

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

RE: James and Anita McGrath
Declaratory Ruling #248

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision, dated July 21, 1992, pertains to a petition for declaratory ruling regarding the construction, in 1990, of a retail store on the site of a pre-existing structure, which was destroyed in a fire. The Board concludes that the construction of the building does not require a permit pursuant to 10 V.S.A. Chapter 151.

I. BACKGROUND

On November, 15, 1990, the acting District Coordinator for District #9 issued an advisory opinion in which he concluded that the construction of the Upper Room Carpet building on a tract of land owned by James and Anita McGrath and located on Route 7 in New Haven required an Act 250 permit. The McGraths appealed that advisory opinion to the Executive Officer of the Board. In Advisory Opinion #EO-90-229 issued on February 28, 1991, the Executive Officer concluded that the construction of the new building on the site required an Act 250 permit.

On March 29, 1991, the McGraths filed a request for a declaratory ruling. An Administrative Hearing Panel of the Board convened a public hearing on November 6, 1991 with the following persons participating:

James and Anita McGrath by Joseph Obuchowski, Esq.

The Town of New Haven indicated by letter dated May 11, 1991, that it intended to participate in the proceeding. The Town had written materials delivered to the Panel by messenger on the day of the hearing. However, the Town failed to file pre-filed testimony or to have a representative at the hearing. At the conclusion of the hearing, the McGraths' attorney was advised to file proposed findings of fact and conclusions of law by December 1, 1991. No findings or conclusions were filed.

A proposed decision was sent to the parties on May 26, 1992, and the parties were provided an opportunity to file written objections, and to present oral argument before the full Board. The Board deliberated concerning this matter on July 15, 1992. On July 15, 1992, following a review of the proposed decision and the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUES

1. Whether two contiguous lots, owned by the same person, constitute a "tract of land" within the meaning of Board Rule 2(A) (2).
2. Whether construction of the existing building to replace a building that was constructed prior to 1970 and was destroyed by fire constitutes a substantial change to a pre-existing development pursuant to 10 V.S.A. § 6081(b) and Rule 2(A)(5).

III. FINDINGS OF FACT

1. James and Anita McGrath own a 13-acre tract of land located on Route 7 in New Haven. Subsequent to their purchase of the tract in April 1988, the McGraths subdivided it into a ten-acre lot and a three-acre lot. The existing building is located on the three-acre lot.
 2. During the early 1960s the tract was the site of a farm stand. In approximately 1963, a building was erected at the site.
 3. From approximately 1968 to 1976, the building was used as a convenience store; gasoline, beer and miscellaneous goods were sold to retail customers. Subsequently, the building was used as a lawn and garden center for approximately six years. The building was used as a retail carpet store from approximately 1985 until September, 1987.
 5. In July 1988, the building burned down. The McGraths commenced construction of the existing building in approximately February, 1990. There is no evidence that any construction took place at the site from 1963 until the existing building was constructed in 1990.
 6. The building that burned was approximately 40' x 50' on a concrete slab 60' x 60'. The existing building is 60' x 60' on a concrete slab of the same size. The location of the slab was not changed.
 7. There have been no other changes to the site. The curb cut onto Route 7 is unchanged. The existing septic system and the well were used for the previous building and were not enlarged. The driveway and parking area are unchanged. No filling or grading was done in connection with construction of the existing building. The existing building is used as a retail carpet store; generally there is only one employee on the premises.
 8. The Town of New Haven has adopted permanent zoning and subdivision bylaws.
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IV. CONCLUSIONS OF LAW

A. Contiguous Lots

Act 250 requires that a land use permit be obtained prior to commencing construction on a development. 10 V.S.A. § 6081(a). Rule 2(A) provides that project is a "development" if it satisfies any of eight definitions set forth in Rule 2(A)(1) through 2(A)(8). Rule 2(A)(1), in pertinent part, defines "development" as follows:

The construction of improvements for any commercial or industrial purpose ... which is located on a tract or tracts of land of more than one acre ... In municipalities with both permanent zoning and subdivision bylaws, this jurisdiction shall apply only if the tract or tracts of involved land is more than ten acres.

