

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

Re: Bernard and Suzanne Carrier
Declaratory Ruling #246

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This declaratory ruling pertains to whether a 10.58 acre parcel is subject to Act 250 jurisdiction. As is explained below, the Board concludes that the 10.58 acre parcel is subject to Act 250 jurisdiction for three, independent reasons.

I. BACKGROUND

The background to this proceeding extends back ten years and centers upon a certain 10.58 acre parcel of land located adjacent to Lake Memphremagog in Newport; Vermont (the Parcel).

On June 12, 1985, Raymond and Betty Stearns conveyed the Parcel to Bernard and Suzanne Carrier (the Petitioners).

On July 24, 1985, then District #7 Coordinator Craig Whipple issued a letter to the Petitioners which stated that a nine-lot subdivision created by Raymond and Betty Stearns (the Stearns Subdivision) on the Parcel prior to the Petitioners' ownership of the Parcel did not require an Act 250 permit.

On September 5, 1985, Daniel and Richard Scott and Bluffside Farms, Inc. (the Respondents) requested that District Coordinator Whipple reconsider his July 24, 1985, determination.

On October 1, 1985, District Coordinator Whipple reaffirmed his July 24, 1985 determination.

On November 5, 1985, after receiving further additional factual information **from both the Petitioners and Respondents**, District Coordinator Whipple concluded that the Stearns Subdivision did, in fact, require an Act 250 permit.

On November 11, 1985, the Petitioners appealed from District Coordinator **Whipple's** November 5, 1985 advisory opinion to then Environmental Board Executive Officer W. Gilbert Livingston, Esq.

On February 13, 1986, Executive Officer Livingston issued advisory opinion #EO-85-86 in which he concluded that the Stearns Subdivision required an Act 250 permit.

On March 18, 1986, the Petitioners filed for an Act 250 permit for the Stearns Subdivision. The District #7

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Environmental Commission issued a permit, the Respondents appealed to the Board, and the Board dismissed the appeal due to the Respondents' failure to submit prefiled testimony. See Re: Bernard and Suzanne Carrier, #7R0639-EB, Order Dismissing Appeal (June 22, 1987). However, the Board's dismissal order precipitated a lawsuit against the Board the settlement of **which resulted** in a hearing on the Respondents' appeal.

On October 5, 1990, the Board denied the Petitioners' application for a permit for the Stearns Subdivision. See Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 5, 1990).

On March 21, 1991, the Petitioners filed a petition for a declaratory ruling regarding the Parcel (the Petition).

On April 11, 1991, the Petitioners requested that the Petition not proceed to final decision until civil court proceedings between the Petitioners and Respondents had reached a final decision.

On October 13, 1994, the Petitioners **filed** a supplement to their Petition and requested that it be adjudicated by the Board.

On December 19, 1994, then Chair Art Gibb convened a **prehearing** conference in Montpelier, Vermont.

On January 31, 1995, Chair Gibb issued a Prehearing Conference Report and Order (the Prehearing Order).

On February 1, 1995, John T. Ewing became Chair of the Environmental Board.

Pursuant to the Prehearing Order, during March and April, 1995, the parties filed statements of fact and legal memoranda, objections, supplemental statements of fact, and reply legal memoranda.

On July 19, 1995, Chair Ewing issued a memorandum to parties which: (i) noticed his appointment as hearing officer; (ii) identified nineteen documents of which official notice would be taken; (iii) proposed findings of fact; and (iv) deadlines for objections to items (i)-(iii).

On August 9, 1995, the Respondents objected to the taking of official notice of ten of the nineteen documents, and to certain proposed findings of fact.

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On August 15, 1995, the parties were notified that the Chair as administrative hearing officer would convene a hearing on September 20, 1995 regarding the taking of official notice.

On August 23, 1995, Chair Ewing issued a memorandum to the parties setting forth deadlines for the submission of prefiled testimony and exhibits in preparation for the September 20, 1995 hearing.

On September 8, 1995, the Petitioner filed prefiled testimony.

On September 20, 1995, Chair Ewing convened a hearing with the Petitioners and Respondents participating.

On November 3, 1995, Chair Ewing issued a proposed decision to the parties. Pursuant to 10 V.S.A. § 6027(g), parties were allowed to request oral argument before the Board. In addition, parties were allowed to file written objections. No party requested oral **argument** nor filed written objections.

On November 29, 1995, the Board deliberated concerning this matter, and, following a review of the proposed decision and the evidence and arguments presented in the case, declared the record complete and adjourned. This Petition is now ready for decision.

II. PRELIMINARY ISSUES

A. Objections to Official Notice

The Chair's July 19, 1995 Memorandum included the following proposed items for official notice:

1. Agency of Environmental Conservation, Division of Protection subdivision permit #EC-7-0922 issued on January 4, 1984, to Raymond and Betty Stearns and **Michel** and **Michele** Sanschagrin.
2. Deposit Receipt and Sales Agreement submitted by the Petitioners as Exhibit A on March 9, 1995.
3. Agency of Environmental Conservation, Division of Protection subdivision permit #EC-7-1009 issued on June 7, 1985, to Raymond Stearns submitted by the Petitioners as Exhibit B on March 9, 1995.

