

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

RE: **Patten** Corporation Northeast Findings of Fact and
by James P. W. Goss, Esq. Conclusions of Law
Abell, Kenlan, Schwiebert Declaratory Ruling #186
& Hall
P.O. Box 578
Rutland, VT 05701

On February 12, 1987, a petition for a declaratory ruling was filed with the Environmental Board (Board) by James P. W. Goss, Esq. on behalf of **Patten** Corporation Northeast (Petitioner) concerning the applicability of 10 V.S.A. Chapter 151 (Act 250) to the construction of improvements on sections of Mansfield Road and Mountain Lake Road serving certain lots created and owned by the Petitioner in Londonderry, Vermont. At issue is whether these improvements to these roads are necessary for the purchasers of the lots to gain access to their lands. The petition was filed as an appeal of the District #2 Assistant Coordinator's Advisory Opinion #2-25 dated January 10, 1987, which concluded that an Act 250 permit was required for the construction of improvements which will necessarily result from the prior sale of the lots in question.

On March 11, 1987, the Board notified the parties of its intention to use an administrative hearing officer as provided for in Board Rule 41 and 3 V.S.A. § 811. No party objected to this procedure. The Chairman of the Board conducted a prehearing conference on March 23, 1987 and a public hearing was scheduled for May 14, 1987. At the request of the Petitioner the public hearing was cancelled, and the Petitioner agreed to submit stipulated facts to the Board by May 18, 1987 in lieu of a public hearing.

On May 19, 1987, the Board received the Petitioner's Statement of Facts and Memorandum of Law. A proposed decision was issued by the Chairman on August 31, 1987. The parties were given an opportunity to submit written objections and to request oral argument before the full Board. Having received no objections or requests for oral argument, the Board deliberated on the proposed decision on December 9, 1987. After Board deliberations on January 12, 1988, a revised proposed decision was issued by the Board. Because the revised proposed decision was significantly different from the original, the parties were again given an opportunity to submit written objections and to request oral argument. At the request of the Petitioner, the Board held a public hearing on February 16, 1988 for the purpose of oral argument. Following the recess of the hearing, the Board conducted a final deliberation. The following

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findings of fact and conclusions of law are based upon the record developed at the oral argument and the information provided by the Petitioner on May 19, 1987 and admitted into the record by stipulation.

I. ISSUES IN THE PROCEEDING

The principal issue which the Environmental Board must decide in this proceeding is whether there is Act 250 jurisdiction over a 14-lot subdivision created by the Petitioner in 1983 in South Londonderry, Vermont. The question to be decided is whether this project constitutes a "development" under 10 V.S.A. § 6001(3) and Board Rule 2(A) (6), the so-called "Road Rule." A subsidiary issue raised by the Petitioner is whether a development may be deemed to have "commenced" when there has been no physical alteration to or construction on the road.

In the Petitioner's Memorandum of Law, the following two additional arguments were advanced:

1. Rule 2(A)(6) is void for exceeding the bounds of its enabling legislation and thus does not constitute a basis for Act 250 jurisdiction in this case.

2. The advisory opinion giving rise to this appeal should be conclusively deemed to be for informational purposes only and not of binding jurisdictional effect.

II. FINDINGS OF FACT

1. On February 12, 1983, **Patten** Realty Corporation (predecessor to **Patten** Corporation Northeast) purchased the 204.4 acres comprising the project from Gordon M. **Moodie** and Maclain B. Smith. The Petitioner had previously prepared a subdivision plat dated January 24, 1983, in which the property was divided into fourteen lots ranging in size from 10.7 acres to 24.3 acres. These lots were sold to individuals during 1983 with no restrictions regarding the type of residential use allowed.

2. Lots 1-9 are located along Mansfield Road. The portion of this road which serves Lots 1, 2, and 3 is designated as a Class 3 town highway and is maintained by the Town of Londonderry to be passable by **pleasur** cars at all seasons of the year. Lots 4, 5, 6, 7, 8, and 9 are located along a privately owned section of Mansfield Road. This 2000'± section of the road is presently 12 to 15 feet wide and is bounded by stone

walls located approximately one and one-half rods on either side of the centerline of the travelled portion. The road has little if any gravel base and no roadside ditching. This portion of the road is plowed during the winter by the property owners. Mansfield Road beyond Lot 9 is a primitive unimproved woods road.

