

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

Re: Town of Wilmington
Declaratory Ruling #258

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision, dated June 30, 1992, pertains to a petition for a declaratory ruling filed with the Environmental Board by the Town of Wilmington concerning whether proposed road improvements in the Town constitute "development" under 10 V.S.A. § 6001(3). The Board concludes that specific road improvements identified in the decision below do constitute "development" and that an Act 250 permit is therefore required prior to construction of these improvements. The reason for this is the Board's conclusion that the identified improvements consist of two separate sets of road upgrades which each involve more than ten acres.

However, the Board also concludes that not all road improvements listed in Wilmington's plan for unpaved roads necessarily require a permit. The improvements will only require a permit if they themselves constitute, or are part of, projects which involve ten or more acres. The Board further states that the rules regarding Act 250 jurisdiction over municipal projects should be revised to encourage town planning.

I. HISTORY OF PROCEEDINGS

On September 26, 1991, Assistant Executive Officer Aaron Adler issued Advisory Opinion #EO-91-240 in response to an appeal filed by the Town of Wilmington from Advisory Opinion #2-67 issued by the Assistant District #2 Environmental Coordinator. Opinion #EO-91-240 concluded that certain road improvements in the Town of Wilmington are subject to Act 250 jurisdiction. The opinion applied to two separate projects only: one involving Shearer Hill Road and the other involving Ray Hill and Mann Roads.

On October 17, 1991, the Town appealed Advisory Opinion #EO-91-240 as a petition for a declaratory ruling. In its petition, the Town stated that it did not request an evidentiary hearing. On November 7, the Board published a notice of the petition. The notice stated that no evidentiary hearing would be held unless requested by a certain date, and that oral argument would be held if requested by any party or deemed necessary by the Board. The notice also stated that interested parties must file

statements of their interest and stake in the matter, identification of relevant issues, and a statement of whether they dispute any of the facts in Advisory Opinion #EO-91-240 or whether they have additional facts.

On November 25, 1991, the Town responded to the notice, stating that the facts in Advisory Opinion #EO-91-240 are accurate, but that the conclusion of "contiguous" contained in Finding 15 should be replaced by the map previously submitted to the Assistant Executive Officer, and that the Town does not request an evidentiary hearing. The Town also sought an extension of time to file a legal memorandum. On November 25, the Windham Regional Commission filed a statement of interest and identification of relevant issues.

On January 16, the Town and the Windham Regional Commission filed legal memoranda. On January 31, the Executive Officer of the Board sent a memorandum to the parties that identified the issues to be resolved by the Board and stated that any party who wishes oral argument should notify the Board.

No party requested oral argument. The Board deliberated concerning this matter on February 26, May 6, and May 20, 1992. The record in this case includes the documents filed by the parties, identified above, as well as the Town's appeal to the Executive Officer from the Assistant District Coordinator's Advisory Opinion dated July 31, 1991, a letter dated August 5, 1991 from Representative David C. Larsen, and Exhibits B, C, D, E, F, G, H, and I previously filed by the Town in connection with Advisory Opinion #EO-91-240. The facts below were stipulated by the parties, except that the last sentence of Finding 15 is based on the map discussed above, which is Exhibit I.

II. ISSUES

1. Whether the improvements to Shearer Hill and Ray Hill Roads are part of a larger, town-wide project which is allegedly shown in a Town document entitled "Town Road Plan for Unpaved Roads" (part of Exhibit C). In connection with this issue, the Board will consider whether a program for future capital investment, when prepared by a Board of Selectmen pursuant to its statutory mandate, is a "plan" within the meaning of

Act 250 and Board Rules and, if it is, whether the partial implementation of such a program constitutes development.

2. Whether the improvements in and of themselves constitute a development or are part of a project which constitutes development.

III. FINDINGS OF FACT

1. The 1988 Wilmington town meeting occurred on March 1. In pertinent part, the minutes of the meeting read as follows:

The one reconstruction project this year will be continued improvement on Mann Rd. toward Ray Hill. ... Mr. Mundell explained that the board is going to reassess where they are going with the roads -reconstruction, maintainence [sic], and priorities of road inventory, based on a long range plan, which the board is studying right now

. . . .

2. The Board of **Selectmen** prepared a Town Report for the 1989 town meeting (the 1988 Town Report). That report states on page 55:

The budget that is presented in this Town Report implements a Road Improvement Plan for gravel roads that has been developed in response to the **mandate** given at last year's Town meeting. ...