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4. October 1, 1985 letter to Duncan Frey Kilmartin from Craig Whipple regarding "Bernard Carrier Subdivision, Newport, **Vermont**" submitted by the Petitioners as Exhibit C on March 9, 1995.
5. Agency of Environmental Conservation, Division of Protection subdivision permit #EC-7-1009-1 issued on January 21, 1986, to Bernard Carrier.
6. Advisory Opinion #7-015 submitted by the Petitioners as Exhibit D on March 9, 1995.
7. November 11, 1985 letter from Robert P. Davison, Jr. appealing Advisory Opinion #7-015 to Environmental Board Executive Officer W. Gilbert Livingston, Esq., submitted by the Petitioners as Exhibit E on March 9, 1995.
8. Executive Officer Advisory Opinion #EO-85-86 submitted by the Petitioners as Exhibit F on March 9, 1995.
9. In Re: Anneal of Bernard and Suzanne Carrier From Newport City Planning Commission's Denial of their Annlication from a Zonina Permit, Orleans Superior Court, Docket No. **S90-860sC**, Findings of Fact, Conclusions of Law and Order, October 26, 1987, submitted by the Petitioners as Exhibit G on April 14, 1995.
10. In Re: Anneal of Bernard and Suzanne Carrier From Newport Citv Planning Commission's Denial of their Annlication from a Zonina Permit, Orleans Superior Court, Docket No. **S90-860sC**, Entry Regarding Motion - Motion to Alter and Amend Judgment, December 14, 1987, submitted by the Petitioners as Exhibit H on March 9, 1995.
11. In Re: Anneal of Bernard and Suzanne Carrier From Newport City Planning Commission's Denial of their Application from a Zonins Permit, Orleans Superior Court, Docket No. **S90-86-0sC**, Amended Findings of Fact, Conclusions of Law and order, April 11, 1988, submitted by the Petitioners as Exhibit I on March 9, 1995.
12. In re Annlication of Bernard and Suzanne Carrier, 155 Vt. 152 (1990), submitted by the Petitioners as Exhibit J on March 9, 1995.
13. The prefiled testimony of Mr. Gary Sweeny, P.E., offered by the Petitioners and admitted into evidence in Re: Bernard and Suzanne Carrier, #7R0639-EB, on November 29, 1989, as "Exhibit #9" therein.

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14. The site plan prepared by Boehm Associates, Inc., dated December 31, 1987, consisting of three pages, drawings S-1 through S-3, offered by the Petitioners and admitted into evidence in Re: Bernard and Suzanne Carrier, #7R0639-EB, on November 29, 1989, as "Exhibit #10" therein.
15. Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 5, 1990).
16. Bernard and Suzanne Carrier v. The City of Newport, Orleans Superior Court, Docket No. **S79-3-91-Osc**, Entry Regarding Motion - Motion for Summary Judgment and Motion to Strike Defendant's Request for Jury Trial, July 16, 1991, submitted by the Petitioners as Exhibit K on March 9, 1995.
17. In re Request for Improvements to Bigelow's Bluff Road, Newoort City, Vermont, Orleans Superior Court, Docket NO. **S59-4-94-Osc**, Complaint and Affidavit, April 4, 1994, submitted by the Petitioners as Exhibit&L on March 9, 1995.
18. Stipulation, dated October 11, 1994, entered into between the Petitioners and the City of Newport in Bernard and Suzanne Carrier v. The City of Newoort, Docket No. **S79-3-91-Osc**, submitted by the Petitioners as Exhibit M on March 9, 1995.
19. 19 V.S.A. § 971 submitted by the Petitioners as Exhibit N on March 9, 1995.

On August 9, 1995, the Respondents filed a timely objection to official notice of items 2, 7, 9, 10, 11, 12, and 15-18. In response, the Chair, as administrative hearing officer, convened the September 20, 1995 hearing to allow the Respondents to be heard relative to the propriety of taking official notice.

After reviewing the **Respondents'** objections, the Administrative Procedure Act (APA), the Vermont Rules of Evidence (VRE), and relevant Vermont Supreme Court precedent, the Board concludes that official notice may be taken of all nineteen items and, therefore, the Respondents' August 9, 1995 objection to official notice is denied. See 3 V.S.A. § 810; V.R.E. 201; and Jakab v. Jakab, 6 Vt. Law Week 157 (June 23, 1995).

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The Petitioners did not object to official notice of any of the nineteen items, and reaffirmed this position at the September 20, 1995 hearing.

B. Objections to Proposed Findings of Fact

On August 9, 1995, the Respondents filed a timely objection to certain proposed findings of fact made by the Chair in his July 19, 1995 memorandum. After reviewing the objections, the Board concludes that the proposed findings of fact are soundly based on the items officially noticed. The Board denies the objection and will adopt the Chair's July 19, 1995 proposed findings as its own.

C. Evidence Offered on September 20, 1995

The parties offered evidence for introduction at the September 20, 1995 hearing relative to the propriety of taking official notice. Objections raised at that time are addressed below.

i. Petitioners

On September 8, 1995, the Petitioners filed Bernard Carrier's prefiled testimony and a list of ten exhibits. The exhibits are the same ten to which the Respondent objects as being inappropriate for official notice. At the September 20, 1995 hearing, the Petitioners offered Mr. Carrier's testimony and the ten exhibits.

The Respondents request the opportunity to make objections to Mr. Carrier's testimony and the exhibits on grounds other than official notice. With regard to the exhibits, the Board denies the Respondents' request since official notice is taken as discussed above in subsection A. With regard to Mr. Carrier's testimony, the Board denies the request since Mr. Carrier's testimony was offered in support of taking official notice, the Respondents cross-examined Mr. Carrier, and, in any event, the Board adopts the **Chair's** proposed findings of fact.

ii. Respondents

At the September 20, 1995 hearing, the Respondents offered exhibits as rebuttal testimony. The Chair's August 23, 1995 memorandum allowed parties to file prefiled testimony and exhibits on or before September 8, and to present live rebuttal testimony on September 20. The Respondents' exhibits should have been prefiled with the Board on or before

September 8. The Board concludes that the offered exhibits shall be excluded since they were untimely offered pursuant to the Chair's August 23, 1995 memorandum.

III. ISSUES

Pursuant to the Prehearing Order, the issues in this proceeding are:

1. Whether the applicable definitions of development and subdivision are those which were in effect when advisory opinion #EO-85-86 was issued or the definitions now in effect.
2. Whether, pursuant to 10 V.S.A. § 6081, 10 V.S.A. §§ 6001(3) and (19), EBR 2(A), and EBR 2(B), the Petitioners have triggered Act 250 jurisdiction over the Parcel at any time since February 23, 1985, because they have:
 - a. sold or offered for sale any interest in a subdivision of the Parcel;
 - b. commenced construction on a **subdivision** or development of the Parcel; or
 - c. commenced development of the Parcel.
3. Whether, if the Petitioners have triggered Act 250 jurisdiction over the Parcel at any time since February 23, 1985, such jurisdiction has been or should be **terminated** due to a subsequent event.