3. Lots 10, 11, 12, **13A**, and 13B are located along Mountain Lake Road. This road is a town maintained Class 3 town highway from before Lot 10 to the first 100 feet of Lot **13A**, after which it is a Class 4 town highway that is little more than a one-lane unimproved woods road with no drainage or gravel base. Lot 13B is located approximately 100 feet from the nearest town maintained portion of the road.
4. Mansfield Road, from Lot 3 to Lot 9, must be significantly improved so that adequate year-round automobile access sufficient for the needs of a six-lot subdivision can be provided. Specifically, the roadbed must be raised about one foot by the addition of gravel to provide better drainage, and the road should be widened in some locations to provide adequate vehicle passing room. In order to provide year-round access to most portions of Lots **13A** and **13B**, at least 200 feet of Mountain Lake Road must also be reconstructed.
5. The Town of Londonderry has granted a building permit for a house on Lot 9 and a foundation has been constructed on this lot. A cellar hole has been excavated on Lot 8.
6. In the course of purchasing and selling the property in 1983 or thereafter, the Petitioner did not commence construction of any improvements on the land, or alter the property or the roads comprising the project. During the marketing of the lots, the Petitioner did plow Mansfield Road in February and March of 1983.
7. In the intervening four years since the sale of these lots, no significant construction of improvements has occurred on the roads serving these lots. From the visual evidence presented by the Petitioner, it is clear that the section of Mansfield Road serving Lots 4-9 has been graded at some time in the recent past.

III. CONCLUSIONS OF LAW

Section 6081(a) of 10 V.S.A., Chapter 151 prohibits the commencement of construction of a development without a permit. "Development" is defined in part by Environmental Board Rule **2(A)** (6) as:

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 (Amended, effective March 11, 1982).

The Board concludes that the sale of these parcels of land by Patten Realty Corporation in 1983 did constitute "development" and a permit was required at that time because construction of significant improvements to both Mansfield and Mountain Lake Roads was required to upgrade the roads to conditions suitable for adequate year-round access to a residential subdivision.

This case is not significantly different from earlier Board Declaratory Rulings regarding the so-called "road rule," although some of the facts of these cases are different. In Re: Dr. Bernard Barney, Declaratory Ruling #82, the landowner created a situation in which construction of improvements by the landowners for roads would be required to provide adequate access to the parcels of land being conveyed. In Re: Town Highway #37, Middlesex, Vermont, Declaratory Ruling #156, access existed to certain parcels of land being conveyed prior to their conveyance. However, because the Class 4 Town Highway was deficient for the purposes of providing adequate access to the proposed subdivision, the permittees undertook the reconstruction of the town highway prior to the sale of the lots. In both cases the Board ruled that the subdividers of the properties were creating situations in which road construction was required for reasonable access to the subdivision, and, therefore, a permit was required.

Applying the reasoning of these two cases to this situation leads the Board to conclude that the construction of improvements required for the upgrade of these deficient private and Class 4 town roads is incidental to the sale of land, notwithstanding that the applicant did not construct any

improvements, that four years have passed since the sale of the lots, and that no improvements have been constructed by the lot owners to date. Because **Patten Corporation Northeast** created the situation where the roads must be improved to serve the reasonably expected use of the subdivided lots, the construction of improvements is a direct result of, and therefore incidental to, the sale of this land. Consequently, **Patten Corporation Northeast**, with all of the owners of the lots served by these roads as co-applicants, must apply for and obtain a permit pursuant to 10 V.S.A., section 6081(a).

In response to the first issue raised in the Petitioner's Memorandum of Law, as outlined above, the Board concludes that Rule 2(A) (6) is a valid interpretation of the enabling legislation. The Board has earlier discussed this issue in detail in Re: R. Brownson Spencer II, Joseph H. Vargas III, and Harry and Martha Ryan, Findings of Fact and Conclusions of Law #1R0576-1-EB, March 10, 1987.

The Board also concludes that the advisory opinion which gave rise to this declaratory ruling is only "advisory" in nature. The Board has previously addressed this question in a Memorandum of Decision in Re: Mr. and Mrs. Joseph Gagnon and Kenneth Gagnon, Declaratory Ruling #173, July 3, 1986.

IV. ORDER

Patten Corporation Northeast with all lot owners served by the non-Class III portions of Mansfield and Mountain Lake Roads as co-applicants, shall apply to the District Environmental Commission for a land use permit by June 15, 1988. A permit must be obtained by June 15, 1989.

Dated at Montpelier, Vermont this 2nd day of March, 1988.

ENVIRONMENTAL BOARD



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