

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

Re: John W. Stevens and Bruce W. Gyles
Declaratory Ruling #240

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision, dated May 8, 1992, pertains to a subdivision created on a tract of land once owned by Frederic and Zygfrieda Van Zeggeren (the Van Zeggeren tract) located in the Town of Newport, Vermont. As is explained below, the Board concludes that a permit was and is required for the subdivision pursuant to 10 V.S.A. Chapter 151 (Act 250).

I. SUMMARY OF PROCEEDINGS

On June 14, 1990, District #7 Coordinator Cynthia Cook issued Advisory Opinion #7-081, concerning the Van Zeggeren tract, which she described as consisting of 230 acres. She concluded that John W. Stevens and Bruce W. Gyles (the Petitioners) controlled the creation of a ten-lot subdivision on that tract. Specifically, she concluded that the Van Zeggeren tract was sold to the Petitioners in nine separate lots at the Petitioners' request and that they had paid for a survey which divided the tract into those nine lots and for the cost of preparing and recording deeds for each of those lots from the Van Zeggerens to the Petitioners. The District Coordinator further concluded that one of the nine lots (Lot #2) was subsequently divided into two lots at the behest of the Petitioners, resulting in a total of ten lots on the tract. This opinion was appealed to the Executive Officer.

On December 31, 1990, the Executive Officer issued Advisory Opinion #EO-90-212, confirming the opinion of the District Coordinator. In addition to agreeing with the District Coordinator's analysis, the Executive Officer concluded that, regardless of whether the Petitioners controlled the further subdivision of one of the nine lots into two lots, a permit was required for the initial nine lots because the Petitioners have created other lots within a five-
:, mile radius of the Van Zeggeren tract.

On January 28, 1991, the Petitioners filed a petition for a declaratory ruling with the Board. The Petitioners seek a ruling that an Act 250 permit is not required for the subdivision.

In response to a notice issued by the Board, on April 17, 1991, Robert J. and Shelly Martin, purchasers of a lot at the subdivision, filed a statement of interest. On April 18, the

DR 240

Petitioners filed a statement of interest. On April 19, the State of Vermont Agency of Natural Resources and Scott A. Bergeron, purchaser of a lot at the subdivision, filed statements of interest.

On June 13, 1991, Chair Elizabeth Courtney issued a prehearing memorandum and order which included a statement that facts not in dispute were deemed stipulated and set a schedule for filing testimony and holding a hearing on those facts in dispute.

On September 3, 1991, the Petitioners filed prefiled testimony. Because no other party filed such testimony, on October 11 the Chair issued a memorandum cancelling the hearing, taking notice of various documents, and stating that she would issue a preliminary ruling following opportunity for parties to submit proposed findings and conclusions. On November 15, the Petitioners submitted proposed findings and conclusions.

A proposed decision was sent to the parties on January 17, 1992, and the parties were provided an opportunity to file written objections and to present oral argument before the full Board. On February 19, the Petitioners submitted a response to the proposed decision. The Board convened a public hearing in **Rutland** on February 26 with the Petitioners participating. The Petitioners submitted a supplemental memorandum on March 9 concerning an issue raised by the Board at oral argument.

The Board deliberated concerning this matter on March 25, 1992. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUES

The main issue before the Board is whether, pursuant to 10 V.S.A. §§ 6001(19) and 6081(a), an Act 250 permit was and is required for the lots which have been created on the Van Zeggeren tract. Questions relevant to this issue include:

1. Whether the Petitioners controlled the creation of the initial nine lots at the tract.
2. Whether the Petitioners and the Van Zeggerens should be considered one person pursuant to 10 V.S.A. § 6001(14)(A)(iii).
3. Whether the Petitioners, or either of them, controlled the division of Lot #2 into two further lots, thereby creating a total of ten lots at the tract.

4. Whether, regardless of the division of Lot #2, a permit was and is required for the initial nine lots because the Petitioners, or either of them, have created other lots within the relevant environmental district or within five miles of the Van Zeggeren tract within a period of five years.