IV. FINDINGS OF FACT

1. The Parcel is 10.58 acres and is located in Newport, Vermont. Raymond and Betty Stearns are the Petitioners' predecessor in title to the Parcel.
2. On January 4, 1984, the Agency of Environmental Conservation, Division of Protection, issued subdivision permit #EC-7-0922 to Raymond and Betty Stearns and **Michel** and **Michele** Sanschagrin. Subdivision permit #EC-7-0922 provides, in part:

'State subdivision permits are issued pursuant to 18 V.S.A. § 1218 and Chapter 3 of the Environmental Protection Rules by the Agency of Natural Resources, Department of Environmental Conservation, Wastewater Management Division as successor to the Agency of Environmental Conservation, Division of Protection.

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This project, consisting of-combining 4 1/2 lots from a pre-existing subdivision as shown on the map known as the "1927 Clough Plan" which is entitled "Map of Bigelow's Bluff" and creating 2 lots, #3 and #4, lot 3 being the southerly half of Lot 16, all of lot 17 and the northerly half of Lot 18 and lot 4 being the southerly half of lot 18, all of lots 19 and 20 and located on the Bigelow Road in Newport, Vermont, is hereby approved under the requirements of the rules named above subject to the following conditions:

1. The subdivision must be completed as shown on the plans prepared by **Norbert** Blais, L.S. dated July 29, 1982 and which have been stamped "**APPROVED**" by the Division of Protection. No changes shall be made to the approved plans without prior written approval from the Agency of Environmental Conservation.

* * *

5. The conditions of this permit shall run with the land and will be binding upon and enforceable against the permittee and all assigns and successors in interest. The permittee shall be responsible for recording this permit and the "**Notice of Permit Recording**" in the Newport City land records within 30 days of the receipt of this permit and prior to the conveyance of any lot subject to the jurisdiction of this permit.

3. Raymond and Betty Stearns conveyed the two lots allowed by subdivision permit #EC-7-0922 prior to the issuance of subdivision permit #EC-7-1009.
4. The Parcel is adjacent to the two lots authorized pursuant to subdivision permit #EC-7-0922.
5. On February 23, 1985, the Petitioners entered into a "Deposit Receipt and Sales **Agreement**" with Raymond and Betty Stearns which provided, in part, that the Petitioners would purchase the Parcel.
6. The sale of the Parcel from Raymond and Betty Stearns to the Petitioners was contingent upon the Petitioners'

"obtaining necessary environmental permits to split the 10 acres into lots within a sixty day period."

7. On June 7, 1985, the Agency of Environmental Conservation, Division of Protection, issued subdivision permit #EC-7-1009 to Raymond Stearns, Underhill Center, Vermont.

8. Subdivision permit #EC-7-1009 provides, in part:

This project, consisting of a 7-lot subdivision--Lots 1 through 4, 7, 8 and 9 to be served by individual on-site wastewater disposal and municipal water supply, located on Bluff Road, Newport City, Vermont, is hereby approved under the requirements of the rules named above subject to the following conditions:

1. The subdivision must be completed as shown on the plans prepared by Douglas Bumps, P. E. entitled, "B. Carrier Project", Sheet 1 of 2 dated June 3, 1985 and Sheet 2 of 2 dated May 7, 1985 and "X-Sections" dated June 4, 1985, all of which have been stamped "APPROVED" by the Division of Protection. No changes shall be made to the approved plans without prior written approval from the Agency of Environmental Conservation.

* * *

5. Lots 5 and 6 that are shown on the Approved Plan shall not be transferred or offered for sale or gift without prior written approval from the Agency of Environmental Conservation.

* * *

7. Each prospective purchaser of each lot shall be shown a copy of the approved plot plan, the engineer's site report and the land use permit before any written contract of sale is entered into.

9. The conditions of this permit shall run with the land and will be binding upon and enforceable against the permittee and all assigns and successors in interest. The permittee shall be responsible for recording this permit and the "Notice of Permit Recording" in the Newport City land records within 30 days of the receipt of this permit and prior to the conveyance of any lot subject to the jurisdiction of this permit.
9. On June 12, 1985, Raymond and Betty Stearns conveyed the Parcel to the Petitioners.
10. On January 21, 1986, the Agency of Environmental Conservation, Division of Protection, issued subdivision permit #EC-7-1009-1 to Bernard Carrier which provided, in part:

This project consists of an **amendment** to Land Use Permit EC-7-1009 to add Lots 5 and 6 to the previously-approved 7-lot subdivision and the relocation of the sewage disposal area on Lot 4 located on Bluff Road, City of Newport, Vermont. All 9 lots within this subdivision will be served by individual on-site wastewater disposal and municipal water supply. This project is hereby approved under the rules named above subject to the following conditions:

1. The subdivision must be completed as shown on the plans prepared by Douglas Bumps, P. E. dated December 9, 1985, revised January 17, 1986 which have been stamped "APPROVED" by the Division of Protection. No changes shall be made to the approved plans without prior written approval from the Agency of Environmental Conservation.
11. In In Re: Anneal of Bernard and Suzanne Carrier From Newport City Plannins Commission's Denial of their Application from a Zonins Permit, Orleans Superior Court, Docket No. S90-860sC, Findings of Fact, Conclusions of Law and Order, October 26, 1987, the Superior Court

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stated, in part:

FINDINGS OF FACT

1. On May 20, 1986, Bernard and Suzanne Carrier, herein after referred to as the Carriers, applied to the Newport Planning Commission, for site development plan approval for a nine lot development located on Bigelow's Bluff Road in the City of Newport, Vermont.

* * *

28. The road known as **Bigelow's** Bluff Road has been recognized by the City of Newport as a public road and by its actions the City has recognized it and accepted it as a city street.

29. **Bigelow's** Bluff Road is not a functionally adequate road to accommodate existing traffic and the increased traffic from the proposed Carrier project in its present condition. The proposed development would make the road unsafe for the road's present users.

