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

RE: Marble Realty, Inc.
c/o Roy H. Marble
Rt. 1 - Box 710
Stafford Avenue
Morrisville, VT 05661

Declaratory Ruling #194

On July 7, 1987 a petition for a declaratory ruling was filed with the Environmental Board (Board) by Roy H. Marble of Marble Realty, Inc. (Petitioner) regarding the interpretation of H.383 as it applies to two previously created but as yet unsold lots which are located within the same jurisdictional area of a District Commission as a 52 lot subdivision also created by the Petitioner. It is the Petitioner's position that the two previously created lots should not be subject to Act 250 jurisdiction because they were legally permitted by the State pursuant to Chapters 3, 7, and 8 of the Environmental Protection Rules prior to July 1, 1987, the effective date of H.383.

On August 7, 1987, the Chairman of the Board convened a prehearing conference in Montpelier, Vermont. The only party in attendance at the prehearing conference was Petitioner Roy H. Marble represented by Sherman W. White, Esq. At the prehearing it was agreed that in lieu of a public hearing the Petitioner would file a legal memorandum on the question and the Chairman would prepare a proposed decision to be reviewed by the full Board.

I. ISSUES IN THE DECLARATORY RULING

The principal issue to be decided in this case is whether the amendments to 10 V.S.A. Chapter 151 (Act 250), effective July 1, 1987 as the result of passage of House Bill 383, require that lots previously approved for subdivision under Chapters 3, 7, and 8 of the Vermont Environmental Protection Rules must receive permits under Act 250 before they can be legally conveyed. As a secondary question, the Petitioner asks whether unsold lots created more than five years ago which were approved under the Vermont Environmental Protection Rules, which were exempt from the Rules, or which were pre-existing lots, would be affected by the changes in the law that took effect on July 1, 1987.

On September 30, following a review of the proposed decision and the legal memorandum submitted by the Petitioner, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision.

II. FINDINGS OF FACT

1. Petitioner Roy H. Marble is a partner in a 52 lot subdivision located in Morristown, Vermont, which is subject to Land Use Permit #5L0877 issued on December 9, 1986. Morristown is located in District #5.

2. The Petitioner is also a co-owner of two lots in Cambridge, Vermont (also in District #5) located approximately 19 miles from the Morristown subdivision. The two lots were originally certified as pre-existing lots of the former Wesley Miller Farm by letter of the Agency of Environmental Conservation dated July 1, 1970. Pre-existing Lot #4 was acquired by the Petitioner in December of 1986. Adjacent pre-existing Lot #9 was acquired by the Petitioner and his partner Marc Mallett in February of 1987.

3. The owners determined that it was advantageous to reconfigure the two pre-existing lots and had a new survey prepared dated February 9, 1987. Applications for approval of the new lot layout were filed with the Agency of Environmental Conservation under the Environmental Protection Rules and Permit #EC-5-1453 was issued on April 17, 1987.

4. None of the lots in either the 52 lot or two lot subdivision had been sold as of July 1, 1987.

III. CONCLUSIONS OF LAW

With the passage of H.383, the definition of a "subdivision" in 10 V.S.A. § 6001(19) has been changed significantly. Prior to this change, a "subdivision" was defined in pertinent part as:

> [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.

H.383 changed this definition by expanding the scope of jurisdiction to the entire jurisdictional area of the same district commission, and by reducing the time period for counting previously created lots from ten years to five years. Consequently, when this amended definition is read in conjunction with 10 V.S.A. § 6081(a), which requires a

permit prior to the sale or offer for sale of any interest in any "subdivision" in the state, it is clear that an Act 250 permit is required when a "person" offers for sale ten or more lots which the person has partitioned or divided within the past five years within a five mile radius or within the jurisdictional area of a district commission.

Less clear, however, is which lots are to be counted for the purpose of determining whether ten or more lots have been partitioned or divided within the prescribed five year period. The Legislature attempted to answer this question with the language of the implementation section of H.383 which reads as follows:

> Any lot, all portions of which are greater than five miles apart, but any portion of which are within the jurisdictional area of a district commission, shall not be counted as a lot, solely on the basis of that distinction, if it was conveyed before the effective date of this act. (Emphasis added)

The Board believes that this section means that any lot located beyond a five mile radius from other lots and within the jurisdictional area of the same district commission must be counted if it was created within the last five years and it has not been conveyed prior to July 1, 1987.

