

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

Re: Geoffrey Wilcock and Judith Burns by Robert A. Gensburg, Esq. Gensburg, Axelrod & Adler PO Box 189 St. Johnsbury, VT 05819	Findings of Fact, Conclusions of Law, and Order Declaratory. Ruling #224
--	---

This decision pertains to a petition for declaratory ruling filed with the Environmental Board by Judith Burns and Geoffrey Wilcock (the Petitioners). As is explained below, the Board has concluded that a permit was and is required pursuant to 10 V.S.A. Chapter 151 (Act 250) for a 17-lot subdivision which the Petitioners created in Lunenburg.

I. SUMMARY OF PROCEEDINGS

On January 11, 1990, the Petitioners filed a petition with the Board, appealing Advisory Opinion #7-068 issued by the District #7 Coordinator on October 19, 1989. That opinion concludes that an Act 250 permit was and is required for the subdivision of a tract of approximately 710 acres located off Town Highway #13 in Lunenburg, Vermont. Two independent grounds of jurisdiction are given in the advisory opinion: (1) that the Petitioners are considered one "person" who created a total of 15 lots; and (2) that the Petitioners will have to improve more than a mile of roadway to provide access to the 15 lots.

On February 15, 1990, Board Chairman Stephen Reynes convened a prehearing conference in St. Johnsbury, and a prehearing conference report and order was issued on March 8, 1990. On March 22, the Petitioners filed a proposed statement of facts with attachments.

On May 2, 1990, the Petitioners filed a memorandum of law in support of their position that Act 250 jurisdiction does not exist on either ground asserted in the advisory opinion.

On August 3, 1990, the Petitioners filed a letter with the Environmental Board stating that Mr. Wilcock and Ms. Burns were withdrawing their request for declaratory ruling. The Assistant Executive Officer of the Board, by letter dated August 10, stated that the Board has discretion whether to allow a withdrawal and that a statement of reasons for the proposed withdrawal **must be given**. On August 17, the Petitioners filed a letter arguing that the

Petitioners have an absolute right to withdraw their petition. The Board issued a memorandum of decision on September 17, ruling that withdrawal was not allowed.

On October 10, 1990, the Chairman issued a proposed decision. On October 23, the Petitioners requested oral argument. On November 2, the Petitioners filed written exceptions to the proposed decision. On November 7, the Board held oral argument and deliberated in Berlin.

On November 26, 1990, the Petitioners filed additional evidence. On December 3, the **Petitioners** filed a supplemental memorandum. On February 7, 1991, by telephone, the Board decided to approve the Chairman's proposed decision with modifications. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are incorporated below, they are granted; otherwise, they are denied.

II. ISSUES IN THE DECLARATORY RULING

1. Whether the Petitioners plan to construct improvements to a road of more than 800 feet in length or which will serve more than five lots, pursuant to Board Rule 2(A)(6)(the Road Rule).

2. Whether the Petitioners have created a subdivision as defined in 10 V.S.A. § 6001(19).

III. FINDINGS OF FACT

1. The tract in question is located in the Town of Lunenburg, on the east and west sides of Town Highway 13, known as the Mt. Tug Road. The tract consists of approximately 710 acres of land. The northern boundary of the tract is the town line between the Towns of Victory and Lunenburg. These towns are within the area of the District #7 Environmental Commission.
 2. Geoffrey Wilcock and Judith Burns jointly operate a day care business in Connecticut. On October 27, 1988, Mr. Wilcock and Ms. Burns acquired title to the tract from Rancourt Associates. On or about the date of conveyance, Mr. Wilcock and Ms. Burns informed Roger Joslin, a real estate broker, that they intended to divide the tract into two pieces. They also informed Mr. Joslin that they had been unable to persuade the seller of the tract to sell to them in two pieces; the seller would convey only a single parcel.
-