30. Carrier has prepared a road improvement plan for Bigelow's Bluff Road. However, the plan is not adequate, it does not include grades, contours, or site distances.

12. In In Re: Appeal of Bernard and Suzanne Carrier From Newport City Planning Commission's Denial of their Application from a Zoning Permit, Orleans Superior Court, Docket No. **S90-86-0sC**, Amended Findings of Fact, Conclusions of Law and Order, April 11, 1988, the Orleans Superior Court stated, in part:

AMENDED FINDINGS OF FACT

A . Paragraph **10** is amended as follows:

A site plan has been filed. It shows proposed structure locations. The stairs and walkway location have been clearly marked. Landscaping designs and screening have also been marked. The Carriers submitted an additional site plan prepared by Boehm Associates, Inc., dated December 31, 1987 and consisting of three **pages**

- drawings S-1 through S-3. Drawing S-2 - a plan, profile and section of interior road of the subdivision, shows the locations of the driveways on the individual lots, the design and location of the interior road system and the roadway drainage system. The plan of the interior road system shows the proposed street profiles, elevations, cutaways, driveway locations and lanes or directional indicators on the proposed streets, and directional lanes for the proposed turning circle or cul-de-sac.

* * *

C. Paragraph 17 is amended as follows:

The proposed project would involve the construction of an interior road. The materials and method of construction of the proposed interior road are set forth on drawing S-2 include a 12" gravel base, topped with a 4" gravel surface. The roads will consist of two 11' wide lanes, together with two 2' shoulders and drainage swales and culverts on either side of the roadway within the 50' right of way. The road design is based on standard **geometrics** which will provide safe conditions for typical residential subdivision traffic including emergency vehicles, moving vans and fuel oil trucks. The surface and base course thickness of the interior roads are adequate to support the estimated auto traffic, as well as heavy truck and emergency vehicle traffic customary in a residential neighborhood. The site distances from driveways onto the interior road system are adequate and safe. The slopes resulting after the proposed construction will stabilize after normal planning procedures, and will not cause undue soil erosion. The **cul-de-sac** provides adequate turning room and distances for all vehicles expected to be in the subdivision. The turning loop has adequate turning radii to allow schoolbuses, moving vans, snowplows, garbage trucks, fuel trucks and emergency vehicles to turn around and, if necessary, to back into **the drive** serving Lots #5 and 6. The proposed interior road system will provide adequate and safe vehicular circulation within the subdivision.

D. Paragraph 22 is amended as follows:

The proposed subdivision will generate 70 vehicle trip ends per day (35 trips out and 35 trips back) and seven vehicle trips ends per peak hour. The interior road system will connect to the **Bigelow's** Bluff road, which presently serves thirteen existing residential structures, plus two of the nine lots in the proposed subdivision which will front on **Bigelow's** Bluff Road. The thirteen existing residences on **Bigelow's** Bluff Road, plus the nine lots from the-proposed subdivision, will generate a maximum of 220 vehicle trip ends per day and 22 per peak hour. At an average of one vehicle per three minutes, there will be adequate gaps to allow vehicles to enter **Bigelow's** Bluff Road from the various driveways. The proposed upgrading of Bigelow's Bluff Road by providing two 11' travel lanes, plus 2' shoulders, will accommodate the anticipated traffic volume of 220 trip ends per day (which is below the 400 trip ends per day special level above which it may be economically preferable to provide a paved surface). **Bigelow's** Bluff Road connects to Bluff Road which serves residential development along Bluff Road or on small loops or **cul-de-sacs** off the road. Bluff Road is also a **dead-end** road, and the nine trip ends per peak hour generated by the proposed subdivision will become a small increment (less than 10%) to the peak hour **traffic** (sic) on Bluff Road generated by the existing dwellings and the total traffic will not exceed the capacity of the Bluff Road. The proposed subdivision has been designed to provide maximum safety of vehicular circulation between the site and existing network, as well as adequate and safe provision for vehicular circulation.

E. Paragraph 30 is amended as follows:

Drawing S-1 prepared by Boehm Associates, Inc. is a plan, profile and section of the Bigelow's Bluff Road and shows improvements proposed to be made to **Bigelow's** Bluff Road. The proposed plan shows grades, **contours**, cross-sections, existing and **proposea** driveways, fire hydrant

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and utility pole locations, site distances and construction design and material specifications. The proposed improvements to Bigelow's Bluff Road involve creating two 11' wide travel lanes, together with two 2' shoulders and two 2 1/2' wide sections within the 31' wide right of way, within which certain hydrants and utility poles would be relocated. The Bigelow's Bluff Road would include a minimum of 12' of gravel as a base, with 4' of gravel as a top dressing surface. The existing grounds and slopes of the Bigelow's Bluff Road would be matched where possible so as to preserve the existing drainage patterns and characteristics. The surface water generated by Bigelow's Bluff Road would infiltrate down through the road, shoulder and right-of-way material. The road **geometrics** and surface and base course materials are adequate support, and provide safe traffic conditions for, typical residential subdivision traffic, **including** emergency vehicles, moving vans, and fuel oil trucks. The site distances from the existing and proposed driveways on Bigelow's Bluff Road are safe and adequate.

AMENDED CONCLUSIONS OF LAW

The **Court's** Findings of Fact demonstrate that the proposed development site plan complies with Section **352(2)**, (3) and (6) of the City of Newport Zoning Regulations. The Carriers should be responsible for the cost of the construction of the proposed improvements to Bigelow's Bluff Road.

AMENDED JUDGMENT ORDER

In view of the foregoing Findings of Fact, Conclusions of Law and those Findings of Fact, Conclusions of Law and Judgement filed October 26, 1987, as subsequently amended, it is hereby ORDERED AND ADJUDGED:

1. Bernard and Suzanne Carrier shall be responsible for the cost of construction of the proposed improvements to Bigelow's Bluff Road.

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2. Bernard and Suzanne Carrier's application for a site development plan approval for a nine-lot development is GRANTED.