If all of these unconveyed lots must be counted, the next question to be resolved is in what circumstances, if any, must a permit be obtained prior to the sale of any unconveyed lots created within the last five years and located beyond the five mile radius but within the jurisdictional area of the same district commission? The answer to this question depends upon the number of unconveyed lots and whether the partitioner has created any other lots as outlined in the definition of a subdivision in 10 V.S.A. Chapter 151, § 6001(19) which would result in a total of ten or more.

Based upon our interpretation of the relevant sections of Act 250 as amended by H.383, the Board concludes that if a person has offered or is offering ten or more lots for sale which were created within the preceding five years and which are located within a five mile radius or within the jurisdictional area of the district commission, as of July 1, 1987 a permit must be obtained prior to the sale or offer for sale of any of these lots. The only difference between the law as it existed prior to July 1, 1987 and the law as it currently exists is that unconveyed lots which were created within the last five years, located beyond the

five mile radius but within the jurisdictional area of the district commission, must now be counted. If these lots total ten or more or, if when added to other lots created within the five mile radius within the past five years they total ten or more, a permit is required. Whether the lots within the district but outside of the five mile radius were legally created under the Vermont Environmental Protection Rules or one of the exemptions to these rules is not relevant. These lots are only exempt from being counted for Act 250 purposes if they were conveyed as of July 1, 1987.

The Petitioner argues that it is unreasonable to require an Act 250 permit in this situation because all of the lots were legally created prior to July 1, 1987 and the Petitioner has done nothing since that date to change the situation. The Petitioner also argues that the "State" would be invalidating its own subdivision permit if it rules that an Act 250 permit must be obtained prior to the sale of these lots.

In response to the first argument, we believe that the implementation language of H.383 was intended by the Legislature to prevent the creation of a significant number of new lots prior to the effective date of the amendments, using the then existing exemptions in the statute and by recording these exempt subdivisions in the local land records to obtain a vested right to these lots. To prevent this from occurring, the Legislature deliberately exempted only those lots which were conveyed prior to July 1, 1987. Unfortunately for the Petitioner and others in the same circumstances, no exemption was included for lots which were permitted under the Environmental Protection Rules. The Board acknowledges that those lots created before July 1 could have been exempted from the permit requirement without contravening the intent of the law. Because of the specific language in the implementation section of H.383, however, the Board concludes that it would be exceeding its delegated authority if it were to exempt a category of lots from the requirements of this amended law, specifically when the Legislature failed to do so.

In response to the Petitioner's second argument, the Board concludes that nothing in this ruling would in any way invalidate the Agency of Environmental Conservation's (now Natural Resources) permit under the Environmental Protection Rules. This permit remains valid under these regulations, since authority for these rules derives from 18 V.S.A. § 1218, under the jurisdiction of the Agency of Natural Resources. This decision only indicates that another permit (Act 250) must be obtained prior to the sale of these lots.

Finally, as can be inferred from the Board's conclusions above, it is clear that any lot which was created more than five years ago under an earlier exemption would retain that exemption because lots can only be counted if they were created within the past five years as defined by Environmental Board Rule 2(B). Had the Petitioner not had the lots resurveyed and new lot lines drawn in 1987, the two lots in question would have retained their pre-existing status and would not now be subject to Act 250 jurisdiction.

IV. ORDER

Because the two Cambridge lots must be counted and because the total number of lots when added to the other 52 unconveyed lots within the district exceeds ten lots, an Act 250 permit must be obtained prior to the sale of these lots.

Dated at Montpelier, Vermont this 8th day of October, 1987.

ENVIRONMENTAL BOARD

Leonard U. Wilson Chairman
Lawrence H. Bruce, Jr.
Elizabeth Courtney
Jan S. Eastman
Arthur Gibb
Samuel Lloyd
Roger Miller