(Emphasis added.)

3. On pages 55 and 56, the 1988 Town Report included proposed work on Mann, Haynes, Shearer Hill, Haystack, Stowe Hill, and Ray Hill Roads. The work to be done on Mann Road was described as follows:

Blast ledge to reshape bad curve, create enough depth for adequate ditches, use blasted material to lessen grade, ditch from Ray Hill Road to paved portion, add filter fabric, gravel and culverts.

Concerning Shearer Hill Road, the 1988 Town Report stated: **"Three** sections to be done this year and the remainder to be done next **year."** Work on Ray Hill Road

was described thus: "Remove ledge in several spots to improve drainage, add filter fabric, culverts, gravel and top dressing."

4. On pages 57 through 59, the 1988 Town Report details a five-year "**Town Road Plan For Unpaved Roads.**" Year 1 of the Plan lists improvements to the roads listed in paragraph 3, above. The improvements to Shearer Hill Road in that year are described as "**Shearer - sec.1.**" Year 2 of the Plan lists improvements to several more roads, including "**Shearer - sec.2,**" Howes Loop, and "**Boyd Hill - sec.1.**" Year 3 of the Plan lists yet more roads, including "**Boyd Hill - sec.2.**" Years 4 and 5 of the Plan each include progressively longer lists of roads.
5. If the Town Road Improvement Plan is completely implemented, construction will occur on 79 town roads over a five-year period. On 39 of those roads, including Mann, Ray Hill, and Shearer Hill Roads, major sub-base improvements will be made. Sub-base improvements for the roads will consist of the addition of 12 inches of bank run gravel and six inches of crushed gravel. The Plan also calls for road widening, where needed, to a width of 20 feet with two-foot ditches on either side. Roads currently vary in width, ranging from 15 feet to well over 20 feet. Some road sections will be paved. Work also will include blasting, drainage inlets, installation and replacement of culverts, and clearing of trees within- 50-foot rights-of-way associated with the roads.
6. An abstract of the minutes of the 1989 Wilmington town meeting, which occurred on March 7, does not specifically show that the voters adopted the Town Road Improvement Plan at the meeting. Votes on the two articles which involved road improvements, Articles 14 and 15, show that the **voters** approved those articles.
7. The Selectboard prepared a Town Report for the 1990 town meeting (the 1989 Town Report), which states on pages 58 and 59:

In 1989, The Board of Selectmen presented to the voters a Town Road Plan for Unpaved Roads. In it we ranked roads in priority **order of** need via a deficiency/sufficiency/use rating system. The

results of that ranking were listed in detail in last year's report. We continue to improve roads using that ranking as a basis.

This past 'summer we undertook extensive work on Mann Road, completed substantial work in Rav Hill Road, did some preliminary work on Shearer Hill Road, and began engineering work on Haynes Road It is our intention in the balance of this fiscal year to complete Mann Road and Rav Hill Road and do Haynes Road. ... Article 8. the general road budget, contains funds to continue next year on the Road Plan whatever work is incomplete at the end of this fiscal year, then begin section 1 (the far end) of Shearer Hill Road, and begin work on Haystack Road from the end of the pavement to Forbush Road. Article 16 requests that the voters approve additional funds that would allow the Town to proceed on with the Road Plan at a faster pace by adding work on Stowe Hill Road (the back side), Section 2 of Shearer Hill Road (Route 9 End) and Lake Raponda Road.

(Emphasis added.)

8. An abstract of the minutes of the March 6, 1990 Wilmington town meeting states that the voters approved Articles 8 and 16.
9. The Selectboard prepared a report for the 1991 town meeting (the 1990 Town Report), which states on p. 51:

We have continued to improve unpaved roads, following the "Town Road Plan for Unpaved Roads" that was set out in the 1988 Town Report. We are able to accomplish a larger portion of the work laid out in that plan in-the-current fiscal year due to the additional \$110,000 voted in a separate article last year. The Board is requesting in Article 12 of this year's Warning that the voters approve a similar amount to continue work on this plan at the accelerated pace.

(Emphasis added.)

