

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

RE: Bradford Moore/S. D. & L. Findings of Fact and
Enterprises, Inc. by Conclusions of Law
Carl H. Lisman, Esq. and Order
Lisman & Lisman Declaratory Ruling #205
P.O. Box 728
Burlington, VT 05402

On July 15, 1988, a request for a declaratory ruling was filed with the Environmental Board by Mark E. Woodward as an appeal from Advisory Opinion 5-88-19 issued on June 22, 1988, by the District #5 Environmental Coordinator. The Petitioners contend that construction of nine rental housing units by Bradford Moore requires a permit pursuant to 10 V.S.A. Chapter 151 (Act 250).

A prehearing conference was convened on August 25, 1988 and a Prehearing Conference Report and Order was issued on September 9. At the prehearing conference, Beth Thibault and Michael and Patricia Zlotucka joined Mark Woodward as Petitioners, represented by Douglas Molde, Esq. A Prehearing Conference Report and Order was issued on September 9. After initially requesting 60 days to prepare their case, the Petitioners requested that the hearing scheduled for November 30 be postponed. With the agreement of the respondents, the Board rescheduled the hearing to February 8, 1989.

The Environmental Board convened a public hearing on February 8, 1989, with the following parties participating:

Petitioners by Douglas L. Molde, Esq.
Bradford Moore and S. D. & L. Enterprises, Inc.
(Respondents) by Carl H. Lisman, Esq.
Lamoille County Planning Commission by Dave Pennella
Johnson Planning Commission by Amy Schultz
Johnson Village Trustees by Kenneth Phelps
Vera Parker

The Board recessed the hearing pending the filing of proposed findings and conclusions and legal memoranda and a review of the record and deliberation by the Board. On March 3, 1989, the Petitioners filed Requests to Find and a Memorandum of Law and on April 7, the Respondents filed a Memorandum. The Board conducted deliberative sessions on March 22 and April 19, 1989. On April 19, the Board determined that it needed additional information in order to decide whether a permit is required for the construction of the nine-unit apartment building. On May 9, the Board issued a Notice of

Reconvened Hearing. A hearing was convened before an administrative **hearing** panel of the Board in Johnson on June 20. with the following parties participating:

Petitioners by Douglas L. Molde, Esq.
Bradford Moore and S. D. & L. Enterprises, Inc.
(Respondents) by Carl H. Lisman, Esq.
Lamoille County Planning Commission by Barbara Farr
Johnson Planning Commission by Amy Schultz
Johnson Village Trustees by Kenneth Phelps
Vera Parker
Dolly Peters by Carroll Peters

On June 22, the Board received from Carroll Peters a request to subpoena certain documents. On June 28 the Board reviewed the request and on July 12 issued a decision requesting Mr. Moore to submit identified documents. On August 9 Carroll Peters submitted legal argument and on August 24 the Petitioners submitted requests to find.

A proposed decision was sent to all parties on March 16, 1990, and the parties were provided an opportunity to file objections and present oral argument.

Oral argument was requested by the Respondents and heard by the Board on April 18, 1990. On April 19, 1990, the Board declared the record complete and adjourned the hearing. This case is now ready for decision. The following findings of fact and conclusions of law are based exclusively upon the record developed at the hearings. To the extent that the Board agreed with and found necessary any findings proposed by the parties, they have been incorporated herein; otherwise, said requests to find are denied.

I. ISSUES IN THE DECLARATORY RULING

A. Party Status

At the prehearing conference, adjoining property owners Mark Woodward, Beth Thibault, Vera Parker, Dolly Peters, and Gordon and Gary Smith requested party status, as did Michael and Patricia Zlotucka who live two houses away from the proposed project. The Chairman granted party status to the adjoiners pursuant to Board Rule 14(A) and to the Slotuckas pursuant to Rule 14(B).

B. Substantive Issues

The Petitioners claim that the construction of a nine-unit apartment building by Bradford Moore on Clay Hill requires an Act 250 permit because Bradford Moore was acting as agent for S. D. & L. Enterprises, Inc. (S. D. & L.) when he negotiated the purchase of the Clay Hill property and S. D. & L. actually bought the property. Since S. D. & L. already constructed three apartment units within a 5 mile radius of the Clay Hill property, the Petitioners contend that an Act 250 permit must be obtained before the Clay Hill apartments are constructed.

