2 Environmental Commission. The Petitioner, together with the current legal owners of the eight lots, shall immediately begin the preparation of an Act 250 application, which shall be filed on or before August 1, 1987. No construction or improvements or other physical alteration of the property shall occur prior to the District Commission's review and approval of the application.

Dated at Montpelier, Vermont this 18th day of June, 1987.

ENVIRONMENTAL BOARD

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