3. A property transfer tax return was recorded along with the deed. This return, signed by Mr. Wilcock and Ms. Burns on October 14, states that it concerns a transfer of property in Lunenburg from Rancourt to Mr. Wilcock and Ms. Burns with a purchase price of \$182,750.
 4. In February 1989, surveyor Michael P. Hemond created two surveys of the Lunenburg property. The surveys are each entitled "Land Survey for Geoffrey A. Wilcock and Judith Burns." One of the surveys (Exhibit #6), shows land northeast of Town Highway #13. Eight lots and a right-of-way have been drawn in pencil on this survey. The other survey (Exhibit #7) shows land southwest of Town Highway #13. Nine lots have been drawn in pencil on this survey. The Petitioners represent that Mr. Joslin drew the pencilled lot lines in the surveys but cannot recall when.
 5. Mr. Wilcock and Ms. Burns together arranged short term financing for purchase of the tract and subsequently, after contact with Mr. Joslin, secured bank financing in a joint note and single mortgage.
 6. On April 18, 1989, Judith Burns signed a purchase and sale contract for approximately 15 acres located on the western side of Town Road 13 in Lunenburg. The lot parcel is described in the contract as "Lot #8." The purchase price for this lot is listed in the contract as \$10,500. The purchasers were Reginald Wakeham and Michael T. Dustin. The contract states that it is "subject to completion of survey and inspection by buyer."
 7. A mortgage concerning the tract, dated May 3, 1989 between the Petitioners and a bank, was recorded in the Lunenburg Land Records on the date of execution.
 8. In May 1989, Mr. Hemond prepared further surveys of the tract for the Petitioners. There were two surveys, one for each of the Petitioners. The exact day is not provided on either survey. The survey for Ms. Burns shows nine lots. Eight of those lots are located west of, and with frontage on, Mt. Tug Road. They are denominated as B-1 through B-8 and range in size from approximately 10.2 acres to 16.3 acres. The most northerly of these eight lots borders the Town of Victory. A ninth lot, B-9, is shown on the survey with no acreage amount identified, and without all of its
-

boundaries. The survey for Mr. Wilcock shows eight lots. Seven of these lots are denominated as A-1 through A-7 and are located east of, and with frontage on, Mt. Tug Road. They range in size from approximately 10.2 acres to slightly less than 11 acres. An eighth lot, A-8, is shown on the survey with no acreage amount identified, and without all of its boundaries.

9. On May 19, 1989, Mr. Wilcock executed a warranty deed conveying to Ms. Burns his interest in 404 acres of the tract which lie "south and west of the Mt. Tug Road, so-called." On that date, Ms. Burns executed a warranty deed conveying to Mr. Wilcock her interest in 306 acres of the tract which lie "north and east of the Mt. Tug Road, so-called."
 10. On May 22, 1989, Geoffrey Wilcock and Roger E. Joslin executed individual listing agreements regarding lots at the parcel denominated A1, A2, A3, A4, A5, A6, and A7. The listing price for Lots A1, A2, A3, and A4 was \$11,500; the listing price for the other lots was \$10,500,
 11. On May 22, 1989, Judith Burns and Roger E. Joslin executed individual listing agreements regarding lots at the parcel denominated B1, B2, B3, B4, B5, B6, and B7. The listing price for Lots B4 and B5 was \$10,500; the listing price for the other lots was \$11,500.
 12. The deed conveying Ms. Burns' interest in the 306-acre portion of the tract to Mr. Wilcock was recorded on May 24, '1989 in Book 49 at Page 186 of the Lunenburg Land Records. The deed conveying Mr. Wilcock's interest in the 404-acre portion of the tract to Ms. Burns was also recorded on May 24, 1989, in Book 49 at Page 184 of the Lunenburg Land Records.
 13. On June 7, 1989, Mr. Wilcock made a listing agreement with Mr. Joslin for approximately 230 acres at the parcel at a listing price of \$140,000, and Ms. Burns made a listing agreement with Mr. Joslin for approximately 310 acres at the parcel at a listing price of \$190,000.
 14. All of the foregoing listing agreements (see findings 10, 11, and 13, above) used a standard listing form which has places to fill in the "Owners [sic] Name and
-

Address," "Res. Telephone," and "Bus. Telephone." All of the listing agreements are filled in by hand with the same address (861 Middle St., Middletown, CT 06457) and the same "Res. Telephone" (203-388-2246). No business telephone was listed.

