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

RE: Richard Farnham
Declaratory Ruling #250

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision, dated July 17, 1992, pertains to a petition for a declaratory ruling regarding a nine-unit apartment building proposed to be constructed by Richard Farnham on property located in Johnson. The Board concludes that a permit is required pursuant to 10 V.S.A. Chapter 151 (Act 250).

I. BACKGROUND

The construction of an apartment building on a two-acre site located on Clay Hill in Johnson was the subject of Re: Bradford Moore and S.D. & L. Enterprises, Inc., Declaratory Ruling #205 (April 24, 1990). In that case, Bradford Moore proposed to construct the nine-unit apartment building. S.D. & L. Enterprises, Inc. had already constructed three apartment units within a five-mile radius of the Clay Hill property where the apartment building was proposed to be constructed. In its decision, the Board concluded that Bradford Moore and S.D. & L. Enterprises, Inc. were one "person" as that term is defined in Act 250. Therefore, the 10-unit threshold for Act 250 jurisdiction set forth in 10 V.S.A. § 6001(3) was exceeded. The Board concluded that a permit was required before any construction could commence on the apartment building.

In an advisory opinion dated January 6, 1991, the Assistant District Coordinator for the District #5 Environmental Commission concluded that Richard Farnham (the Petitioner) does not need to obtain a land use permit for the construction of a nine-unit apartment building on the two-acre site. That advisory opinion was appealed to the Executive Officer of the Board by Byron and Dolly Peters and the Johnson Planning Commission. On March 26, 1991, the Executive Officer issued an advisory opinion in which she concluded that a land use permit is required for the construction of the apartment building by the Petitioner.

On April 26, 1991, the Petitioner filed a request for a declaratory ruling with the Board. Party status was granted to Bradford Moore, the owner of the land on which the project is proposed to be built. Party status was also granted to the following adjoining landowners: Scott Meyer and Maria Stadl-Meyer, Byron and Dolly Peters, Gordon and Carolyn Smith, and Vera Parker.

The Prehearing Conference Report and Order dated July 15, 1991, stated that the facts in this matter did not appear to be in dispute and that the Board would decide the legal issues based on a statement of facts set forth in the Prehearing Conference Report and Order. The parties were advised that if they believed that those facts were not accurate they could file a written statement contesting them.

Written statements contesting certain of those facts were filed by Byron and Dolly Peters and the Johnson Planning Commission. They disagreed with a proposed finding that the Petitioner has not constructed any housing projects, and is not affiliated for profit in this venture with persons who have constructed housing units, within a five-mile radius of the property, within a continuous period of five years. In response, the Chair issued a Memorandum to Parties dated September 5, 1991, which set forth a revised statement of facts on which the Board would decide the legal issues. The Memorandum noted that an evidentiary hearing might be required at a later date to resolve the question of whether the Petitioner is a "person" within the meaning of 10 V.S.A. § 6001(14)(A).

The parties were given an opportunity to present legal arguments based on the facts set forth in the Memorandum to Parties. The Panel convened a public hearing for this purpose on October 9, 1991. A proposed decision was sent to the parties on April 22, 1992. The parties were provided an opportunity to present oral argument concerning the proposed decision to the full Board. Oral argument was held on May 20, 1992. The Board deliberated on May 20 and June 17, 1992. On June 17, the hearing was adjourned.

II. ISSUE

Whether the Petitioner is required to obtain an Act 250 permit in order to complete the construction of a nine-unit apartment building on the two-acre parcel of land which he intends to purchase from Bradford Moore.

III. FINDINGS OF FACT

The following uncontested facts were identified in a Memorandum to Interested Parties dated September 5, 1991:

1. Bradford Moore is the owner of a two-acre parcel of land located on Clay Hill in Johnson, Vermont. Richard Farnham proposes to purchase the two-acre parcel from Bradford Moore and to construct a nine-unit apartment building on the parcel.

2. Bradford Moore owned the two-acre parcel in the spring of 1988 and, at that time, commenced construction of a nine-unit apartment building on the parcel. He did not file an application for an Act 250 permit prior to commencing construction.

3. On June 22, 1988, Edward Stanak, District Coordinator .for the District #5 Environmental Commission, issued an advisory opinion in which he concluded that the construction of the nine-unit apartment building did not require an Act 250 permit. That advisory opinion was appealed on July 15, 1988, with the filing of a request for a declaratory ruling.