5. If an Act 250 permit is required for the lots, lot purchasers have asked the Board to answer the following questions:

- a. Whether the Petitioners should be held responsible for obtaining an Act 250 permit and bearing all expenses in that regard.
- b. What liability the Petitioners may have if the Board determines that Act 250 has been violated, and what recourse third party purchasers have.
- c. What steps would be necessary in order to commence construction on the lots.

III. FINDINGS OF FACT

The Van Zeaaeren Tract

1. On March 16, 1988, Frederic and Zygfrieda Van Zeggeren listed a single tract of land in Newport Center (the Van Zeggeren tract) at a price of \$85,000.00 with Roy's Real Estate in Newport.
2. The Van Zeggeren tract is located within Environmental District #7, which consists of Essex, Orleans, and Caledonia counties.
3. Francis D. Roy is a licensed real estate broker who is the principal broker of Roy's Real Estate. The listing of the Van Zeggeren tract with his firm stated that the tract consisted of 230 acres.
4. John W. Stevens is a licensed real estate broker and is the principal broker of Stevens Real Estate, Inc. (SRE) of Newport. Bruce W. Gyles is Vice President of SRE.
5. On April 1, 1988, Mr. Stevens, for SRE, signed a Deposit Receipt and Sale Agreement in which he offered to purchase the Van Zeggeren tract for the sum of \$78,000.00 provided that any shortage in acreage would be adjusted at the rate of \$300.00 per acre. The offer was accepted by the Van Zeggerens by signature on April 6, 1988.

6. The April 1, 1988 agreement states that the Van Zeggeren tract is approximately 230 acres and states the following:

Sellers are advised and aware that (1) buyer is a Real Estate Brokerage Firm. (2) Buyers [sic] intention is to subdivide and re-sell the property. (3) Buyer will receive a portion of the commission paid to listing broker. (4) Buyer had no input into the listing [of] this property or the listing price.

The agreement specifies a closing date of June 1, 1988.

7. **Norbert** A. Blais is a registered land surveyor with Blais Surveying Company in Newport. Sometime after the April 1, 1988 agreement was signed, Mr. Stevens retained Mr. Blais and asked him to conduct a perimeter survey of the Van Zeggeren tract.
8. Mr. Stevens has filed prefiled testimony stating that he retained Mr. Blais on behalf of the Van Zeggerens.
9. Mr. Roy has filed prefiled testimony stating that he retained Mr. Blais.
10. The survey was not completed by June 1, 1988. On or about that date, the Van Zeggerens called Mr. Roy and stated that they wanted to close by that date regardless of whether the survey was complete.
11. Mr. Blais completed the **perimeter** survey in early June 1988. On or about June 10, 1988, he advised Mr. Stevens that the tract contained only 150 acres rather than 230 acres as stated in the contract.
12. A price adjustment of \$300.00 per acre as provided for in the contract would have reduced the purchase price to **\$54,000.00**. Upon notification of the shortage, the Van Zeggerens refused to close the transaction.
13. On June 10, 1988, Robert **W.** Davis, attorney for SRE and the Petitioners, wrote Raymond Peterson, attorney for the Van Zeggerens, advising that unless closing occurred he would file an action for specific performance of the April 1, 1988 agreement.

