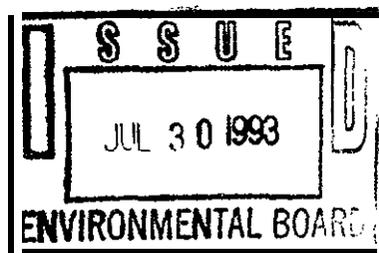


VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151



Re: Costantino Antique Business
Declaratory Ruling #262

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to the Costantino Antique Business (the Business) located in the towns of Clarendon and Rutland. As is explained below, the Environmental Board concludes that Clarendon Water Company and Yvette Bourassa (the Petitioners) are interested parties who properly may seek a declaratory ruling concerning whether a permit is required for the Business under 10 V.S.A. Chapter 151 (Act 250). The Board also concludes that no such permit is required.

I. SUMMARY OF PROCEEDINGS

On February 11, 1991, pursuant to Board Rule 3(C), the Clarendon Water Company (CWC) filed a request for an executive officer advisory opinion (#EO-91-230) concerning whether an Act 250 permit is required for the commercial antiques sales operation of Anthony and Bonita Costantino (the Business). This request was made as an appeal from an advisory opinion issued by the District #1 Coordinator on December 17, 1990. In that advisory opinion, the District Coordinator concluded that no permit is required.

On April 1, 1991, the Executive Officer dismissed the request because she determined that CWC was not an interested party as required by Board Rule 3(C). On May 30, attorney J. P. W. Goss filed a request for reconsideration of the dismissal based upon a new request for an executive officer opinion on behalf of Yvette Bourassa in addition to CWC. On November 13, the Executive Officer declined to reconsider the dismissal because she concluded that the appeal of the Coordinator's advisory opinion by Yvette Bourassa was filed four and a half months late.

The Petitioners filed a petition for a declaratory ruling on December 5, 1991. A prehearing conference scheduled for January 9, 1992 was cancelled due to bad weather. Subsequently, a notice was published stating that all interested parties must file a statement of their interest and stake in this matter and an identification of all relevant issues. On January 30 both the Petitioners and the Respondents filed responses to the notice. On that date, the Respondents also filed a motion to dismiss the declaratory ruling petition.

On May 12, 1992, the Board issued a memorandum denying the motion to dismiss and stating that evidence would be taken at a hearing concerning matters alleged in that motion. During the period of July through September 1992,

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parties filed prefiled testimony and written evidentiary objections.

An administrative hearing panel of the Board convened a hearing on October 28, 1992 with the following parties participating:

The Petitioners by Lewis Davis
The Costantinos by Neal Vreeland, Esq.

After taking a site visit and hearing testimony, the panel recessed the matter pending filing of proposed findings of fact and conclusions of law, review of the record, deliberation, and issuance of a proposed decision. On November 24, the Costantinos filed requested findings and a memorandum of law. On December 1, the Petitioners filed proposed findings of fact and conclusions of law. On December 4, the Costantinos filed a response. On December 9, the Petitioners filed a response.

A proposed decision was sent to the parties on February 26, 1993, and the parties were provided an opportunity to file written objections, and to present oral argument before the full Board. On March 19, the Petitioners requested oral argument. On April 9, the Costantinos filed a letter regarding the proposed decision. On April 13, the Petitioners filed a memorandum concerning the proposed decision. The Board convened a public hearing in Montpelier on April 21, 1993. The Board deliberated concerning this matter on that date. Following April 21, time was given to members of the hearing panel who were not present at oral argument to review the record of the argument. 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, pursuant to Board Rule 3(C), the Petitioners qualify as interested parties who may seek a declaratory ruling concerning the Business.

2. Whether, pursuant to 10 V.S.A. §§ 6081(a) and 6001(3), the Business constitutes a development requiring an Act 250 permit.

III. FINDINGS OF FACT

The Clarendon House

1. The Town of Clarendon does not have both permanent zoning and

subdivision by-laws.