4. Upon the filing of the request for a declaratory ruling, Bradford Moore ceased construction on the site.

5. In April, 1990, the Environmental Board issued Declaratory Ruling #205 in which it concluded that an Act 250 permit must be obtained before commencement of any construction on the two-acre parcel owned by Bradford Moore. This conclusion was based on a finding that Mr. Moore and S.D. & L. Enterprises, Inc., pursuant to the definition of "person" found at 10 V.S.A. § 6001(14), had already created several housing units within a five-mile radius of the Clay Hill property.

6. The construction which took place in the spring of 1988 consisted of the demolition of a mobile home; the installation of municipal sewer, water and electric utilities; and installation of a slab foundation. No other construction had occurred on the property as of April 14, 1992.

IV. CONCLUSIONS OF LAW

A. Statute and Rules

10 V.S.A. § 6081(A) provides: "No person shall ... commence construction on a subdivision or development, or commence development without a permit." "Development" is defined, in pertinent part, as follows:

> [T]he construction of housing projects such as cooperatives, condominiums, or dwellings, or construction or maintenance of mobile homes or trailer parks, with 10 or more units, constructed or maintained on a tract or tracts of land, owned or controlled by a person, within a radius of

> five miles of any point on any involved land, and within a continuous period of five years.

10 V.S.A. § 6001(3). Rule 2(A)(3), in pertinent part, defines development as follows:

> The construction of a housing project or projects such as cooperatives, apartments, condominiums, detached residences, construction or creation of mobile home parks or trailer parks or commercial dwellings with ten or more units constructed or maintained on a tract or tracts of land owned or controlled by a person within a radius of five miles of any point on any involved land within any period of time after June 1, 1970.

Rule 2(D) provides: "'construction of improvements' means any physical action on a project site which initiates development for any purpose enumerated in Rule 2(A)."

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

> (i) shall mean an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership;
>
> (ii) means a municipality or state agency;
>
> (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;
>
> (iv) includes an 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.

B. Discussion

In Declaratory Ruling #205, the Board concluded as follows:

> The construction of the nine units at the Clay Hill property constitutes "development" because those nine units, when added to the other units constructed by Susan Kruthers Moore and Donald Fleury within a five mile radius, exceed 10 units. The Board concludes that Mr. Moore and S. D. & L. are therefore one "person" within the definition in Act 250 and that a permit pursuant to 10 V.S.A. Chapter 151 must be obtained before any construction may commence on the Clay Hill apartment building.

Re: Bradford Moore and S.D. & L. Enterprises, supra, at 9.

The findings of fact made by the Board in that decision state that the mobile home was demolished in April, 1988, but do not mention the other construction activity that had already taken place at the site. The Board did not specifically address whether construction for which a permit was required had already commenced. On the basis of the findings of facts set forth above, the Board concludes that Bradford Moore actually commenced construction of a nine-unit apartment house on the property. The demolition of a mobile home on the site, the installation of municipal sewer, water and electric utilities and installation of a slab foundation constitute permanent improvements to the land and therefore meet the definition of "construction of improvements" set forth in Rule 2(D). Bradford Moore required, and still requires, a permit for the construction which took place.

This case raises the question of whether, once having been triggered, Act 250 jurisdiction over the project is retained if the land is sold to the Petitioner and he completes the project. The Petitioner suggests there is no statutory basis for the Board to conclude that, because there was Act 250 jurisdiction over the project proposed by Mr. Moore, jurisdiction exists over the same project if it is to be constructed by another "person." He argues that the existence of jurisdiction over the Petitioner's proposed project is unrelated to the transfer of the property or to the construction commenced by Mr. Moore. Rather, he contends the Board must separately examine whether the Petitioner's proposed project is subject to Act 250 jurisdiction. He argues that a separate examination of this issue will lead to

the conclusion that the Petitioner is not a "person" and therefore his construction of the apartment building does not constitute "development" subject to Act 250 jurisdiction.

The Board disagrees. It is true that if the Petitioner was initiating construction of a nine-unit apartment-building, unless he were shown to have constructed other housing units within a radius of five miles and within a continuous period of five years, the nine-unit apartment building would not meet the definition of "development" relating to housing projects set forth at 10 V.S.A. § 6001(3). However, that is not what the Petitioner proposes to do. Rather, he proposes to complete construction of a project which has already commenced and which has already been determined to be within Act 250 jurisdiction.