14. Mr. Stevens has filed prefiled testimony stating that, on or about June 15, 1988, Mr. Roy called Mr. Gyles with an offer to sell the Van Zeggeren tract to the Petitioners as six separate parcels.
15. Mr. Roy has filed prefiled testimony that, shortly after June 10, 1988, he called Mr. Gyles with an offer to sell the Van Zeggeren tract as a subdivided parcel.
16. The Petitioners have filed no testimony from the Van Zeggerens.
17. On June 17, 1988, Mr. Davis wrote to Mr. Peterson, advising that the April 1, 1988 agreement had been re-negotiated and that the Van Zeggerens would sell the property in nine parcels or less for a total purchase price of **\$59,000.00**.
18. A new Deposit Receipt and Sale Agreement reflecting a purchase price of **\$59,000.00** was signed by Mr. Gyles for SRE. The new agreement is dated June 28, 1988, but no date of signature is given. The agreement provides that "**seller** is to deed this property in no less than 6 separate parcels" and that the buyer will pay all attorney fees for the deeds.
19. The June 28, 1988 agreement states that "Sellers are aware that ... Buyer will receive a portion of the commission paid to listing broker."
20. Mr. Blais prepared a survey map of the tract dated July 1, 1988, showing nine lots on the parcel. The Petitioners paid for this survey.
21. The bill from Mr. Blais concerning the July 1, 1988 survey includes time spent in a meeting with Mr. Gyles. The bill is addressed to the Van Zeggerens "**c/o**" Mr. Stevens. The Petitioners have submitted testimony from Mr. Blais stating that he determined how many lots would be created and where the lot lines would be located.
22. On July 14, 1988, another Deposit Receipt and Sales Agreement was executed by Mr. Stevens on behalf of SRE. It reflected a purchase price of **\$60,500.00** for 150 acres to be deeded in no less than nine separate parcels with the buyers to pay all attorney's fees for preparation of the deeds. The Van Zeggerens signed the agreement on August 2, 1988.

23. The July 14, 1988 agreement states that "Sellers are aware that ... Buyer will receive a portion of the commission paid to listing broker."
24. The Petitioners have filed a copy of the July 14, 1988 agreement which includes the following phrase: "THIS CONTRACT VERBALLY PROPOSED BY SELLER." Mr. Stevens wrote this phrase on the agreement and initialed it. The Van Zeggerens did not initial the phrase. No testimony has been filed as to when the phrase was placed on the agreement or whether it was there when the Van Zeggerens signed the agreement.
25. On or about August 3, 1988, closing took place and the Van Zeggerens deeded the property in nine lots to the Petitioners.
26. On December 31, 1988, Mr. Blais prepared survey map #311-88. This survey subdivides Lot #2 of the original subdivision into two approximately ten-acre lots - 2A and 2B. This survey plan refers to "new interior boundary as requested by Agent Bruce Gyles."
27. On January 5, 1989, Kevin Mager purchased Lot #2 at the Van Zeggeren tract from the Petitioners.
28. On or about February 3, 1989, the Petitioners sold Lot #1 at the Van Zeggeren tract to Scott A. Bergeron. The Petitioners sold a lot at the Van Zeggeren tract to Robert and Shelley Martin. The date of sale and lot number have not been provided.'
29. On January 18, 1990, Mr. Mager conveyed Lot #2B, as depicted on the December 31, 1988 survey, back to Mr. Stevens.

Other Tracts

30. On August 24, 1984, John Stevens and others obtained Subdivision Permit #EC-7-0970 for a one-lot subdivision on Town Highway #28 in Troy. This subdivision is located within Environmental District #7 and within a five-mile radius of the Van Zeggeren tract.

¹The Board makes this finding based on facts set forth in statements provided to it by Mr. Bergeron and the Martins which have not been controverted by any other party.

31. On March 5, 1988, Blais Surveying Company prepared a site plan that subdivided a parcel off Lake Road in the City of Newport into five lots. The site plan was created for Mr. Gyles. At the time, he and Edward and Patricia Duffet owned the Lake Road parcel, which is located within Environmental District #7 and within a five-mile radius of the Van Zeggeren tract.
32. On January 5, 1989, the Agency of Natural Resources, Department of Environmental Conservation, Division of Protection issued Subdivision Permit #EC-7-1263 for the five-lot subdivision created by Mr. Gyles and the Duffets off Lake Road in Newport.
33. On May 3, 1989, Mr. Gyles and the Duffets sold Lot #2 at the Lake Road parcel to Gregory Smith. On May 11, 1989, Mr. Gyles and the Duffets sold Lot #3 at the Lake Road parcel to Michael Rushford. On June 3, 1989, Mr. Gyles and the Duffets sold Lot #1 at the Lake Road parcel to James Lynch. On February 12, 1990, Mr. Gyles and the Duffets sold Lot #5 at the Lake Road parcel to Gary Todd and Elizabeth Troiano.