The McGraths argue that because they have subdivided the 13-acre tract of land into a three-acre parcel and a ten-acre parcel, the existing building that has been constructed on the three-acre parcel is exempt from Act 250 jurisdiction.

The term "tract" is not defined in Act 250. The Board has previously concluded that if a proposed project is located on a contiguous land mass of the requisite size, then the "tract" requirement of the definition of development is met. Re: Gerald Costello Garage, Declaratory Ruling #243 at 4 (July 2, 1991). The tract of land on which the existing building is located is, for Act 250 purposes, a 13-acre tract.

The McGraths also contend that because the three-acre lot is exempt from the requirement to obtain a subdivision permit from the Agency of Natural Resources, no Act 250 permit is required. Whether a subdivision permit from the Agency of Natural Resources is required is not relevant to the issue of whether there is Act 250 jurisdiction over the project.

B. Pre-existing Development

Board Rule 2(0), in pertinent part, defines "pre-existing development" as "any development in existence on June 1, 1970." An argument can be made that the construction of a new building should not be analyzed as a change to a pre-existing development, but rather constitutes the construction of improvements for a commercial purpose on a tract of more than ten acres and is therefore a development pursuant to Rule 2(A)(1). However, the Board has previously ruled that replacement of a building that existed prior to 1970 and was destroyed by fire does not require a permit. Re: Montgomery Schoolhouse, Declaratory Ruling #32 (Sept. 27, 1973). The existing building in this case was built to replace a building that existed prior to 1970. Accordingly, the new building is

subject to Act 250 jurisdiction only if it constitutes a substantial change to the pre-existing development.

C. Substantial Chancre

In a declaratory ruling proceeding concerning a substantial change, the burden is on the person engaging in the development to provide complete information to the Board on the nature of the development prior to and after 1970. The burden of persuading the Board that a substantial change has taken place is on any party making that claim. In the absence of an opponent, the Board gives the evidence regarding a substantial change the weight it deems appropriate. Re: Champlain Construction Co., Inc., Declaratory Ruling #214, Memorandum of Decision at 4, 5 (Oct. 21, 1990).

Board Rule 2(G) defines substantial change as follows:

[A]ny change in a development or sub-division which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10).

The Board applies a two-step test to determine when a substantial change to a pre-existing development has occurred. First, there must be a cognizable physical change to the project. Second, the change must have potential for significant impacts under one or more of the ten Act 250 criteria. Re: Robert and Barbara Barlow, Declaratory Ruling #222 at 4 (Dec. 29, 1989).

In this case, the first change in the use of the building subsequent to 1970 occurred in approximately 1976 when it was converted from a convenience store to a lawn and garden center. In 1985, the building was converted to a retail carpet store. There is no evidence that either change in use constituted a cognizable physical change. There is no evidence of any other change to the building until it burned in 1988.

The construction of the new building in 1990 to replace the structure that burned does constitute a cognizable physical change. Furthermore, the existing building has a larger enclosed square footage than the building that burned. The increase in size also constitutes a cognizable physical change.

However, the Board finds that the construction of the new building, without any other alterations to the site, **does not** have the potential for significant impacts with respect to the Act 250 criteria. Neither does the increase in the square footage of the interior space of the building create a potential for significant impacts. The use of the new building as a retail carpet store has no greater potential for

impacts with respect to the Act 250 criteria than the use of the building as a convenience store.

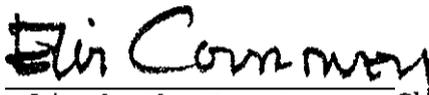
The Board therefore concludes that the construction of the new building does not constitute a substantial change to the pre-existing development.

V. ORDER

No permit is or was required for the construction of the building on the 13-acre tract.

Dated at Montpelier, Vermont, this 21st day of July, 1992.

ENVIRONMENTAL BOARD


Elizabeth Courtney, Chair
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Terry Ehrich
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