II. FINDINGS OF FACT

1. On March 23, 1987, Donald B. Fleury and Susan Kruthers Moore, doing business as S. & D. Enterprises, purchased the former Davis residence on Railroad Street in Johnson Village (the Railroad Street property). They converted the single family residence into three apartments between March 23, 1987 and April 1, 1988. Mr. Fleury and Ms. Moore, doing business as S. & D. Enterprises, had previously purchased a rental building on Route 100C in Johnson Village on August 23, 1985 and two rental buildings on Railroad Street in Johnson Village on December 4, 1985.
2. On June 19, 1987, S. D. & L. Enterprises, Inc. was incorporated, with Susan Kruthers Moore, Donald B. Fleury, and Carl H. Lisman constituting the Board of Directors. Carl H. Lisman resigned as a director on June 21, 1988.
3. The minutes of First Meeting of Directors was not signed, no corporate stock was ever issued, and the certificate of issuance of shares of the corporation was not completed or filed with the Secretary of State.
4. By warranty deeds dated July 5, 1988, Susan Moore and Donald Fleury conveyed the Railroad Street properties and the Route 100C property to S. D. & L. No land gains taxes or property transfer taxes were paid because the transfers were claimed to be "Transfer to a corporation without consideration."
5. On August 19, 1987, Susan Kruthers Moore's husband Bradford Moore entered into a Deposit Receipt and Sale Agreement with Bernard and Elaine Earle to purchase a mobile home and lot on Clay Hill in Johnson Village (the Clay Hill property). The Clay Hill property is located within a five mile radius of the Railroad Street and Route 100C rental properties owned by S. D. & L. While

negotiating with the Earles, Mr. Moore told them that he was a representative of S. D. & L., acting as a trustee on its behalf, and was not purchasing the property himself. He also told the Earles that since he was not acting as a broker, he would not charge them a fee. Mr. Moore signed the contract "as trustee."

6. Before entering into a contract with the Earles, Mr. Moore measured the ground where the mobile home was located to determine what size building would fit into the space.
 7. By warranty deed of November 16, 1987, the Earles conveyed the Clay Hill property to S. D. & L. for the sum of \$14,500. Mr. Moore paid the down payment of \$1,000. Shortly before the closing, David Polow, Esq. wrote a letter to the Earles in which he stated he was representing S. D. & L. in the purchase of the Earles' property. A copy of the letter was sent to Bradford Moore.
 8. Bradford Moore claims he did not contact David Polow about Mr. Polow's statement that he represented S. D. & L. in connection with S. D. & L.'s purchase of the Earles' property in Mr. Polow's November 13, 1987 letter to Mr. and Mrs. Earle because at that time (one week before the closing) he did not know whether S. D. & L. or he would purchase the property.
 9. At the closing on the Clay Hill Property, David Polow signed the Property Transfer Tax Return on behalf of S. D. and L. Enterprises.
 10. On November 16, 1987, the Earles also conveyed their mobile home located on the Clay Hill property to S. D. & L.
 11. On November 20, 1987, S. D. & L. entered into a lease agreement with the Earles for the Earles to lease the property recently conveyed by the Earles to S. D. & L. until March 1, 1988. The lease was signed by Bradford B. Moore on behalf of S. D. & L.
 12. In late January or early February 1988, Don Fleury called Vera Parker and told her he was her new neighbor on the Earle property and that he was interested in buying a small piece of land from her.
 13. By deed dated February 29, 1988, S. D. & L. conveyed the Clay Hill property to Bradford B. Moore. The Property Transfer Tax Return indicates that the total price paid
-

was \$1.00 and that no land gains tax return was being filed because it was a "Corrective Deed."