13. **Bigelow's** Bluff Road is a public road in the City of Newport. **Bigelow's** Bluff Road is 1,100 feet in length and 31 feet in width.
14. The Petitioners must make and pay for the improvements identified in the Orleans Superior Court April 11, 1988 Order to Bigelow's Bluff **Road**.
15. The Petitioners submitted to the Board in Re: Bernard and Suzanne Carrier, #7R0639-EB, the prefiled testimony of Mr. Gary Sweeny, P.E., as Exhibit #9, and the site plan prepared by Boehm Associates, Inc., dated December 31, 1987, consisting of three pages--drawings S-1 through S-3--as Exhibit #10. The Board admitted Exhibits #9 and #10 on November 29, 1989. Exhibit #9 provides, in part:

Q.2 Please state your place of **work**, occupation, and your relationship to the applicant.

A.2 I work for TWM Northeast of Vermont, Inc. in Williston, Vermont. I am a Civil Engineer, registered in the State of Vermont to practice Civil Engineering. In 1987, my company, then known as Boehm Associates, Inc. was retained by Bernard and Suzanne Carrier to provide professional services in the design of a new interior road and design of roadway improvements on **Bigelow's** Bluff Road, as part of the proposed Carrier Subdivision. We also agreed to provide the design for a water supply system for fire fighting purposes.

* * *

Q.6 Please outline the intent and basis of your design-for the roadway.

A.6. The intent of the roadway design is to provide an improved existing Town road, **Bigelow's** Bluff Road, in order to maximize the safety and efficiency of access to the project. Also included is design for the

new roadway beyond the existing road for access within the subdivision boundaries.

The proposed plan shows grades, contours, cross-sections, existing and proposed driveways, fire hydrant and utility pole locations, site distances and construction design and material specifications. The proposed improvements to **Bigelow's** Bluff Road involve creating two **11'** wide travel lanes, together with two **2'** shoulders and two **2 1/2'** wide sections within the **31'** wide right of way, within which certain hydrants and utility poles would be relocated. The **Bigelow's** Bluff Road would include a minimum of **12"** of gravel as a base, with **4"** of gravel as a top dressing surface. The existing grounds and slopes of the **Bigelow's** Bluff Road would be matched where possible so as to preserve the existing drainage patterns and characteristics. The road surface and base course materials are adequate to support typical residential subdivision traffic, including emergency vehicles, moving vans, and fuel oil trucks. The sight stopping distances in the road system are adequate.

The plan of the interior road system shows the proposed street profiles, elevations, cutaways, driveway locations and lanes or directional indicators on the proposed streets, and directional lanes for the purposed (sic) turning circle or **cul-de-sac**. The materials and method of construction of the proposed interior road are set forth on drawing S-2 include a **12"** gravel base, topped with a **4"** gravel surface. The roads will consist of two **11'** wide lanes, together with two **2'** shoulders and drainage swales and culverts on either side of the roadway within the **50'** right of way. The road design is based on standard **geometrics** which will provide safe conditions for typical residential subdivision traffic including emergency vehicles, moving vans and fuel oil trucks.. The surface and base course

thickness of the interior roads are adequate to support the estimated auto traffic, as well as heavy truck and emergency vehicles traffic customary in a residential neighborhood. The cul-de-sac provide adequate turning room and distances for all vehicles expected to be in the subdivision. The turning loop has adequate turning radii to allow schoolbuses, moving vans, snowplows, garbage trucks, fuel trucks and emergency vehicles to turn around and, if necessary, to back into the drive serving Lots #5 and 6. The proposed interior road system will provide adequate and safe vehicular circulation within the subdivision.

* * *

Q.8. Please address Criteria 4 (Erosion Control) and 5 (Highways) as they relate to the roadway for the project.

A.8 Criterion 4: The proposed interior road and improvements to **Bigelow's** Bluff Road are designed to prevent undue soil erosion during and after construction. Standard erosion protection measures are expected during construction.

Criterion 5: Our opinion is that the new interior roadway is safe and efficient and meets AASHTO guidelines for horizontal and vertical alignment and sight stopping distances. Also, the existing conditions on **Bigelow's** Bluff Road will be maximized to provide as safe and efficient an access as possible. Based on traffic generation figures provided by Michael Munson, no unreasonable--congestion is anticipated.

The figures, as provided by Mr. Munson, show that the proposed subdivision will generate 70 vehicle trip ends per day, (35 trips out and 35 trips back) and seven vehicle trip ends per peak hour. The thirteen existing residents on **Bigelow's** Bluff Road, plus the nine lots from the proposed subdivision, will generate a

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maximum of 220 vehicle trips ends per day
and 22 per peak hour.

16. Exhibit #10 as introduced before the Board on November 29, 1989--the site plan prepared by Boehm Associates, Inc., dated December 31, 1987 and consisting of three pages, drawings S-1 through S-3--is incorporated herein as if fully set forth.
17. In Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact, Conclusions of Law, and Order at 3 (Oct. 5, 1990), the Board made, in part, the following findings of fact:
 2. Until 1985 the [Parcel] was forested with a plantation of red and white pine and oak trees. In preparation for developing the site but prior to applying for an Act 250 permit, the [Petitioners] cleared the site of the trees and sold the lumber, buried the stumps on the site, stripped the topsoil, and excavated 17,000 cubic yards of earth which was **used** as fill for the stump burial area, regraded the site into terraces for house site, and excavated a road into the subdivision.
 3. Access to the subdivision will be by way of **Bigelow Bluff Road**, an existing Newport City street that ends at the project site. Lots 8 and 9 will have access directly onto Bigelow Bluff Road. The other seven lots will be served by a new road that will extend 700 feet into the subdivision from the end of Bigelow Bluff Road. One thousand one hundred feet of Bigelow Bluff Road will be upgraded.
18. Bernard and Suzanne Carrier v. The City of Newport, Docket No. **S79-3-91-OsC**, is currently pending before the Orleans Superior Court. On July 16, 1991, the Orleans Superior Court issued an Entry Regarding Motion which provides, in part, that: (i) the City of Newport owns **Bigelow's** Bluff Road by virtue of dedication and acceptance, in fee simple, and for all purposes and uses whatsoever; (ii) the Petitioners are to obtain a permit from the Vermont Environmental Board and the City of Newport is to be a co-applicant; (iii) the Petitioners will hold the City of Newport harmless from any loss including attorney fees by being a co-applicant; and (iv)

the Petitioners are to file an insurance policy or hold harmless agreement with the Court.