IV. CONCLUSIONS OF LAW

Act 250 states that "[n]o person shall sell or offer for sale any interest in any subdivision located in this state, or commence construction on a subdivision ... without a permit." 10 V.S.A. § 6081(a). The statute defines subdivision as follows:

"Subdivision" means a tract or tracts of land, owned or controlled by a person, which the person has partitioned or divided for purposes of resale into 10 or more lots within a radius of five miles of any point on any lot, or within the jurisdictional area of the same district commission, within any continuous period of five years. In determining the number of lots, a lot shall be counted if any portion is within five miles or within the jurisdictional area of the same district commission.

10 V.S.A. § 6001(19).

10 V.S.A. § 6001(14)(A) provides that "person"

(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

In In re Eastland, Inc., 151 Vt. 497, 500-501 (1989), the Supreme Court affirmed a Board ruling that a person may be attributed the creation of lots through the exercise of control over a parcel. In that case, land had not been divided prior to entry into a purchase and sale agreement. Following execution of such an agreement, the purchaser had the parcel surveyed and divided into lots. The purchaser made the arrangements with the surveyor, chose the number of lots to create, directed where the survey lines should be drawn, and paid for the survey. The seller received no tangible benefits from the subdivision. Id. at 497, 500.

A. Control over the Initial Nine Lots at the Van Zegqeren Tract

The Board concludes that SRE and the Petitioners are one person who had control over the Van Zegqeren tract and who used that control to cause the division of that tract into nine lots. To begin with, SRE and the Petitioners are one person because they were affiliated for profit and beneficial interest derived from the division of the Van Zegqeren tract. Both of the Petitioners were and are employees of SRE, which was the entity which entered into the purchase and sale agreement with the Van Zegqerens. In that agreement, SRE declared its intention to divide the property. Further, the Petitioners were both actively involved in the sale of this parcel from the Van Zegqerens to them and ultimately the Van Zegqerens sold the tract not to SRE but to the Petitioners. The Petitioners together sold portions of the parcel to others.

The execution of the April 1, 1988 Deposit Receipt and Sales Agreement with the Van Zegqerens gave SRE and the Petitioners control over the property. A sales agreement gives the purchaser the status of equitable owner with certain rights in the land. Eastland, 151 Vt. at 500. For example, the purchaser can bring an action for specific performance to compel the transfer of the tract. Re: Eastland, Inc., Declaratory Ruling #177 at 5 (June 18, 1987).

The Board believes that SRE and the Petitioners exercised this control to create nine lots on the Van Zegqeren tract. They stated their intention to divide the property and resell it in the April 1991 Deposit Receipt and Sales Agreement. Later, when the shortage in acreage was found and the Van Zegqerens refused to close the transaction, SRE and the Petitioners threatened to file an action for specific performance. Apparently as a result of this threat, an

agreement was made that the Van Zeggerens would deed the parcel to SRE in nine separate lots. The Petitioners paid for the survey creating those lots and the Van Zeggerens subsequently sold the property to them in nine deeds.

The Petitioners argue that the lot creation should not be attributed to them because the Van Zeggerens allegedly suggested that the tract be divided prior to sale. The Petitioners have filed testimony from Petitioner Stevens and Francis Roy, the listing broker, to the effect that Mr. Roy made an offer in mid-June 1988, following the discovery of the acreage shortage, to sell the property as six separate parcels. The Petitioners have also filed a copy of a July 14, 1988 Deposit Receipt and Sales Agreement which states that the Van Zeggerens will deed the tract as nine separate parcels and contains the phrase: "This contract verbally proposed by seller."

The Board does not find this argument to be persuasive. The Petitioners, in threatening to sue for specific performance, set in motion the chain of events which led to the division of the parcel. Whether the Van Zeggerens first suggested that division is immaterial.