15. On July 26, 1989, Mr. Wilcock as seller executed a purchase and sale contract with W. Robert Rodgers as purchase of Lot A4 at the tract. The purchase price was \$11,500.
 16. On July 28, 1989, Mr. Wilcock as seller executed a purchase and sale contract with Christian A. Dunklee and Eric P. and Karen E. Hard as purchasers of Lot A1 at the tract. The purchase price was \$11,500.
 17. On August 15, 1989, Mr. Wilcock as seller executed a purchase and sale contact with Steven L. Richard as purchaser of Lot A2 at the tract. The purchase price was \$11,500.
 18. All of the foregoing purchase and sale contracts executed by Ms. Burns and Mr. Wilcock (see findings 6 and 15 through 17, above) give the "Mailing address" as 861 Middle St., Middletown, CT 06457. The "phone no." given for Mr. Wilcock on his three purchase and sale contracts (see findings 15 through 17, above) is the same as that on all the listing agreements (see finding 14); the "phone no." given on Ms. Burns' purchase and sale contract is 203-632-2014.
 19. On June 15, 1989, Mr. Wilcock sent a memorandum to Robert Gensburg regarding the "Cost of Lunenburg Land." The memorandum states, "Enclosed is a summary of what Judy and I have paid up to the point of dividing the land between us." Dates of the incurred costs listed on the attached summary run from September 10, 1988 through June 15, 1989. Five entries are dated subsequent to the May 19 deeds (see finding 9, above). The memorandum states that "[t]he allocation of land costs was made 404/710 to Judy and 306/710 to me - 404 and 306 are the acreage of our separate pieces." The memorandum does not state who paid the incurred costs out-of-pocket or how any reimbursement from one of the Petitioners to the other would be accomplished.
 20. Messrs. Reginald Wakeham and Michael T. Dustin purchased Lot B-8 from Ms. Burns on or about June 16, 1989. This lot is at the northernmost extent of the
-

tract and at the northernmost extent of the Mt. Tug Road in the Town of Lunenburg.

21. On August 29, 1989, Mr. Wilcock signed an Act 250 disclosure statement concerning a sale of land at the tract to Steven L. Richard, Allan H. Richard, Martin J. McCuin, and John T. Henne. Under a section of the statement requiring the signator to "List below any partition or division of land by any individuals or entities now or previously affiliated with the seller(s) for benefit or profit ..," Mr. Wilcock listed Judith Burns with respect to "404 acres" of the "former Rancourt property."
 22. On September 1, 1989, Mr. Wilcock as seller executed a purchase and sale contract with Steven L. Richard as purchaser of Lot A2 at the tract. The purchase price was \$11,500.
 23. If all land subject to the foregoing listing agreements were sold at the price listed, the gross economic gain to the Petitioners over the initial purchase price for the tract would be \$291,750.
 24. The Petitioners represent that no profit will accrue to Ms. Burns from the sale of lots on the 306-acre portion of the tract now owned by Mr. Wilcock, or to Mr. Wilcock from the sale of lots on the 404-acre portion of the tract now owned by Ms. Burns. The Petitioners represent that, following the division of the tract into two pieces (one for each of them), they each dealt separately with Mr. Joslin concerning listing the land, dividing it for resale and making sales. The Petitioners represent that each of them, in listing, sharing, or selling portions of the tract, deals only with the portion of the tract conveyed to him or her in May 1989, and not with the other portion.
 25. The Petitioners represent that Ms. Burns' intent with respect to her portion of the land is and was to sell some of the land and retain a portion as a long-term investment, and that Mr. Wilcock's intent is and was to sell all of his portion of the tract.
 26. Mt. Tug Road in the area of the subject land is a Class IV Road. The road is used by the general public and is traversable by ordinary pleasure cars throughout its length in the Town of Lunenburg. The Petitioners have no plans to improve the Mt. Tug Road.
-

IV. CONCLUSIONS OF LAW

A. Road Rule

The Board has concluded that the Road Rule is not applicable to the facts of this matter.

B. Subdivision

Act 250 prohibits the sale or offer for sale of any interest in, or commencement of construction on, a subdivision without a permit. 10 V.S.A. § 6081(a): "Subdivision" means:

a tract or tracts of land, owned or controlled by a person, which the person has partitioned or divided for the purpose of resale into 10 OR more lots within a radius of five miles, or within the jurisdictional area of the same district commission, within any continuous period of five years.