19. On October 11, 1994, the Petitioners and the City of Newport entered into a stipulation relative to Bernard and Suzanne Carrier v. The City of Newport, Docket No. **S79-3-91-OsC** (the Stipulation). The Stipulation states, in part:

1. The parties agree that the jury trial now underway may be continued.
2. If the settlement set forth herein is not accomplished, no matter may be resumed for trial before a judge, without a jury.
3. The City of Newport agrees to improve Bigelows Bluff Road to A-21 design standards so that it may be classified as a class III Newport City Street by the Vermont Department of **Highways** so long as it does not trigger [Act] 250.
4. The City of Newport will enter into a stipulation with the petitioners in the pending T.19 **§971** proceeding that the improvements to be made will benefit all residents of Bigelows Bluff Road and dispose of the proceeding by making the improvements as set forth in paragraph 3 hereof.
5. Bernard and Suzanne Carrier agree to pay for the improvements to Bigelows Bluff Road provided such payment does not trigger [Act] 250 jurisdiction for the improvements and they are made in a manner which satisfies the site plan approval granted to the Carriers by the Orleans Superior Court.. The Carriers have the right to prior approval of all improvements and contracts.
6. The Carriers shall seek a declaratory ruling that these proceedings or the payment for the improvements will not trigger [Act] 250 jurisdiction over the road improvements.

7. Should an Act 250 proceeding be necessary, the Carriers may elect not to proceed with [Act] 250 and resume this litigation as set forth in paragraph 2 hereof.

20. The petitioners referred to in paragraph 3 of the Stipulation are **Norbert** Blais, Douglas Fairbrother, and Kevin **Barrup**, and the T.19 §971 proceeding is In re Request for Improvements to Bigelow's Bluff Road, Newport City, Vermont, Docket No. **S59-4-94-Osc** (the Title 19 Action). The Title 19 Action pertains to **Bigelow's** Bluff Road, beginning at its northerly end, "at the point meeting the Bluff Road, and extending southerly along the road the full length of said road approximately 1000 ft. to the current Carrier property."

21. The petitioners in the Title 19 Action request that the Orleans Superior Court issue an order which provides, in addition to other relief, for the following improvements to **Bigelow's** Bluff Road:
 - a. The subject road must **be widened** to a travelled width of 22 feet with 2 foot wide shoulders on each side of road, resulting in a total shoulder to shoulder width of **26'**.

 - b. Clearing of trees should be accomplished as necessary to facilitate the requested road widening.

 - c. The finished road bed must include a **minimum of 12"** gravel base below a **4"** minimum crushed gravel wearing surface.

 - d. Road improvements must include all incidental drainage ditches, culverts and structures, and final re-establishment to perimeter vegetation as is reasonably required to accomplish the requested improvements.

v. CONCLUSIONS OF LAW

A . Applicable definitions of Subdivision

10 V.S.A. § 6001(19) and EBR 2(B) define "**subdivision.**" At the time advisory opinion #EO-85-86 was issued, 10 V.S.A. §6001(19) defined subdivision, in part, as the partition of land 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 Act 250's enactment. EBR 2(B) similarly defined subdivision.

After the issuance of advisory opinion #EO-85-86 but prior to the filing of the Petitioners' petition for declaratory ruling, the Legislature amended 10 V.S.A. §6001(19) and the Board modified EBR 2(B). The statutory and Board rule changes reduced the period over which a person's subdivision activity is measured for purposes of determining jurisdiction from ten down to five years. See 1987 Vt. Laws No. 64 § 2.

Under either the ten or five year rule, the issue is not whether ten or five years has elapsed since the issuance of subdivision permit #EC-7-1009, but rather, whether Raymond and Betty Stearns triggered Act 250 jurisdiction over the Parcel because they created a subdivision for Act 250 purposes within either a five or ten year period. The Board concludes that, because subdivision permits #EC-7-0922 and #EC-7-1009 were issued within an eighteen month period, the conclusions in sub-part B, below, are the same regardless of whether the Board uses the ten or five year continuous period for measuring subdivision activity.

B. Jurisdictional Analysis

1. Whether the Parcel is subject to Act 250 jurisdiction due to Raymond and Betty Stearns' creation of the Stearns Subdivision.

As noted above, a subdivision is the division of 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 5 years after Act 250's enactment. See 10 V.S.A. § 6001(19) and EBR 2(B). EBR 2(B) further defines that a subdivision is 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;

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(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 a radius of five miles of any point on any other lot created by that person within any continuous period of five years subsequent to April 4, 1970.

EBR 2(J) defines a lot, in part, as any undivided interest in land.

10 V.S.A. § 6081(a) provides, in part, that no person shall sell or offer for sale any interest in any subdivision without a permit.

Raymond and Betty Stearns, the Petitioners' predecessor in title, created the two-lot subdivision evidenced by subdivision permit #EC-7-0922 and conveyed these two-lots: Raymond and Betty Stearns then created the Stearns Subdivision (as evidenced by subdivision permit #EC-7-1009) and conveyed the Stearns Subdivision in toto to the Petitioners five days after subdivision permit #EC-7-1009's issuance.

Raymond and Betty Stearns triggered Act 250 jurisdiction over the Parcel when they conveyed the Parcel to the Petitioners because the two lot #EC-7-0922 subdivision and the Stearns Subdivision constitute the creation of more than nine lots from a tract of land for the purpose of resale within a radius of five miles and within a continuous 5 (or 10) year period. When Raymond and Betty Stearns conveyed the Parcel, they were required to obtain an Act 250 permit under 10 V.S.A. § 6081(a) prior to the sale because the Parcel was a subdivision under 10 V.S.A. § 6001(19) and EBR 2(B).

