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

RE: Investors Corporation of Vermont
Declaratory Ruling Request #249

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision, dated December 31, 1991, pertains to a petition for declaratory ruling filed with the Environmental Board by Investors Corporation of Vermont (IC). The Board concludes that a permit is required pursuant to 10 V.S.A. Chapter 151 (Act 250) for a commercial subdivision in Williston.

I. SUMMARY OF PROCEEDINGS

This declaratory ruling request was filed on March 29, 1991 as an appeal from Executive Officer Advisory Opinion #90-227 issued on March 1, 1991. In that opinion, the Executive Officer concluded that the creation of a five-lot commercial subdivision is a development requiring an Act 250 permit and that the Environmental Board is not estopped from asserting jurisdiction over the subdivision despite the earlier issuance of a project review sheet which concluded that a permit was not required.

An Administrative Hearing Panel of the Board convened a public hearing on July 12, 1991. The only party participating in this proceeding is IC. A proposed decision was sent to the parties on October 18, 1991, and the parties were provided an opportunity to file written objections, and to present oral argument before the full Board. Having received no request for oral argument and no written responses from any party, the Board deliberated concerning this matter on December 19, 1991, On December 19, 1991, 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 the project is a "development" within the meaning of 10 V.S.A. § 6001(3) and Board Rule 2(A).

2. Whether the Environmental Board is estopped from asserting jurisdiction over the project because of the issuance of a project review sheet in 1988 that stated that an Act 250 permit was not required for this project.

III. FINDINGS OF FACT

1. IC proposes to create a five-lot industrial/commercial subdivision on a 15.1-acre tract of land owned by Marshall and Anna O'Brien. The tract of land is located on Shunpike Road in Williston and is adjacent to Williston Road.

2. The proposed project consists of the subdivision of the tract of land into five lots, the construction of an access road less than 800' in length, and the installation of pipe to the five lots for connection to the municipal water system. IC intends to develop a small commercial park in the subdivision. It never intended to create a residential subdivision. IC believed that the project was not subject to Act 250 jurisdiction because it consisted of only five lots and a road of less than 800 feet.

3. On June 14, 1988, IC and Marshall and Anna O'Brien executed a Purchase and Sale Agreement in which IC agreed to purchase the tract of land. Under the terms of the Purchase and Sale Agreement, IC is responsible for obtaining all permits necessary for IC's intended use of the property.

4. On August 2, 1988, District #4 Environmental Coordinator, Dana Farley, issued a project review sheet (the original project review sheet) which stated that an Act 250 permit was not required for the subdivision of the 15-acre tract. In the project review sheet, the project was described as:

> The subdivision of 15 acres into five lots with an access road less than 800 feet in length, to be served by municipal water and on-site sewage disposal, located off of Shunpike Road.

The original project review sheet further states that the determination that an Act 250 permit would not be required was based on Rule 2(B) and states: "Not a subdivision for Act 250 purposes - less than 10 lots." Rule 2(B) concerns subdivision of land into ten or more lots. There is no reference made in the project review sheet that the proposed project was to be used for commercial/industrial purposes.

5. Dana Farley acknowledges that she issued the original project review sheet, but she has no independent recollection of issuing it and does not recall the substance of any conversations with a representative of IC concerning this project. She issues up to 100 project review sheets per year. She has dealt with Christopher D'Elia on other Act 250 projects proposed by IC.

6. Before issuing a project review sheet, Ms. Farley ordinarily asks if a project is for residential or commercial use. If Ms. Farley had known the project was for commercial purposes, she would have asked about the acreage of the project land and referenced the section which defines development on the project review sheet.

7. On July 26, 1988, Christopher D'Elia of IC wrote a letter to Ms. Farley in which he stated that it "is to follow up on our phone conversation of July 25, 1988, regarding Marshall and Anna O'Brien's 15-acre parcel ..." The letter describes the parcel as a five-lot subdivision serviced by an access road that will be less than 800 feet in length. The letter does not state whether the subdivision is intended for residential or commercial purposes. The letter also contains the following language:

> When the buyer is ready to develop the parcel they will have to go through the normal Town approvals, public buildings and labor and industry but that is all.

8. In November, 1990, IC requested verification of the 1988 Act 250 determination, as required by its lending institution. On November 9, 1990, in response to that request, District #4 Coordinator Louis Borie issued a project review sheet for the proposed project in which he concluded that an Act 250 permit was required because the project consisted of the construction of improvements for a commercial purpose pursuant to Board Rule 2(A)(2).