14. The mobile home that S. D. & L. purchased from the Earles was demolished in April, 1988. S. D. & L. had owned the mobile home at the time it was demolished.
15. At a Johnson Village Trustee meeting on March 14, 1988, Bradford Moore requested permission to connect a nine-unit apartment house, consisting of one- and two-bedroom apartments and laundromat, to the municipal sewer. He also requested that the Village supply water to the apartments and laundry.
16. An application to the Village of Johnson dated March 22, 1988, and signed by Bradford Moore for permission to install and connect a building sewer to a nine-unit apartment building on Clay Hill indicates that Donald B. Fluery is the general contractor for the project.
17. The Plans Review Application submitted by Bradford Moore to the Department of Labor and Industry on April 18, 1988 indicates that S. D. & L. Enterprises will be the contractor for the construction of rental apartments on Clay Hill Road in Johnson. Don Fleury has done some work at the site; however, Mr. Moore no longer plans to have S. D. & L. as contractor for this project because, he claims, "**there** would be such a fuss about it."
18. A letter dated June 17, 1988 to Bradford Moore from W. Arlen Smith, President of the Union Bank, approving Mr. Moore's request for construction funds for the nine apartments at the Clay Hill property included the following:

This is to be secured by a first mortgage on the apartment complex, the equity in the real estate currently mortgaged to us by S & D Enterprises, and the personal guaranties of yourself, Susan and Donald. ...

Brad, implementing the loan is going to be quite complex since S & D has been incorporated.

Secondly, we will need title searches on the four (4) pieces of property currently mortgaged to us by S & D Enterprises and appraisals on them by a qualified

appraiser. New mortgages and notes will need to be taken to get the current technical default due to the incorporation corrected. The notes will be at the same amount, term and rate as currently existing, but in the current ownership name. Appropriate **corporate** resolutions and **certificate** of good standing will be needed to accomplish that.

19. The Clay Hill property serves as collateral for a promissory note in the amount of \$13,500 to the Union Bank signed, by Bradford Moore.
20. Bradford Moore is a real estate broker and in that capacity seeks opportunities for S. D. & L. to buy and manage rental properties. He previously represented S. & D. Enterprises or S. D. & L. in the purchase of several apartment houses, signing the Deposit Receipts and Sale Agreements as broker. Mr. Moore has been involved in no real estate transactions other than those for S. D. & L.
21. Mr. Moore also acts as property manager for the properties owned by S. D. & L. and is responsible for routine maintenance and repair of the properties. However, Donald Fleury actually does most of the repairs and renovations of the buildings owned by S. D. & L.
22. S. D. & L. only does construction work on its own properties.
23. Bradford Moore collects **rent** for S. D. & L. and makes deposits in the bank account of S. D. & L. at the Union Bank. He has the power of attorney to sign Susan Moore's name at the bank and he is authorized to make withdrawals from S. D. & L.'s account for routine expenses such as day-to-day maintenance and materials required for operating the business.
24. Mr. Moore does not have and never has had a written contract with S. & D. Enterprises or S. D. & L. He usually receives three percent of the purchase price and he is given a vehicle for his own use as compensation for his services to S. D. & L.
25. Mr. Moore has used his own funds on behalf of S. D. & L. to expedite a small transaction or at a store at which S. D. & L. did not have an account. S. D. & L. always reimbursed him. Mr. Moore and S. D. & L. have made loans to each other for short periods of time and have always reimbursed each other.

26. S. D. & L. paid the Johnson Fire Department \$200 to burn and remove the mobile home on the Clay Hill property. The \$200 was paid with S. D. & L. funds and Mr. Moore later reimbursed S. D. & L.
27. Bradford Moore purchased lumber and other materials from several stores in Johnson using S. D. & L.'s discounts.

III. CONCLUSIONS OF LAW

Act 250 provides that "[n]o person shall ... commence **construction** on a ... development, or commence development **without** a permit." 10 V.S.A. § 6081(a). "Development" is **defined**, in pertinent part, as

the construction of housing projects such as cooperatives, condominiums, or dwellings, or construction or maintenance of mobile homes or trailer parks, with 10 or more units, constructed or maintained on a tract or tracts of land, owned or controlled by a person, within a radius of five miles of any point on any involved land.