The Petitioners contend that subdivision permit #EC-7-1009 was unintentionally issued to Raymond Stearns, and therefore, there should not be Act 250 jurisdiction over the Parcel. Regardless of who was suppose to have obtained subdivision permit #EC-7-1009, the fact is that it was issued to Raymond Stearns as the applicant. This is consistent with § 3-08 of the Environmental Protection Rules which provides that an application for a permit to subdivide land shall be made "by the person intending to do so."

The Board concludes that the Parcel is subject to Act 250 jurisdiction due to the creation of the Stearns Subdivision. The Petitioners must obtain an Act 250 permit prior to the sale or offer for sale of any interest in the Parcel to comply with 10 V.S.A. § 6081(a).

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2. Whether the Parcel is subject to Act 250 jurisdiction pursuant to EBR 2(A)(6) in that the Petitioners' have commenced development thereon.

The Board concludes that there is a second, independent ground for Act 250 jurisdiction which arises out of the Petitioners' conduct since becoming the Parcel's owner. The Petitioners have constructed improvements to a development as defined in EBR 2(A)(6) on the Parcel. Therefore, the Parcel **is** subject to Act 250 jurisdiction.

10 V.S.A. § 6081(a) provides, in part, that no person shall commence construction on a development (or a subdivision) without a permit.

EBR 2(A)(6) defines development, in part, 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 ten acres owned or controlled by a person. This jurisdiction only applies where (a) the road is to provide access to more than five parcels or (b) is to be more than 800 feet in length.

In 1985 the Legislature ratified the Board's rules, including EBR 2(A)(6), such that they have the same effect as any law passed by the Legislature in the first instance. In effect, the ratified Board rules have "effectively become part Of the Act 250 legislative scheme codified at chapter 151 of Title 10." In re Barlow, 160 Vt. 513, 521 (1993); In re Spencer, 152 Vt. 330, 336 (1989).

In In Re: Appeal of Bernard and Suzanne Carrier From Newport City Planning Commission's Denial of their Application from a Zoning Permit, the Orleans Superior Court gave site plan approval to a nine lot subdivision, including the construction of an interior road, and "[t]he interior road system will connect to the **Bigelow's Bluff [R]oad**, which presently serves thirteen existing residential structures, plus two of the nine lots in the proposed subdivision which will front on **Bigelow's Bluff Road**." Drawing S2 clearly shows that seven lots will be served by the interior road. Therefore, the nine lot-subdivision for which the-Orleans Superior Court gave site plan approval to is a development under EBR 2(A)(6) because seven of the nine lots will be served by the interior road.

EBR 2(D) defines construction of improvements, in part, as "**any** physical action on a project site which initiates development for any purpose enumerated in [EBR] **2(A)**."

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As the Board found in Re: Bernard and Suzanne Carrier, #7R063339-EB, Findings of Fact, Conclusions of Law, and Order at 3 (Oct. 5, 1990), until 1985 the Parcel was forested with a plantation of red and white pine and oak trees. In preparation for developing the site but prior to applying for an Act 250 permit, the Petitioners cleared the site of the trees and sold the lumber, buried the stumps on the site, stripped the topsoil, and excavated 17,000 cubic yards of earth which was used as fill for the stump burial area, regraded the site into terraces for house site, and excavated a road into the subdivision.

Based on the preceding, the Board concludes that the Petitioners triggered Act 250 jurisdiction over the Parcel because they constructed improvements to a development (and a subdivision) thereon. Having commenced construction, the Parcel was and is subject to Act 250 jurisdiction.

3. Whether the Parcel is subject to Act 250 jurisdiction pursuant to EBR 2(A)(6) because of the improvements to be made to **Bigelow's** Bluff Road.

The Board concludes that there exists a third, independent ground for concluding that the Parcel is subject to Act 250 jurisdiction. As noted above, under 10 V.S.A. § 6081(a) and EBR 2(A)(6), a project is a development and requires an Act 250 permit if there is 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 ten acres owned or controlled by a person where the road is more than 800 feet in length.

In In Re: Anneal of Bernard and Suzanne Carrier From Newport City Planning Commission's Denial of their Application from a Zonings Permit, Orleans Superior Court, Docket No. S90-860-sC, Amended Findings of Fact, Conclusions of Law and Order, April 11, 1988, the Orleans Superior Court made extensive findings of fact in relation to the proposed upgrade of **Bigelow's** Bluff Road. These findings were based upon the December 31, 1987, **S1-S3 plans prepared by Boehm Associates, Inc.** The Petitioners' engaged the services of Boehm Associates, Inc.

In granting site plan approval, the Court specifically ordered that the Petitioners shall be responsible for the cost of construction of the proposed improvements to **Bigelow's** Bluff Road.

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After the grant of site plan approval by the Orleans Superior Court, the Petitioners submitted to the Board in Re: Bernard and Suzanne Carrier, #7R0639-EB, the prefiled testimony of Mr. Gary Sweeny, P.E. and the same December 31, 1987, S1-S3 plans submitted to the Orleans Superior Court.

Mr. Sweeny was retained by the Petitioners to provide professional services in the design of a new interior road and design of roadway improvements on **Bigelow's** Bluff Road. As the Board found in Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact, Conclusions of Law, and Order at 3 (Oct. 5, 1990), access to the Parcel will be by way of Bigelow's Bluff Road; lots 8 and 9 will have access directly onto **Bigelow's** Bluff Road; the other seven lots will be served by a new road that will extend 700 feet into the subdivision from the end of Bigelow's Bluff Road; and one thousand one hundred feet of **Bigelow's** Bluff Road will be upgraded.

The Board concludes that the upgrade of the one thousand one hundred feet portion of Bigelow's Bluff Road is construction attributable to the Petitioner³ based on the terms of the Stipulation entered into by the Petitioners and the City of Newport in Bernard and Suzanne Carrier v. The City of Newport, Docket No. **S79-3-91-Osc**. The Stipulation does provide that the City of Newport will improve Bigelows Bluff Road to A-21 design standards so that it may be classified as a class III Newport City Street, but this will be done at the Petitioners expense, subject to the Petitioners' right of prior approval of all improvements and contracts, and in settlement of the Title 19 Action.