9. As of July 10, 1991, IC has incurred the following expenses in connection with the proposed project:

a. engineering fees	$ 38,248.66
b. legal fees	2,500.90
c. permit fees	5,035.00
d. option payments	93,328.00
e. miscellaneous	1,078.01
Total	$140,190.57

The amount listed under "option payments" includes a $50,000 non-refundable downpayment paid at the time of execution of the Purchase and Sale Agreement. Some of the money expended would have to be spent whether or not an Act 250 permit is required.

10. IC might have designed the project differently had it known that an Act 250 permit is required.

11. The Town of Williston has permanent zoning and subdivision bylaws.

IV. CONCLUSIONS OF LAW

A. Develooment

Act 250 requires that a land use permit be obtained prior to commencing construction on a development. 10 V.S.A. § 6081(a). "Development" is defined in 10 V.S.A. § 6001(3) to include:

> The construction of improvements on a tract or tract of land, owned or controlled by a person, involving more than 10 acres of land for commercial or industrial purposes. ...

Rule 2(A) provides that a project is a "development" if it satisfies any of-eight definitions set forth in Rule 2(A)(l) through 2(A)(8).

The definition found at Rule 2(A)(l), in relevant part, states:

> 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.

Pursuant to Rule 2(D), "construction of improvements" is defined in pertinent part as "any physical action on a project site which initiates development ...."

The improvements proposed for this project are a road 'and the installation of pipe for sewer connections. These proposed improvements constitute "development" within the meaning of these definitions.

IC argues that its project falls within the definition Of Rule 2(A)(6), and that jurisdiction does not apply because the road will not provide access to more than five parcels and is less than 800 feet in length. However, as stated above, a project is a "development" if it meets any one of the listed definitions. Because this project meets the definition of construction for a commercial purpose found at Rule 2(A)(1), Rule 2(A)(6) is irrelevant.

The Board finds that the proposed project is a development within the meaning of the relevant statutory sections and rules because it will be located on more than ten acres of land and it will be for a commercial purpose.

B. Estovvel

Having concluded that the project is a development that requires an Act 250 permit, the Board must examine whether it is nevertheless estopped from imposing that requirement on IC because of the issuance of the original project review sheet which concluded that an Act 250 permit was not required.

The Vermont Supreme Court has on numerous occasions set forth both the rationale and the elements of equitable estoppel.

> The doctrine of [equitable] estoppel is based upon the grounds of public policy, fair dealing, good faith, and justice and its purpose is to forbid one to speak against his own act, representations or commitments to the injury of one to whom they were directed and who reasonably relied thereon.

My Sister's Place v. City of Burlington, 139 Vt. 602, 609 (1981) (quoting Dutch Hill Inn, Inc. v. Patten, 131 Vt. 187, 193 (1973)).

> [T]he test is whether, in all the circumstances of the case, conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct.

Neverett v. Towne, 123 Vt. 45, 55 (1962); McLaughlin v. Blake, 120 Vt. 174, 179 (1957).

The elements of equitable estoppel against a private party are:

1. The party to be estopped must know the facts.

2. That party must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended.

3. The party asserting the estoppel must be ignorant of the true facts.

4. The party asserting the estoppel must rely on the other party's conduct to his injury.

In re McDonald's Corp., 146 Vt. 380, 384 (1985).

A party who invokes the doctrine of equitable estoppel has the burden of establishing each of its constituent elements. Chadwick v, Cross, Abbott Co., 124 Vt. 325, 331 (1964); Cleveland v. Rand, 90 Vt. 223, 229 (1916). The doctrine will not be invoked in favor of one whose own omissions or inadvertences contributed to the problem. Town of Benninaton v. Hanson-Walbridae Funeral-Home, Inc., 139 Vt. 288, 294 (1981).

Estoppel as a defense is available against the government "only in extraordinary circumstances." In re McDonald's, at 383. Estoppel against the government requires a consideration of the public policy to be affected by the acceptance of the estoppel defense as reflected by the Vermont Supreme Court's decision in In re McDonald:

> The state ... may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and ... the injustice which would result from a failure to uphold an estoppel is of sufficient dimensions to justify any effect upon public interest or policy which would result from the raising of an estoppel.

146 Vt. at 383, auotina City of Lona Beach v. Mansell, 3 Cal. 3d 462, 496-97 (1970).

With these legal standards in mind, the Board must examine the facts of the present case. With respect to the first element of estoppel, the Board finds that IC has failed to ***meet*** its burden of establishing that Ms. Farley knew that the project was intended to be a commercial subdivision at the time she issued the first project review sheet. Because Ms. Farley has no recollection of her review of this project or of any conversations about it with a representative of IC, and because the representative of IC who spoke with Ms. Farley about the project did not offer testimony at the hearing, the best evidence of what Ms. Farley knew about the project is the project review sheet itself. Ms. Farley's written comments on that document are evidence of her knowledge of the facts and those comments do not reflect knowledge of the commercial purpose of the subdivision, but do indicate that she had a residential subdivision in mind.