10 V.S.A. § 6001(19). Board Rule 2(B) provides:

"Subdivision" means a person's partitioning or dividing a tract or tracts of land into ten or more lots including all other lots which that person has created through subdivision within an environmental district, or within a five mile radius of any point of subdivided land if any lots have been created in any adjoining district, within any continuous period of five years after April 4, 1970. "Subdivision" shall also mean any material change of an existing subdivision over which a district commission or the board has jurisdiction and any substantial change to a pre-existing subdivision. A subdivision shall be deemed to have been created with the first of any of the following events.

(1) The sale or offer to sell or lease the first lot within a tract or tracts of land with an intention to sell, offer for sale, or lease 10 or more lots. A person's intention to create a subdivision may be inferred from the existence of a plot plan, the person's statements to financial agents or potential purchasers, or other similar evidence:

(2) The filing of a plot plan on town records;

(3) The sale or offer to sell or lease the tenth lot of a tract or tracts of land, owned or controlled by a person, when the lot is within an environmental district or within a five mile radius of any point on any other lot created by that person within any continuous period of five years after April 4, 1970.

The definition of "person" includes the following:

[I]ndividuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land.

10 V.S.A. § 6001(14)(A)(iii).

This definition of person was added to the statute in 1987. 1987 Vt. Laws No. 64. In enacting the definition, the legislature stated:

It is the finding of the general assembly that the state of Vermont is experiencing a significant increase in the number of land subdivisions which are made for speculative purposes; that some of these subdivisions are eroding the natural resource base upon which Vermont's agricultural, forestry, mineral and recreational industries depend; that some of these subdivisions have the potential of imposing significant financial burdens upon local communities providing municipal and educational services; that it is the policy of the state of Vermont to ensure that major subdivision activity within the state comply with the criteria of Vermont's Land Use and Development Law (Act 250), in order to protect the public health, safety and general welfare; and that in order to ensure appropriate Act 250 review, it is necessary to treat persons with an affiliation for profit, consideration, or some other beneficial interest derived from the partition or division of land as a single Person for the purpose of determining whether a particular conveyance is subject to Act 250 jurisdiction.

Id., § 1. At the time of the 1987 amendment, the definition of person included the terms "partnership" and "joint venture." 10 V.S.A. § 6001(14)(A)(i); 1969 Vt. Laws No. 250 § 2.

In this case, there is no question that ten lots were created at the tract, that the tract is within District #7, and that the Petitioners own the tract. See 10 V.S.A. §§ 6001(19), 6007(a)(1)(B). The only issue is whether the Petitioners should be regarded as one person who created a subdivision of 17 lots. The Petitioners argue that they are not a person with regard to the 17 lots they created on the tract. While they acknowledge their affiliation, they argue that it ceased prior to the division of the parcel into 17 lots, and therefore the sale of some of those lots did and does not require a permit. Instead, the Petitioners believe that each of them should be held to have independently created fewer than ten lots on his or her piece. The Petitioners argue that the facts and representations set forth in findings 19 and 24, above, require the Board to reach this conclusion.

The Board concludes that the Petitioners are one person with respect to the division of the 710-acre Lunenburg parcel into 17 lots because they were and are affiliated for profit and beneficial interest derived from the division of land, as follows:

Affiliation. The Petitioners were and are affiliated with respect to the land in question. They bought a tract of land together in Lunenburg. They financed the purchase through a joint note and single mortgage. They used the same real estate broker for all listings, sales, and offers for sale. They used the same surveyor to prepare surveys of their pieces of the tract during the same month, May 1989. They listed the same owner's address and telephone number on all of the listing agreements for the parcel submitted to the Board, regardless of whether those agreements related to portions owned by one or the other of the Petitioners. They also listed the same owner's address on all of the purchase and sale agreements and contracts for the tract submitted to the Board, again regardless of which portion of the parcel the agreements concerned. Further, the Petitioners paid most of the costs associated with the Lunenburg purchase on a joint basis and later allocated the costs between each other.

Profit and Beneficial Interest. The Petitioners have received and will receive beneficial interest and profit. They have each received a beneficial interest in owning a large portion of the tract. They have also each received and will receive profit from the sale of lots at the tract. Further, the Petitioners' affiliation was for this profit and beneficial interest. The affiliation caused and was intended to cause the profit and interest. The facts demonstrate an intent to enter into a real estate transaction and divide purchased land in order to achieve the Petitioners' stated goals of marketing property.