Further, even if the argument were relevant, it has not been sufficiently substantiated. The Petitioners **have** submitted no testimony from the Van Zeggerens corroborating the idea that they initiated the division of the tract. The testimony which has been submitted, that of Messrs. Stevens and Roy, is undermined by the fact that it is in Stevens' interest to claim that he did not divide the tract, by the Petitioners' stated intent to subdivide in the April 1988 agreement, and by the circum-stances surrounding their threat to sue the Van Zeggerens.

The Board also questions the authenticity of the statement on the July 14, 1988 Deposit Receipt and Sales Agreement that the contract was verbally proposed by the Van Zeggerens. The statement was initialed only by Petitioner Stevens and not by the Van Zeggerens. There is no testimony from the Van Zeggerens verifying that the statement is true or that the statement was present on the agreement when they signed the agreement.

Instead, the Board infers that SRE and the Petitioners used the acreage shortage to compel the Van Zeggerens to fulfill the Petitioners' already-stated intention to divide the property. The facts support this inference: Following the discovery of the shortage, the **Petitioners** threatened to bring an action for a specific performance. One week after the threat was made, the attorney for SRE and the Petitioners

wrote to the Van Zeggerens' attorney, advising their attorney that the agreement had been renegotiated to the effect that the Van Zeggerens would deed the property in nine parcels or less.

In addition, Mr. Gyles signed a Deposit and Receipt Sale Agreement dated June 28, 1988 which provided that the Van Zeggerens would deed the property in no less than six parcels. This agreement was not signed by the Van Zeggerens. It appears to be an offer by SRE and the Petitioners to the Van Zeggerens which, through subsequent negotiation, became the July 14, 1988 agreement.

The Petitioners further argue that they did not exercise control because Mr. Blais was hired on behalf of the Van Zeggerens and because Mr. Blais determined the number of lots and location of lot lines himself.

The Board does not consider the allegation that Mr. Blais was hired on behalf of the Van Zeggerens to be substantiated. The Petitioners did not file testimony from the Van Zeggerens corroborating this allegation. In addition, there is an inconsistency in the Petitioners' testimony on this point. Mr. Stevens states that he hired Mr. Blais on behalf of the Van Zeggerens. Mr. Roy, in contradiction, states that he hired Mr. Blais.

In view of the lack of corroboration from the Van Zeggerens and the inconsistency in the testimony, the Board considers it more likely that the Petitioners hired Mr. Blais and were the ones with whom Mr. Blais dealt. Mr. Blais sent his bill to Mr. Stevens and Mr. Stevens paid for the surveyor's services.

The Board also is not convinced that the Petitioners had nothing to do with the number and location of the lots. The bill from Mr. Blais to Mr. Stevens states that the surveyor met with Mr. Gyles during the course of laying out the **sub-**division.

Further, even if Mr. Blais did decide the number and location of the lots, he did so as a result of the use of control by SRE and the Petitioners to cause the division of the Van Zeggeren tract. The issue is who caused the division of the tract, not who drew the lot lines. While joining lot lines may be indicative of control over the parcel, control also may be shown where a purchaser uses the power to compel specific performance to achieve a stated intention of dividing a parcel into lots. **Such control is not** defeated by leaving the specific layout decision to a surveyor.

B. Affiliation of the Petitioners and Van Zeggerens

The Petitioners have vigorously disputed the Board's inference that the Petitioners used the acreage shortage to achieve the division of the Van Zeggeren tract. The Petitioners assert that they simply had a contract to buy divided land and that the contract resulted from an offer by the Van Zeggerens to sell the tract in lots. The Petitioners appear to be arguing that the Van Zeggerens, not the Petitioners, controlled the division of the tract.