The overwhelming evidence is that the Stipulation links the Title 19 Action to the improvements which the Petitioners are obligated to make to Bigelow's Bluff Road and the interior road pursuant to the Orleans Superior Court's site plan approval such that the Title 19 Action improvements are a condition precedent for the construction of the subdivision which the Orleans Superior Court gave site plan approval to. The fact that **Bigelow's** Bluff Road is already in public ownership does not by itself make the improvements for a public purpose.

The Board rejects unequivocally that the improvements provided for in the Stipulation are to be done by the City of Newport or are for a public purpose. The Stipulation requires the Petitioners to pay for the improvements and grants them the right to prior approval of all improvements and contracts, and the Orleans Superior Court has already ordered the Petitioners to pay for similar if not identical improvements

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to **Bigelow's** Bluff Road. See Re: Town Highway #37,
Declaratory Ruling #156 (Dec. 19, 1984); Re: Dr. Bernard
Barney, Declaratory Ruling #82 (Oct 11, 1977); Re: Gibou
Valley Company, Declaratory Ruling #67 (Sept. 16, 1975).

The Board concludes that an Act 250 permit is required under 10 V.S.A. § 6081(a) and EBR 2(A)(6) prior to the commencement of the construction of the improvements provided for under the Stipulation, and that such permit, if issued, would be a third, independent ground for Act 250 jurisdiction over the Parcel.¹

C. Whether Act 250 jurisdiction has been or should be terminated due to a subsequent event

The Petitioners did, in fact, apply for an Act 250 permit for the Parcel. As noted above, the Board ultimately denied this application in Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 5, 1990).

The Petitioners contend that the **denial** of application #7R0639-EB or the mere elapse of time results in no continuing Act 250 jurisdiction over the Parcel.

The Prehearing Order informed the parties that the Board has generally held that when Act 250 jurisdiction is triggered, subsequent events cannot defeat the triggering of jurisdiction. The underpinning of this principle is that Act 250 permits are issued for both construction and land use associated with construction. See Re: Interstate Uniform Services, Inc., Declaratory Ruling #147 at 7 (Sept. 26, 1984). The Prehearing Order directed the parties to Re: John Rusin, #8B0393-EB, Findings of Fact, Conclusions of Law, and Order (June 10, 1994), aff'd In re John Rusin, 5 Vt. Law Week 241 (1994); Re: Wildcat Construction Co., Inc., #6F0283-1-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 4, 1991), aff'd In re Wildcat Construction, 160 Vt. 631 (1993); Re: City of Barre Sludae Management Program, Declaratory

²The Board notes that this declaratory ruling does not address whether an Act 250 permit is required if the City of Newport improves **Bigelow's** Bluff Road to Class III standards as the construction of improvements for municipal purposes. See EBR 2(A)(4). If the City of Newport is not clear as to the applicability of EBR 2(A)(4) to such a project, then the City of Newport may request a jurisdictional opinion pursuant to 10 V.S.A. § 6007(c).

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Ruling #284 (Oct. 7, 1994); Re: Richard Farnham, Declaratory Ruling #250 (July 17, 1992); and Re: Stevens and Gyles, Declaratory Ruling #240 (May 8, 1992). Nevertheless, none of the parties addressed the issue of whether this precedent is controlling in this Petition.

In Stevens and Gyles the Board ruled that the lot owners in a subdivision which required an Act 250 permit but did not have one needed to obtain an Act 250 permit to comply with 10 V.S.A. § 6081(a) notwithstanding their seller's continuing liability for failing to obtain a permit.

In Farnham, the Board ruled that once construction had commenced on a housing project that was subject to Act 250 jurisdiction, such jurisdiction was not divested due to the sale of the property to an individual who would not have required a permit had the construction begun under his ownership.

In Rusin, the Board ruled that a **permittee's** commencement of construction on a project for which a **permit** was required subjected the project to Act 250 jurisdiction regardless of subsequent changes in the design of the project.

In Wildcat, the Vermont Supreme Court held that Act 250 jurisdiction was not divested when a city or town went from being a **"one acre"** to a **"ten acre"** town or city. See 10 V.S.A. § 6001(3).

Since the issuance of the Prehearing Order, the Board has issued Re: Charles and Barbara Bickford, #5W1186-EB, Findings of Fact, Conclusions of Law, and Order at 25 (May 22, 1995), wherein the Board ruled that certain subsequent events do not void the attachment of jurisdiction.

Based on the above precedent, and in the absence of any attempt to distinguish it, the Board concludes that neither its decision in Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 5, 1990) nor the elapse of five (or ten) years since Raymond and Betty Stearns triggered Act 250 jurisdiction over the Parcel are grounds for the divestiture of jurisdiction over the Parcel.

While the Petitioners are within their right to seek an Act 250 permit without having necessarily conceded jurisdiction back in 1985-86, In re Barlow, 160 Vt. 513, 519 (1993), the denial of such permit application in 1990 does not preclude the Board from ruling that the Parcel was and is subject to Act 250 jurisdiction due to the creation of the

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Stearns Subdivision and the Parcel's subsequent conveyance to the Petitioners.

VI. ORDER

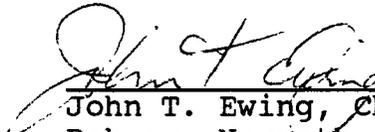
1. The Parcel is subject to Act 250 jurisdiction due to the creation of a subdivision and development thereon.

2. The Petitioners shall obtain an Act 250 permit prior to the conveyance of any interest in, or development of, the Parcel.

3. An Act 250 permit is required under 10 V.S.A. § 6081(a) and EBR 2(A)(6) prior to the commencement of the construction of the improvements provided for under the Stipulation.

Dated at Montpelier, Vermont, this 7th day of December, 1995.

ENVIRONMENTALBOARD



John T. Ewing, Chair
Rebecca Nawrath
John M. Farmer
Arthur Gibb
Samuel Lloyd
William Martinez
Steve Wright

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