The only other evidence of what Ms. Farley may have known concerning the commercial nature of the project is the letter of July 26, 1988, to Ms. Farley from Christopher D'Elia of IC. In that letter, Mr. D'Elia describes the subdivision but makes no reference to whether its use is to be residential or commercial.

The reference in that letter to "public buildings " and to "labor and industry" raises a question as to whether IC's reference to the need for these approvalsof necessity implies a commercial project. However, there was no evidence or argument offered that a project that requires approval as a "public building" and by "labor and industry" would necessarily constitute a commercial project for Act 250 purposes. Consequently, the Board cannot find that the contents of this letter establish knowledge on Ms. Farley's part that the proposed project was a commercial subdivision.

The Board recognizes that the coordinator's job, in part, is to review the nature of the project and that an adequate review requires a certain amount of investigation by the coordinator. There is no indication in this case that IC deliberately withheld information concerning the true nature of the project. Additional investigation by the coordinator might have avoided the confusion and delay that has resulted. However, the Board is bound by Vermont Supreme Court precedent with respect to the burden of establishing the elements of estoppel. That precedent includes a finding that the duty of a government official to make further inquiry concerning a proposed use does not dispel the requirement that the party claiming the estoppel must completely and accurately disclose the facts. Town of Bennington v. Hanson-Walbridge Funeral Home. Inc., 139 Vt. 288, 294 (1981). In that case, a zoning administrator ruled that no zoning permit was required for the construction of an incinerator at a funeral home. The Town later claimed that it did not know that the intended purpose of the incinerator was for cremation. There was no evidence that the administrator had been misled by statements of the applicant or by the applicant's deliberate failure to provide adequate information. The applicant claimed that the administrator had a duty to make further inquiry about the proposed use. The Court stated as follows:

> The law is otherwise. The duty to disclose this principal intended use truthfully and accurately rests squarely on the applicant. [Citations omitted.] A claim of estoppel in the absence of such disclosure is unfounded.

Town of Benninaton, at 294.

With respect to the second element of estoppel, The Board finds that the district coordinator, in issuing a project review sheet, intended that her conduct would be acted upon by IC. This element of estoppel is met.

With respect to the third element of estoppel, the Board finds that IC has established, although barely, that at the time it sought the project review sheet, it was ignorant of the true facts that a subdivision as proposed by IC, if constructed for a commercial as opposed to residential purpose, required an Act 250 permit. Mr. Williams, who assisted Mr. D'Elia on this project, testified that he thought the project would not be subject to Act 250 jurisdiction because it consisted of only five lots and a road of less than 800 Feet.

With respect to the fourth element of estoppel, the Board finds that IC has failed to establish the nature and extent of the injury it has incurred as a result of its reliance on the determination in the original project review sheet. IC provided information concerning expenditures in the amount of $140,190.00 associated with the proposed project. However, it did not provide evidence that it will not go forward with this project because of the necessity of obtaining an Act 250 permit. There is no basis on which to conclude that those expenditures have been incurred to IC's injury. The sellers of the property are still willing to go through with the sale so IC may yet be able to proceed with the project as proposed and designed. Furthermore, there was no evidence offered that IC would not have incurred all of these expenditures despite issuance of the original project review sheet.

There is no question that the issuance of the second project review sheet asserting jurisdiction over the project at a time when IC was ready to proceed with construction of the project has caused delay. Most likely there have been and will be expenses associated with that delay. However, no evidence has been offered as to the specific costs attributable to that delay. Testimony was provided that the project might have been designed differently had IC known that an Act 250 permit was required, but this evidence is too speculative to provide a basis for concluding the IC has been injured.

Because the Board concludes that IC has not met the burden of establishing the elements of equitable estoppel, it does not need to weigh any injustice which would result from failure to uphold an estoppel against any effect upon the public interest.

V. ORDER

An Act 250 permit is required for the proposed commercial subdivision and related improvements.

Dated at Montpelier, Vermont, this 31st day of December, 1991.

ENVIRONMENTAL BOARD

Charles Storrow

Charles Storrow, Acting Chair
Ferdinand Bongartz
Terry Ehrich
Samuel Lloyd
William Martinez

Dissenting:
Arthur Gibb
Lixi Fortna

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