10 V.S.A. § 6001(3).

The definition of "**person**" at 10 V.S.A. § 6001(14), states, in pertinent part:

(14)(A) "Person":

(i) shall mean an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership;

(ii) means a municipality or state agency;

(iii) includes individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land;

(iv) includes an individual's parents and children, natural and adoptive, and spouse, unless the individual establishes that he or she will derive no profit or consideration, or acquire any other beneficial interest from the partition or division of land by the parent, child or spouse. ...

The Board concludes that S. D. & L. (or Susan Kruthers Moore and Donald Fleury) and Bradford Moore are one person within the meaning of person defined at 10 V.S.A. § 6001(14)(a)(i), that construction of apartment units at the Clay Hill property constitutes "development," and that an Act 250 permit must be obtained prior to any construction on the Clay Hill property.

The facts as they developed in this case reveal that the actions of Bradford Moore, Susan Kruthers Moore, and Donald Fleury concerning rental properties in the Johnson area were so intertwined that it would be difficult, if not impossible, to separate them. Bradford Moore's actions strongly indicate that he is associated with Susan Moore and Donald Fleury in the business of purchasing, renovating, and operating rental housing. For example, although Mr. Moore claims that the conveyance of the Earle property to S. D. & L. rather than to him was a mistake, while negotiating the purchase of the Earles' land and mobile home Mr. Moore told the Earles that he was purchasing the property on behalf of S. D. & L., and he did not attempt to correct Attorney Polow's statement in a letter to the Earles that he was representing S. D. & L. in the purchase of the Earles' property. Furthermore, even after S. D. & L. conveyed the Earle property to Mr. Moore by "corrective deed," S. D. & L. retained ownership of the mobile home on the property until it was demolished to clear the way for construction of the apartment building.

In addition, Mr. Moore's actions would lead people to believe that he and Susan Moore and Donald Fleury were in business with each other and in fact have been so intertwined with S. D. & L. that he is not distinguishable from the corporation. For example, he told the Earles that although he was acting on behalf of S. D. & L., he was not acting as a real estate broker. In both the application to the Village of Johnson for permission to install and connect a building sewer to the apartment in question and the application for the Department of Labor and Industry, Donald Fleury is listed as general contractor for the project. The letter to Bradford Moore from the Union Bank approving construction funds for the apartments at the Clay Hill property indicated that the funds would be secured "by a first mortgage on the apartment complex, the equity in the real estate currently mortgaged to us by S & D enterprises, and the personal guarantees of yourself, Susan and Donald." Moreover, Mr. Moore is married to Susan Moore, has the power of attorney to sign her name at the bank, is authorized to make withdrawals from S. D. & L.'s bank account, and has made purchases at local stores using S. D. & L.'s discounts.

Although Mr. Moore claims that his relationship with S. D. & L. is solely as a real estate broker, he admits that he has been involved in no real estate transactions other than those for S. D. & L., he has no contract with the corporation, and he was given a vehicle by S. D. & L.

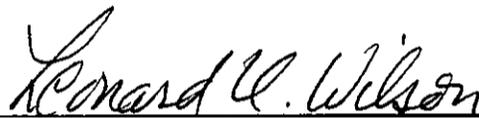
In summary, the evidence strongly indicates that S. D. & L. and Bradford Moore work together in the business of purchasing, renovating, and operating rental housing. The construction of the nine units at the Clay Hill property constitutes "development" because those nine units, when added to the other units constructed by Susan Xruthers Moore and Donald Fleury within a five mile radius, exceed 10 units. The Board concludes that Mr. Moore and S. D. & L. are therefore one "person" within the definition in Act 250 and that a permit pursuant to 10 V.S.A. Chapter 151 must be obtained before any construction may commence on the Clay Hill apartment building.

ORDER

An Act 250 permit pursuant to 10 V.S.A. Chapter 151 must be obtained before commencement of any construction on the property owned by Bradford Moore on Clay Hill in Johnson.

Dated at Montpelier, Vermont this 24th day of April, 1990.

ENVIRONMENTAL BOARD



Leonard U. Wilson, Acting Chair
Lawrence H. Bruce; Jr.
Ferdinand Bongartz
Rebecca J. Day
Arthur Gibb
Charles F. Storrow

a:moor (S2)