Even if the Board were to conclude that the Van Zeggerens controlled the division of the tract, the Board would conclude that, under the circumstances, the Petitioners and the Van Zeggerens were one person under Act 250 because they were affiliated for profit, consideration, and beneficial interest resulting from the division of the tract. Having concluded that the Van Zeggerens and the Petitioners were one person with respect to dividing the tract, it would become immaterial which of these individuals actually caused the lot creation. Instead, the lot creation by the Van Zeggerens would be attributed to the Petitioners since they were one person as Act 250 defines that term. See 10 V.S.A. §§ 6001(14)(A)(iii) and 6001(19), quoted above.

Several grounds support the conclusion that the Van Zeggerens and the Petitioners constitute one person. To begin with, the Petitioners and the Van Zeggerens were affiliated with respect to the tract because they entered into several deposit receipt and sales agreements regarding the tract. They were also affiliated through their negotiations concerning the division of the tract (see Findings 14 through 25, above). They each received profit, consideration or beneficial interest as a result of their affiliation: The Petitioners obtained the beneficial interest of owning divided land and the Van Zeggerens received the consideration of the sales price. The Van Zeggerens also received additional consideration of \$6,500 for selling the land as nine lots. Compare Findings 12 and 22, above.

All of the profit, consideration, and beneficial interest was derived from the division of the tract for two reasons. First, the Van Zeggerens' profit of \$6,500 arose solely because of the lot creation. Second, the sale of the tract as set out in the July 1988 Deposit Receipt and Sales agreements was contingent on the lot creation and the deeding of the tract as nine separate parcels.

In making this ruling, the Board emphasizes that this case concerns a negotiated division of land. Specifically, the Van Zeggerens listed the tract originally as one piece.

They then entered into the April 1988 Deposit Receipt and Sales Agreement and that agreement contemplated sale of one tract, not nine lots. During the course of the transaction, a dispute arose which was resolved by the sale of the tract in nine lots. The number of lots to be created was the subject of negotiation between the parties, with the initial offer being for six lots and the final agreement being for nine.

The Board distinguishes such facts from a transaction in which the seller divides the tract into lots before the buyer enters the picture. For example, had the Van Zeggerens divided the tract in nine lots without any involvement of the Petitioners, then listed the tract as nine lots, and sold all nine to the Petitioners, the Board would conclude that the Van Zeggerens and the Petitioners were not affiliated within the meaning of 10 V.S.A. § 6001(A)(14)(iii).

The Petitioners argue that they were not so affiliated with the Van Zeggerens because they had an **adverse relationship** arising from the acreage shortage and the threat to sue. However, the Board does not interpret the term "affiliated" to exclude all relationships which have an adverse component. Indeed, the Board believes that most affiliations between individuals become adverse at times and yet can achieve results such as the division of land. This case provides an example. Specifically, the Van Zeggerens and the Petitioners resolved the adversity of their relationship by reaching an agreement which was contingent on transferring a formerly whole tract to the Petitioners as nine lots.

The Petitioners also argue that, when the General Assembly amended the definition of person to include affiliated individuals in 1987, it intended only to include individuals who are not mentioned in a conveyance, and that, since the Petitioners and the Van Zeggerens **are** mentioned in all the deeds for the nine lots, they therefore cannot be one "person." The Petitioners base this argument on a quote from the case of In re Spencer, 152 Vt. 330 (1989) (see below).

The Board disagrees with the Petitioners' assertion that individuals who are mentioned in a conveyance cannot be a **"person"** under 10 V.S.A. § 6001(14)(A)(iii). That provision is worded broadly to include those individuals who are affiliated for profit, consideration, or beneficial interest derived from the division of land, and does not state that it excludes individuals mentioned in a conveyance. Moreover, to exclude such individuals would enable individuals who are in fact affiliated with respect to land division to evade Act 250 simply by transferring lots to each other.

The Board also does not believe that the Spencer case actually limits the applicability of the definition of person to individuals not mentioned in a conveyance. In that case, the Court stated:

The legislative findings accompanying the 1987 amendment make clear that the amendment was merely intended to broaden the definition of "person" owning or controlling land to include those who may not be mentioned specifically in the conveyance, but who may nevertheless derive some benefit from partition or division of the land.