10. On page 52, the 1990 Town Report states that certain work has been or will be done "in the current year," including work on Mann Road, Ray Hill Road, Haynes Road, Shearer Hill Road, Boyd Hill Road, Howe's Loop, Lake Raponda Road, and Smith Road. Concerning Ray Hill Road, the 1990 Town Report states:

Work continues on sections of Ray Hill Road with the replacement of culverts, ditches cleaned and lined and matting (filter fabric) laid. *In addition, the intersection with Mann Road was blasted and widened.* With the completion of a 1500' section in the spring and top dressing on 500', the unpaved section of Ray Hill will have been completed.

(Emphasis added.) Concerning Shearer Hill Road, the 1990 Town Report states:

Work was begun on a long section of Shearer Hill Road, 1.3 miles, to remove trees, create ditches, lay matting, put down a base of crushed gravel and add a top dressing.

11. The minutes of the March 1991 Wilmington town meeting show that Articles 8 and 12, for town road improvements, were approved.
12. In a May 28, 1990 letter to Julia Schmitz, Assistant District #2 Coordinator, Wilmington Town Manager **Sonia De Lury** stated concerning 1991 Shearer Hill Road improvements:

The length of the Shearer Hill Road project is 8400 **feet** within a two hundred year old 50 foot right of way. The construction limits ... will involve 9.64 acres of land.

13. In an April 19, 1991 letter to Ms. Schmitz, Ms. De Lury stated that, during the fiscal year beginning on July 1, 1990, the Town planned to place fabric, 12 inches of bank run gravel, and six inches of crushed gravel on a number of roads, including three sections of Ray Hill Road with a total length of 4,084 feet, and an 8,400-foot portion of Shearer Hill Road.
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14. Exhibit I to the Town's July 31, 1991 request for an advisory opinion from the Executive Officer is a map of the Town with the sections of roads in question identified and highlighted. In the Town's appeal to the Executive Officer, Attorney Brownell represented that a number of road improvements have occurred or will occur. He stated that in 1989, improvements were made to a 2,112-foot or 2.42-acre stretch of Mann Road and a 1,584 foot or 1.81 acre stretch of Ray Hill Road; in 1990, improvements were made to a 4,224-foot or 4.84 acre stretch of Ray Hill Road; and in 1991, improvements have been or will be made to a 6,180-foot or 7.09-acre portion of Shearer Hill Road and a 1,500-foot or 1.72-acre portion of Ray Hill Road.
15. All of the projects listed in Exhibit I are reconstruction projects and involve the removal and replacement of the entire road, from sub-base up. Exhibit I shows that the sections of Ray Hill and Mann Roads discussed above are adjacent to each other.
16. During the winters of 1990 and 1991, the Town removed all trees within the 50-foot right-of-way along the entire length of Shearer Hill Road, which is longer than 8,400 feet. The entire acreage of Shearer Hill Road exceeds ten.

IV. CONCLUSIONS OF LAW

10 V.S.A. § 6081(a) requires that a permit be obtained prior to commencement of development or commencement of construction on a development. In relevant part, 10 V.S.A. § 6001(3) defines development to include:

[T]he construction of improvements on a tract of land involving more than ten acres which is to be used for municipal or state purposes. In computing the amount of land involved, land shall be included which is incident to the use such as lawns, parking area, roadways, leaching fields and accessory buildings.

A. Town Road Plan for Unpaved Roads

One question raised here is whether all roads listed in the Town Road Plan for Unpaved Roads (the Plan) should be aggregated together in computing the amount of land involved. Board Rule 2(A)(4) provides:

In the case where a state, county or municipal project is to be completed in stages according to a plan, or it is evident under the circumstances that a project is incidental to or part of a larger undertaking, all land involved in the entire project shall be included for the purposes of determining jurisdiction.

The Town argues that the Plan cannot be used as evidence of a plan because it allegedly has not been approved by the voters. The Windham Regional Commission argues that the Plan does not show one project but rather lists several separate projects.

The Board disagrees with the assertion that the Plan is not a plan. The Plan was developed by the Selectboard and placed into the 1988 Town Report prepared for the 1989 town meeting. It contains a yearly schedule of improvements, specifically earmarks and ranks certain roads for improvement each year, and describes the type of improvements planned.

Moreover, the Selectboard is implementing the Plan with voter approval on a year-by-year basis. For example, the 1988 Town Report states that the budget which was presented implemented the Plan. That budget, Articles 14 and 15 for road improvements, was approved by the voters.

Similarly, the 1989 Town Report states that the Selectboard was continuing to improve town roads on the basis of the ranking in the Plan and that Articles 8 and 16 were designed to implement the Plan. The voters also approved those articles.