2. Anthony and Bonita Costantino are engaged in the antique business (the Business). They own the Clarendon House located in the Town of Clarendon on the east side of State Aid Highway #3, near the junction of that highway with Town Highway #16. The Clarendon House is an historic building and was a resort hotel in the 1800s. It will be referred to hereinafter as the Hotel.
 3. Commercial use of the Hotel was abandoned prior to June 1, 1970. The Costantinos acquired the Hotel tract in 1977. The tract consists of approximately seven acres. Prior to acquisition, they had rented the Hotel for several years and had been storing antiques there.
 4. At the time of acquisition by the Costantinos, the exterior of the Hotel was in a state of neglect and disrepair.
 5. In 1978, using funds received from the State of Vermont Division for Historic Preservation, the Costantinos repaired, restored, and rehabilitated the exterior of the Hotel structure to its previous historic appearance, replacing wooden columns, porch railings, window sill, and decks. They did not expand or enlarge the Hotel or replace its foundation. They created an apartment on the second floor of the Hotel, which was later expanded to two units. In connection with the apartment units, the Costantinos installed plumbing facilities and a septic system. The apartment units are not used in connection with the Business.
 6. Aside from the two apartment units, the Costantinos continue to use the remainder of the Hotel for the storage of antiques associated with the Business. No employees work there. On average, there are approximately two or three vehicle trips per day to the Hotel, usually dropping off or picking up antiques. The Costantinos make antique sales at the Hotel.
 7. The Hotel tract abuts the Clarendon River. The Clarendon Water Company (CWC) owns an acre of land containing a spring house located immediately across the River from the Hotel. The centerline of the River forms the boundary between CWC's property and the Hotel tract.
 8. Vehicle access to the Hotel tract and the CWC property is solely over Town Highway #16. Drivers in vehicles trying to reach the CWC property must pass the Hotel.
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9. The Hotel is visible from the CWC property. Behind the Hotel, the Hotel tract descends down toward the River immediately adjacent to the CWC property.
10. The Hotel tract does not abut the property of Yvette and Roland Bourassa.

The Harrison House

11. The Harrison House (the House) is an historic structure located in Clarendon on an approximately three-acre tract lying south of the Hotel just across Town Highway #16. The House tract does not abut the property of CWC or of Yvette and Roland Bourassa.
12. The Costantinos bought the House tract in 1982. Prior to their acquisition, the House was vacant. Its previous use, dating to well before the enactment of Act 250, had been as a store and two dwelling units. In early 1983, the Costantinos made plans to convert the House into three apartment units and an antique shop. On April 12, 1983, a project review sheet was issued stating that no Act 250 permit was required for these activities.
13. The Costantinos performed interior renovations of the House, including the creation of three apartment-type units and the installation of a septic system to serve only the apartments. The Costantinos also restored the front of the building to its original condition. They use the front of the building now as a personal antique museum and have never actually used it as an antique shop. Members of the public are not admitted. Sometimes pieces from the museum are removed and taken to the Hotel to be placed into the inventory of the antique business. There are no bathroom facilities for the museum.
14. The apartment units at the House are not used as part of the Business.

The Costantino Residence

15. The Costantinos reside on an approximately 32-acre tract which they acquired in 1974. It is located in Clarendon on the west side of State Aid Highway #3 within walking distance of the Hotel and the House.
16. When the Costantinos bought the residential tract, there was a house and a barn on the property. They have made minor additions and done interior

remodeling of these buildings since they bought the tract. The additions consist of two bedrooms and a kitchen and their use is unrelated to the Antique Business. The buildings are served by a septic system.

17. The Business telephone rings at the Costantinos' residence. Customers sometimes stop at the residence to have Mr. Costantino accompany them to the Hotel where the inventory is located. The Costantinos have entertained Business customers at their residence. Mr. Costantino maintains a personal office in his residence where he keeps his Business records.
18. The CWC property does not abut the Costantinos' residential tract. A portion of the tract containing the primary residence of Yvette and Roland Bourassa lies directly across Town Highway #3 from the Costantinos' residence. The Bourassas routinely travel Town Highway #3 in the vicinity of the Costantinos' residence, the Hotel, and the House, and thus use the same roads as traffic associated with the Business, and also view the House and the Costantinos' residence as part of their daily travels.