152 Vt. at 339. Such a statement means only that individuals not mentioned in a conveyance may be a person; it does not mean that a "person" cannot include individuals who are mentioned in a conveyance.

The Board further believes that the Spencer case is not on point. In that case, the Court was construing 10 V.S.A. § 6001(14)(A)(iv) (emphasis added), which provides that person includes:

[a]n 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 Court was not construing the section which the Board is applying here, 10 V.S.A. § 6001(A)(iii) (emphasis added). As quoted above, Subsection (iii) is broadly worded to include those individuals affiliated for profit derived from land division, and unlike Subsection (iv), is not limited to family members.

c. Control over the Division of Lot #2 at the Van Zeqgeren Tract

Mr. Gyles controlled the division of Lot #2 into Lots #2A and #2B. Specifically, Mr. Gyles directed that Mr. Blais prepare a survey map of that lot and Mr. Blais did so. That map is dated December 31, 1988 and shows Lot #2 as being divided into Lots #2A and #2B. Five days later, the Petitioners conveyed Lot #2 to Kevin Mager. A year after that conveyance, Mr. Mager conveyed Lot #2B to Mr. Stevens.

These facts strongly suggest that Lots #2A and #2B should be attributed to the Petitioners. It was Petitioner Gyles who arranged for the creation for two lots and this creation occurred prior to the sale to Mr. Mager. Further, the lot

creation was subsequently realized when Mr. Mager sold Lot #2B back to Mr. Stevens with boundaries exactly as portrayed on the survey Mr. Gyles ordered from Mr. Blais.

The Board has concluded above that the Petitioners are one person with respect to the division of the Van Zeggeren tract. That conclusion applies to the further division of Lot #2 as well. Both of the Petitioners work for SRE and both were involved in the transaction regarding Lot #2.

Accordingly, the division of Lot #2 into Lots #2A and #2B is attributable to the Petitioners because of Mr. Gyles' control of that division. Therefore the Petitioners created ten lots on the Van Zeggeren tract for which an Act 250 permit was and is required.

D. Creation of Lots on Other Tracts

The requirement to obtain an Act 250 permit applies if a person has created ten lots within five years within an environmental district. District #7 consists of Caledonia, Essex, and Orleans counties. Thus, regardless of whether the Petitioners controlled the division of Lot #2, an Act 250 permit was and is required if the Petitioners created other lots within that district within five years of the lots on the Van Zeggeren tract.

Petitioner Stevens created at least one lot on August 24, 1984 when he received a subdivision permit for a one-lot subdivision in the town of Troy. This occurred less than five years prior to the creation of lots on the Van Zeggeren tract and Troy is within District #7. Accordingly, this lot is added to the lots on the Van Zeggeren tract for purposes of determining jurisdiction. Thus, even if the Petitioners did not control the division of Lot #2, they were required to obtain a permit for the lots on the Van Zeggeren tract because of the prior existence of Petitioner Stevens' Troy lot.

Further, Petitioner Gyles and others had Mr. Blais create five lots on a tract off Lake Road in Newport by a survey dated March 5, 1988. Subdivision Permit #EC-7-1263 was issued for this subdivision on January 5, 1989. These lots were created within five years of the lots on the Van Zeggeren tract and are within District #7. Accordingly, they are attributed to the Petitioners for the purposes of determining Act 250 jurisdiction. Thus, regardless of who controlled the division of Lot #2 or of Petitioner Stevens' lot in Troy, the Petitioners were required to obtain an Act 250 permit for the lots on the Van Zeggeren tract because of the prior survey and

creation of lots on the Lake Road tract in Newport. A permit also should have been obtained prior to the sale of any lots at the Lake Road tract.

The Board's conclusion regarding the Lake Road lots is premised on an analysis of the applicability of Board Rule 2(B), which provides in relevant part:

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

Under Rule Z(B)(1), the August 1988 sale of lots at the Van Zeggeren tract constituted the sale of the first lot (Or actually the first nine lots) of a subdivision with an intention to sell 10 or more lots. The intention to sell ten or more lots is shown by the fact that, prior to the August 1988 sale of lots at the Van Zeggeren tract lots, a March 5, 1988 survey dividing the Lake Road parcel into five lots had already been made by one of the Petitioners.