Further, the 1990 Town Report states that the Selectboard was continuing to improve town roads in accordance with the Plan and that Articles 8 and 12 were designed to implement the Plan. The voters again approved the articles.

Road projects listed in the Plan have also been physically implemented. Many of the roads listed in the Plan have been improved. These include portions of Shearer Hill, Ray Hill, and Mann Roads, as well, as others. Thus, the road projects are sufficiently concrete to trigger Act 250 jurisdiction. See In re Vt. Gas Systems, 150 Vt. 34, 39 (1988).

It does appear that the voters have never approved the Plan in its entirety. However, under the circumstances outlined above, it is clear that the Selectboard, with voter sanction on a year-by-year basis, has an active, ongoing road improvement plan which is being implemented. We believe that the plan is a "plan" under the statute and rules and that the level of implementation is sufficient to confer Act 250 jurisdiction if all other prerequisites for such jurisdiction are present.

Those prerequisites include whether the Plan shows one or more projects consisting of ten or more acres. The Board agrees with the Regional Commission's argument that the listing of roads in a plan is not itself sufficient to find Act 250 jurisdiction. Rule 2(A)(4) requires that a plan pertain to a "project" which the plan shows is being completed in stages or which is part of a larger undertaking.

Accordingly, each of the road improvements listed in the Plan must be examined to determine whether it is a project or is part of a larger project which meets the definition of development. We will perform this examination with respect to the two sets of 1991 road improvements before us: Ray Hill and Shearer Hill Roads.

B. Ray Hill and Shearer Hill Roads

There are two pertinent issues with respect to these improvements: (a) whether they involve the requisite ten acres of land either by themselves or because they are part of a larger project, and (b) whether they include construction of improvements or constitute maintenance or repair.

1. Land Involved with the Projects

In Re: City of Montpelier, Declaratory Ruling #220 (July 13, 1990), the Board essentially concluded that three types of lands are counted in determining how much acreage is involved with a municipal project. The first type is land which is within the project construction limits. Id. at 5. The second type is land which is "incident to the use" because it will be changed as part of the project. Id. at 7. The third type is those lands referred to in Board Rule 2(F)(3):

Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which bear some relationship to the land actually used in the construction of improvements, such that there is a demonstrable likelihood that the impact on the values sought to be protected will be substantially affected by reason of that relationship.

Id. at ii.

The City of Montpelier case also sheds some light on what a municipal project is. The case involved the City's proposed reconstruction of Berlin Street. Id. at 1. Berlin Street intersects with Fisher Road and Paine Turnpike, which are town highways located within the Town of Berlin. Id. at 4. Those town highways had recently received an Act 250 permit for reconstruction. Id. The Board concluded that the reconstruction of Berlin Street and the other town highways were not part of the same project, stating:

[T]he City of Montpelier owns and controls Berlin Street while the Town of Berlin owns and controls Paine Turnpike and Fisher Road. The City of Montpelier and the Town of Berlin did not proceed jointly on the planning, approval or funding of their separate projects. Furthermore, there was no evidence to establish that the road improvements are being done pursuant to a common plan.

Id. at 12 (emphasis added).

The notion that a project is shown by common ownership, planning, and funding is consonant with other cases which have construed the term "project". For example, the Supreme Court upheld a Board decision concerning a housing project in In re Trono Construction Company, 146 Vt. 591 (1986). Housing projects consisting of ten or more units within a radius of five miles are subject to Act 250. 10 V.S.A. § 6001(3). The Supreme Court concluded that two sets of housing units within a half-mile of each other were properly considered one project. The following factors were cited as relevant to this determination: common ownership or management, common funding, shared facilities, and contiguity in time of development. Id. at 592.

Based on the above facts and authorities, the Board believes that the 1991 Ray Hill Road improvements, in connection with past improvements to adjacent sections of that road and Mann Road, form a larger project which consists of ten or more acres. The Plan included plans for improvements to Ray Hill Road and an intersecting portion of Mann Road. Three portions of Ray Hill Road and the intersecting portion of Mann Road have been improved. The roads are commonly owned and managed by the Town and the improvements were commonly funded through the Town appropriations process. The improvements took place within the span of three consecutive years and in accordance with a previously conceived plan. The improvements in total include at least 10.79 acres within the project construction limits: the 2.42 acres of Mann and the 1.81 acres of Ray Hill improved in 1989; the 4.84 acres of Ray Hill improved in 1990; and the 1.72 acres of Ray Hill either being improved or to be improved in 1991.