The Rutland Town Property

19. In 1989, the Costantinos purchased a building on Route 4, Woodstock Avenue, in the Town of Rutland. It is located on a tract of less than one acre and is more than five miles away from the Costantinos' Hotel, House, and residential tracts. The Costantinos sold antiques from the Route 4 building until 1991, when they discontinued such sales.

IV. CONCLUSIONS OF LAW

A. Interested Party

Board Rule 3(C)¹ provides:

'In 1991, the General Assembly amended 10 V.S.A. § 6007(c) to apply to advisory opinions and petitions for declaratory ruling concerning developments. However, this amendment was not in effect when this petition was filed, and previously the provision only applied to subdivisions. Accordingly, we apply Rule 3(C).

Any interested party seeking a ruling as to the applicability of any statutory provision or of any rule or order of the board may request an advisory opinion from a district coordinator, or if appropriate, the executive officer of the board. An advisory opinion of a district coordinator may be appealed to the executive officer of the board. An advisory opinion of the executive officer may be appealed to the environmental board by means of a petition for a declaratory ruling. An appeal from an advisory opinion of a district coordinator or the executive officer of the board must be filed within 30 days of mailing of the advisory opinion.

The Board previously has stated that the term "interested party" includes those who would qualify for party status in Act 250 permit proceedings, namely, statutory parties such as municipalities and planning commissions, adjoining landowners whose property interests are affected under the criteria set forth at 10 V.S.A. § 6086(a), and permitted parties under the Board Rules. See 10 V.S.A. §§ 6084(a), 6085(c) and Rule 14. The Board also has stated that, regardless of whether a person fits into any of the above categories, the person may be an interested party if he or she has an "identifiable stake" in the proceedings. Re: Interstate Uniform Service, Declaratory Ruling #147 at 3 (Sep. 26, 1984).

Based on the foregoing facts and authorities, the Petitioners constitute interested parties because they are adjoining landowners whose property interests may be affected under the Act 250 criteria.

B. Development

In relevant part, 10 V.S.A. § 6081(a) prohibits the commencement of construction on, or the commencement of, development without a permit. 10 V.S.A. § 6001(3) defines the term "development" to include, among other things:

[T]he construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality which has not adopted permanent zoning and subdivision bylaws.

In addition, Board Rule 2(A)(2) provides in pertinent part that "development" means:

[T]he construction of improvements for any commercial or industrial

purpose ... which is located on a tract or tracts of land of more than one acre owned or controlled by a person. . In determining the amount of land, the area of the entire tract or tracts of involved land owned or controlled by a person will be used.

Rule 2(F) provides that involved land includes:

- (1) The entire tract or tracts of land upon which the construction of improvements for commercial or industrial purposes occurs; and
- (2) 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 is incident to the use of the project; and
- (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 by Act 250 will be substantially affected by reason of that relationship.

Previously, the Board has ruled that activities which constitute repair or routine maintenance do not constitute the construction of improvements and that an upgrade over an historic condition is not repair or routine maintenance. Re: Town of Wilmineton, Declaratory Ruling #258 at 12 (June 30, 1992).

Based on the foregoing facts and authorities, the Board concludes that an Act 250 permit is not required for the Business for the following reasons:

- (a) The only construction at the House and the Hotel associated with the Business constitutes repair and not construction of improvements;
- (b) The only improvements made by the Costantinos to their residence and the associated barn were primarily residential in purpose and any commercial use associated with them is incidental to the primary purpose; and
- (c) The Route 4 building is more than five miles away from the other Costantinos' Clarendon tracts and is on a tract of less one acre.

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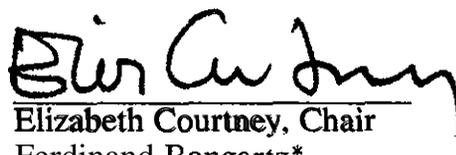
V. ORDER

1. The Petitioners constitute interested parties under Rule 3(C) who may bring this petition for declaratory ruling.

2. An Act 250 permit is not required for the Costantino Antique Business.

Dated at Montpelier, Vermont this 30th day of July, 1993.

ENVIRONMENTAL BOARD


Elizabeth Courtney, Chair
Ferdinand Bongartz*

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