E. Questions Raised by Purchasers

Parties Scott Bergeron and Robert and Shelley Martin, who purchased lots from the Petitioners, have asked the Board three questions. Because these parties are placed in a difficult situation due to the need for an Act 250 permit for the subdivision at the Van Zeggeren tract, the Board will answer these questions.

The first question is whether the Petitioners should be held responsible for obtaining an Act 250 permit and bearing all expenses in that regard. The second question is what liability the Petitioners have if the Board determines an Act 250 permit was and is required and what recourse the purchasers may have against the Petitioners. These questions are grouped together because the answers overlap.

10 V.S.A. § 6081(a) prohibits any person from selling or offering for sale any interest in an Act 250 subdivision or from commencing construction on an Act 250 subdivision, without a permit. Accordingly, the Board concludes that the Petitioners were required to obtain a permit prior to the sales of lots at the subdivision to the Martins, Mr. Bergeron,

and Mr. Mager, and they remain responsible for obtaining a permit. In terms of liability, the State may seek administrative, civil, or criminal penalties for failure to comply with Act 250. 10 V.S.A. §§ 6003, 8010(c), 8221(b)(6).

However, the fact that the Petitioners bear continuing liability does not relieve purchasers of lots at the subdivision from the responsibility of obtaining a permit. Section 6081(a) prohibits any person from engaging in certain activities without a permit, and therefore purchasers must obtain a permit prior to sale or offer for sale of an interest in, or commencement of construction on, their lots.

With respect to bearing expenses or recourse against the Petitioners, Act 250 does not contain any provisions which authorize the Board or district commissions to award costs or which grant a right of action against the Petitioners. This does not mean that no provision of statutory or common law allows a court to award costs or grant other relief to the purchasers, but analysis of such provisions is beyond the Board's purview.

The third question is what steps would be necessary in order to commence construction on the lots.

To commence construction on the lots, or to sell or offer for sale an interest in the lots, the purchasers must obtain an Act 250 permit. In general, an Act 250 permit must be obtained for the entire subdivision. See 10 V.S.A. § 6086(a) (before issuing a permit, affirmative findings of compliance with the Act 250 criteria must be issued for the entire subdivision or development). An application for a permit must be made to the District #7 Environmental Commission. 10 V.S.A. § 6083. The District Commission will review the application to determine whether it complies with ten environmental and fiscal criteria set forth in Act 250. 10 V.S.A. § 6086(a). If it finds that the criteria are met, it will issue a permit.

The General Assembly has enacted a limited exception to the requirement that a permit must be obtained for the entire subdivision. 10 V.S.A. § 6025(c) authorizes the Board to adopt rules allowing for a modified process by which a permit may be issued for less than all lots at the subdivision, provided that the application is made by an eligible person or an eligible group of persons. To be eligible, the purchaser must, among other things, have bought the lot prior to January 1, 1991, must not have been involved in creating the lots at the subdivision, and must not have known at the time of purchase that a permit was required and had not been obtained.

The Board has adopted a rule, Rule 60, creating the modified process mandated by the General Assembly. Purchasers such as the Martins or Mr. Bergeron may be eligible for this process and, if they have not already done so, they should contact the District #7 Coordinator for a determination of eligibility and for assistance in the application process.

V. ORDER

An Act 250 permit was and is required prior to the sale or offer for sale of any interest in, or commencement of construction on, the lots created on the Van Zeggeren tract in Newport.

Dated at Montpelier, Vermont, this 8th day of May, 1992.

ENVIRONMENTAL BOARD



Elizabeth Courtney, Chair
Ferdinand Bongartz
Terry Ehrich
Lixi Fortna
Arthur Gibb
Samuel Lloyd
William Martinez

stevens.dec(awp5)