The Board also believes that the 1991 Shearer Hill Road improvements are part of a project on that road which consists of more than ten acres. In this regard, Mr. Brownell represented that the 1991 improvements include only 7.09 acres.. However, this is contradicted by Town Manager De Lury, who stated that the 1991 improvements include 9.64 acres.

Further, it is clear that the 1991 Shearer Hill improvements are part of a larger undertaking on that road. The 1988 Town Report speaks of several sections of the road to be improved during the 1989 year with more to follow. The 1989 Town Report states that work had been done on Shearer Hill Road during 1989 and more work would be done during 1990. The 1990 Town Report similarly states that Shearer Hill Road improvements occurred in 1990 and more are proposed for 1991.

Importantly, the Town has cleared all trees within the right-of-way along the whole length of Shearer Hill Road. This land has been physically disturbed and changed incident to the road improvements, and therefore is involved land under the City of Montpelier ruling.

Moreover, the entire length of Shearer Hill Road is greater than the length of the 8,400 foot or 9.64 portion which the Town Manager states is to be improved (and therefore is larger than the 7.09-acre portion Mr. Brownell

stated is to be improved). Clearing trees along the whole road indicates an intent to do more work than just the 1991 segment.

The common ownership, funding, and proximity in time of the tree clearing along, and the other improvements to, Shearer Hill Road indicate that they are part of the same project. Since the entire acreage of Shearer Hill Road exceeds ten, more than ten acres are involved with the project.

2. Maintenance or Repair

Road activities which constitute repair or routine maintenance do not constitute construction of improvements under 10 V.S.A. § 6001(3). Cf. Re: Productions, Ltd., Declaratory Ruling #168 at 4 (April 10, 1985). However, an upgrade over an historic condition is not repair or routine maintenance. Id. In addition, substantial widening and tree clearing constitute road improvements. Re: Agency of Transportation, Route 7, Leicester, Declaratory Ruling #153 at 4 (June 20, 1984).

The Board reaffirmed the Leicester case in its Montpelier ruling. Declaratory Ruling #220 at 12. Similar to the Leicester case, the Board concluded in the Montpelier case that tree clearing was part of project construction. Id. at 2 (Finding of Fact #2).

In both the Ray Hill and Shearer Hill Road projects, the activities are more than repair or routine maintenance and include construction of improvements. Attorney **Brownell** characterized both projects as reconstruction projects, and stated that they involve the removal and replacement of the entire road, from sub-base up. The Plan bears this out, calling for sub-base improvements to Mann, Ray Hill, and Shearer Hill Roads. In addition, the 1990 Town Report indicates that the intersection of Ray Hill and Mann Roads was to be blasted and widened, the 1988 Town Report indicates that a curve on Mann Road was to be reshaped, and the Town has **cleared trees** along the length of Shearer Hill Road. The Board concludes that these types of improvements are not repair or routine maintenance.

In making this determination, we have considered a letter dated **August 5**, 1991 submitted by Representative David C. Larsen. Rep. Larsen argues that the road improvements do not constitute a major reconstruction, but

rather are upgrades to facilitate maintenance of the roads. Rep. Larsen also contends that the Town has considered the environmental effects of the road improvements.

We cannot agree with Rep. Larsen's implication that his arguments mean that an Act 250 permit is not required. It may well be that one purpose of the road improvements is to make future maintenance easier. Nonetheless, an upgrade to facilitate later maintenance is still an upgrade. The upgrade itself is not maintenance.

In addition, the General Assembly did not base the Act 250 permit requirement on a project's actual environmental impacts. Instead, as outlined above, the issue is whether a project consists of the construction of improvements for municipal purposes involving ten or more acres of land. If it does, a district commission reviews the environmental effects of the project under the ten criteria.