Jurisdiction under Act 250 is triggered when "the activity [is] about to impinge on the land" and attaches to "activity which has achieved such finality of design that construction can be said to be ready to commence." In re Agency of Administration, 141 Vt. at 78-79 (1982). The "activity" at issue here is the construction of the apartment building. That activity has already impinged on the land and has proceeded far beyond achieving "finality of design." Jurisdiction over the apartment building was triggered and attached by virtue of the construction commenced in 1988. Whether or not that construction, if undertaken by someone other than Mr. Moore, would have triggered jurisdiction is irrelevant at this point. Jurisdiction over this project was triggered and further construction and completion of substantially the same project is subject to Act 250 jurisdiction, irrespective of who continues or completes the project.

The Petitioner argues that for jurisdictional purposes Mr. Moore's activities and the Petitioner's proposed activities must be examined independently. However, the fact that there has already been construction on the site precludes the independent jurisdictional assessment of the project that the Petitioner suggests should take place. This project could be considered separately for jurisdictional purposes only if there had not already been actual commencement of construction of a project subject to Act 250 jurisdiction.

The Board has previously considered a similar question in connection with the need for purchasers of a subdivision lot to obtain an Act 250 permit. In Re: Stevens & Gyles, Declaratory Ruling #240 (1992), the Petitioners had created a subdivision and sold lots to individual purchasers without obtaining a required Act 250 permit. With respect to the responsibility of the purchasers of those lots to obtain Act 250 permits, the Board stated:

> [T]he fact that the Petitioners bear continuing liability does not relieve purchasers of lots at the subdivision from the responsibility of obtaining a permit.,

In that case, the Board noted that the General Assembly had enacted a provision which allows the Board to establish by rule a process whereby purchasers of subdivision lots for which a required permit had not previously been obtained could obtain an Act 250 permit. See 10 V.S.A. § 6025(c).[1]

The Board decision in that case and the action of the General Assembly clearly reflect that Act 250 jurisdiction over a subdivision that had already been created is not released upon sale of the land to a party that did not create the subdivision. The Board concludes in this case that Act 250 jurisdiction over a development which has already commenced is not released upon sale of the land on which the project is located to, or upon completion of the project by, someone whose construction of the project might not have triggered jurisdiction initially.

In further support of this conclusion, the Board notes that Rule 32(B)(2) states that during its term, an Act 250 permit "runs with the land." If this were not the case, a subsequent purchaser of the land would not be required to comply with its terms. This would seriously undermine the effectiveness of the Act. Re: Allenbrook Associates, Land Use Permit #4C0466-2-EB, Findings of Fact, Conclusions of Law, and Order at 5 (April 19, 1982).

Had Mr. Moore obtained a permit as required, a subsequent purchaser of the land would become the permit holder subject to both the rights and restrictions contained in the permit. It would be illogical to conclude that Mr. Moore's failure to obtain a permit as required allows the project to be completed by the Petitioner free of Act 250 jurisdiction.

The Petitioner argues that a conclusion that there is Act 250 jurisdiction over the project proposed by the Petitioner would imply that the construction of a single-family residence on the property would require a permit. He contends that such a result is not within the intent of the law and therefore supports a determination that the project he proposes to construct is not subject to Act 250 jurisdiction.

---

[1] Board Rule 60 was adopted in furtherance of 10 V.S.A. § 6025(c).

The Board need not address the question of whether a permit would be required for a single-family residence because that is not the.project that is proposed. In re Orzel, 145 Vt. 355, 360 (1985). Nevertheless, the Board notes that its decision does not lead to the conclusion that construction of a single-family residence on this site would require a permit. The Board's conclusion is only that once Act 250 jurisdiction over the construction of a nine-unit apartment building at this site was triggered, any construction in furtherance of substantially the same project at the site will also be subject to Act 250 jurisdiction, irrespective of who owns the land or completes construction of the project.

V. ORDER

An Act 250 permit is required for the proposed completion of construction of a nine-unit apartment building by the Petitioner on a tract of land located on Clay Hill in Johnson.

Dated at Montpelier, Vermont, this 17th day of July, 1992.

ENVIRONMENTAL BOARD

Elizabeth Courtney by E.H.
Elizabeth Courtney Chair
Ferdinand Bongart
Terry Ehrich
Lixi Fortna
Arthur Gibb
Samuel Lloyd
Charles Storrow
Steve Wright

c:\ebtext\DR250.ord (ccm-wp)