Derivation from Division of Land. The profit and beneficial interest cited above are derived from the division of the Lunenburg tract. Without that division, the Petitioners would not have received the benefit of owning a large portion of the tract. Without the further division into lots, the Petitioners would not each receive his or her portion of the economic gain cited in finding 23, above.

The Petitioners argue that, because one of them does not share the profit from the other's lots, they do not derive "mutual" benefit from the division of land, and therefore do not constitute a person. This argument fundamentally misconstrues the meaning of the language added to the definition of "person" in 1987.

There is no requirement in the 1987 amendments that profits be shared. The legislature's express intent in the 1987 amendment was to group together those people who derive benefit from dividing land in order to ensure that any adverse consequences of major land divisions are reviewed and corrected. Accordingly, the Board believes that two people are a person with respect to lot creation where they are affiliated with respect to land, where they each will receive profit, consideration, or other beneficial interest as a result of that affiliation, and where the profit, consideration, or other beneficial interest is derived from that land's division or partition.

The Petitioners also argue that their affiliation ceased prior to the division of the Lunenburg land into lots, and this cessation means that they do not have to obtain a permit. Central to this argument is the assertion that the subdivision was created in May 1989.

The Board disagrees. To begin with, the subdivision was created no later than April 18, 1989. On that date, Ms. Burns signed a purchase and sale contract for lot B-8.

Rule 2(B) states that a subdivision is deemed to be created when an offer for sale of a lot is made with the intention to sell ten or more lots, and that such an intention may be inferred from documents, acts, and statements of the offeror. The Board has previously stated that these examples of intent in Rule 2(B) are illustrative rather than exclusive. Re: Black Willow Farm, Declaratory Ruling #202 at 9 (June 30, 1989).

On review of the evidence, the Board concludes that the Petitioners did intend at the time of the April 1989 contract to divide and sell the land into more than ten lots. The Board infers this intent from the following facts: the denomination of a lot as number 8, which implies the existence of seven other lots and possibly more; the creation of surveys showing 17 lots on the property in May 1989, shortly after contract's execution; and the listing of at least 10 lots on the market on May 22, 1989. The shortness of time between the April 1989 offer and the May 1989 events leads to an inference that the events which occurred in May were the execution of a concept that was in existence no later than April 1989. This concept may have been in existence much earlier. As described in finding 4, above, surveys showing 17 lots on the parcel exist which are dated February 1989.

Further, even if the subdivision was created subsequent to April 1989, the Board is not persuaded that it was created subsequent to the conveyance of the two larger portions to each of the Petitioners. The surveys are dated May 1989, without indication of the specific day, while the conveyance of the two larger portions to each of the Petitioners occurred no earlier than May 19, 1989. It is entirely possible, therefore, that the surveys were created before May 19. Moreover, the timing of the first listing agreements, May 22, and the date the deeds to the larger portions were recorded, May 24, suggests that if the lot creation did not occur before the alleged separation of the Petitioners, the two processes were concurrent.

Finally, it is irrelevant whether the land was divided into two portions prior to the further division of the tract. The Petitioners joined together to obtain profit and beneficial interest from the division of the Lunenburg parcel. An act of separating the parcel in two, and subsequent acts of creating lots and separating profits, do not change the fact that as a result of their affiliation, the Petitioners have received and will receive profit and

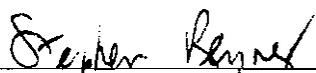
beneficial interest from dividing the tract. To rule otherwise would be to violate the intent of the 1987 amendment to Act 250, and allow a major division of one tract by two affiliated persons to occur without the environmental review intended by the legislature.

V. ORDER

An Act 250 permit was and is required prior to sale or offer for sale of any interest in, or commencement of construction on, the 17-lot subdivision created by the Petitioners off Town Highway #13 in Lunenburg.

Dated at Montpelier, Vermont this 8th day of February, 1991.

ENVIRONMENTAL BOARD



Stephen Reynes, Chairman
Elizabeth Courtney
Rebecca J. Day
Arthur Gibb
Samuel Lloyd
Charles Storrow
Steve E. Wright

Dissenting:
W. Philip Wagner