Conclusion

The Board has concluded that:

1. The Wilmington *Town Road Plan for Unpaved Roads* represents evidence of a plan to embark on the improvements listed therein.
 2. Not all road improvements listed in the Plan are necessarily subject to Act 250 jurisdiction. Each must be separately analyzed to determine whether it is a project or is part of a larger project which is being completed in stages or which is part of a larger undertaking. The project must involve ten or more acres of **land**. Factors which must be considered in such a determination include whether there is common ownership, planning, or funding, or proximity in time.
 3. Improvements to Ray Hill and Mann Roads together constitute a single project involving more than ten acres of land.
 4. Improvements to Shearer Hill Road are part of a project involving more than ten acres of land.
 5. The Ray Hill and Shearer Hill Road projects do not constitute repair or routine maintenance but include the construction of improvements.
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Accordingly, we conclude that an Act 250 permit was required prior to the construction of any of the improvements involved in the Ray Hill and Shearer Hill Road projects and remains required.

The analysis herein of only the Ray Hill and Shearer Hill Road projects should not be interpreted to mean that those are the only projects listed in the Town Road Improvement Plan which require a permit. The Board does not have sufficient information or knowledge of the relationship of the other road projects listed in that Plan to make a determination concerning them.

The Town has argued vigorously that the legislature did not intend for the jurisdiction of the Environmental Commissions and Board to extend to public projects such as these. The Town believes that the consequence of Act 250 jurisdiction over town highway projects undertaken according to a plan is to usurp local authority over public improvements undertaken by elected local officials and approved by the voters.

The Town's arguments, however, overlook the legislative definition of "development," as cited above at page 7, that includes construction of improvements "for municipal... purposes." 10 V.S.A. § 6001(3). The Town's arguments also ignore Board Rule 2(A)(4), also cited above at pages 7 and 8, that was validly adopted and later ratified by the Vermont Legislature, In re Spencer, Varaas, and Ryan, 152 Vt. 330, 336-37 (1989). While the Town argues that the State should not have jurisdiction over town road improvements undertaken according to a plan, it is clear that in enacting Act 250, the legislature intended that the District Environmental Commissions and Board review all major construction in the State, whether undertaken by private developers, the State, or municipalities, to ensure that adverse environmental impacts do not occur. Adverse impacts can occur regardless of who the builder is. Accordingly, the Board cannot exempt the Town of Wilmington's road project from the requirement that an Act 250 permit be obtained for such construction.

However, the Board is concerned that the effect of the existing law is to discourage towns from planning. If towns view the permit requirement as a penalty for having a plan, they will avoid planning. We do not see this result as desirable. Consequently, we have decided to review our authority over municipal projects to determine whether and how it should be changed to balance the concerns of the towns with the need for state review over large development projects.

V. ORDER

An Act 250 permit pursuant to 10 V.S.A. Chapter 151 is required for the improvements to the Ray Hill and Shearer Hill Road projects.

Dated at Montpelier, Vermont this 30th day of June, 1992.

ENVIRONMENTAL BOARD



Elizabeth Courtney, Chair

Ferdinand Bongartz

Terry Ehrich

Lixi Fortna

Arthur Gibb

Samuel Lloyd

Steve E. Wright

Concurring opinions of Members Arthur Gibb and Lixi Fortna are attached.

Dissenting opinion of Member William Martinez is attached.

C:wilming.dec(PC)

Concurrina opinion of Member Arthur Gibb:

I have voted with the majority in this case regretfully, and only because a strict reading of the statute leads me to believe that we have to assert jurisdiction. However, I do not feel that it was the intent of the Legislature to impinge to this extent upon the authority of local boards of selectmen in the administration of their local highway policies.

Concurrina opinion of Member Lixi Fortna:

I agree with the Board's decision because it is correct under existing law. However, I believe that existing law interferes with local control and discourages town planning.

A town's board of selectmen is responsible for the public health and safety. They are required to construct road projects if the voters approve them. Through denial of a permit, requirements to modify the project, or slow permit processing, a district commission may delay a project. Local control is then lost. Moreover, towns will be reluctant to include large upgrades in a capital budget if they know the permit might be delayed.

Dissentina opinion of Member William Martinez:

I dissent. The Wilmington "Town Road Plan for Unpaved Roads" should not be considered a "plan" under Rule 2(A)(4). In addition, the improvements to Ray Hill, Mann, and Shearer Hill Roads should be considered maintenance and repair.

I would interpret the term "plan" in Rule 2(A)(4) much more narrowly than does the majority. I believe that the interests of local control dictate that only plans approved by the voters for the current budget year should be considered.

In addition, the reconstruction of the roads appears needed to bring them up to contemporary needs. As such, I classify them as **maintenance and** repair which we have previously ruled is not subject to the Act.

I endorse the comments of Member Fortna regarding non-interference with local control.