

Carson

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

RE: Costantino Antique Business
Declaratory Ruling Request #262

MEMORANDUM OF DECISION

This decision, dated May 12, 1992, pertains to a motion to dismiss this declaratory ruling petition. The motion to dismiss was filed on January 30, 1992, by Clarendon House, Inc., Anthony R. Costantino, and Bonita Costantino (the Respondents). **The petition**, filed by Clarendon Water Company and Yvette Bourassa (the Petitioners), concerns whether an Act 250 permit is required for the Costantino Antique Business located in the towns of Clarendon and **Rutland**. For the reasons explained below, the Board has decided to deny the motion to dismiss.

I. BACKGROUND

On February 11, 1991, a request for an Executive Officer Advisory Opinion was filed by the Clarendon Water Company concerning whether an Act 250 permit is required for the commercial antiques sales operation of Anthony and Bonita Costantino. This request was made as **an appeal from an** Advisory Opinion issued by the District Coordinator December 17, 1990. On April 1, 1991, Executive Officer Advisory Opinion #91-230 dismissed the request **because the Executive Officer determined that the Clarendon Water Company 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 on behalf of Yvette Bourassa in addition to the Clarendon Water Company. On November 13, the Executive Officer declined to reconsider the dismissal because she concluded that Yvette Bourassa's appeal of the Coordinator's Advisory Opinion was filed four and a half months late.

This petition for a declaratory ruling was filed on December 5, 1991. On December 13, a notice of appearance was filed by Attorney Neal C. Vreeland on behalf of the Respondents. A prehearing conference scheduled for January 9, 1992 was cancelled due to bad weather. Subsequently, a notice was published ~~that~~ **sought all** interested parties to file a statement of ~~their~~ **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. Both parties dispute some of the facts listed in Executive Officer Advisory Opinion #91-230. On that date, the

Respondents also filed a motion to dismiss the declaratory ruling petition. On April 5, the Board deliberated on the motion.

II. DECISION

The Respondents contend that the petition should be dismissed because it was untimely filed. Board Rule 3(C) states:

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.

(Emphasis added.)

The Respondents argue that Attorney Goss's **request** for reconsideration of the Executive Officer's dismissal, filed on behalf of Yvette Bourassa as well as the Clarendon Water Company two months after the date of the dismissal and four and a half months after the Coordinator's Advisory Opinion, was filed beyond the 30-day deadline in Rule 3(C). The Respondents also argue that neither of the Petitioners qualifies as an interested party.

The Petitioner Clarendon Water Company argues that the 30-day time frame in Rule 3(C) has no legal force because Rule 3(D) allows for the filing **of** petitions for declaratory rulings directly without the need to first seek an advisory opinion. The Petitioner Clarendon Water Company also contends that it is an interested party for purposes of seeking a declaratory ruling.

The Board declines to dismiss the declaratory ruling petition on the basis of untimely filing. The time period requirements in Rule 3(C) have often been waived, and in the

past the Board has accepted petitions for declaratory rulings without requiring prior advisory opinions from the coordinators or the Executive Officer.

Parties should note that on July 1, 1991, section 6007(c) of 10 V.S.A. Chapter 151 (Act 250) was amended and the following language was added, concerning appeals from advisory opinions:

Appeals from an advisory opinion of a district coordinator or the executive officer or an assistant executive officer must be filed within 30 days of the mailing of the advisory opinion. Appeals to the board are by means of a petition for declaratory ruling and must be accompanied by a \$25.00 filing fee.

However, the Board will not apply this statutory provision since it was not in effect on May 30, 1991, the date that the request to the Executive Officer for an advisory opinion on behalf of Yvette Bourassa was filed by Attorney Goss.

~~With regard to the~~ contention that the Petitioners are not "interested parties" eligible to petition for a declaratory ruling, the Board will take evidence on this issue at the hearing on the merits of the declaratory ruling petition.

III. ORDER

1. The motion to dismiss is denied.
 2. The Environmental Board will convene a public hearing on August 26, 1992. The time and location of the hearing will be announced at a later date.
 3. The issues at the hearing will be:
 - (a) Whether the Clarendon Water Company and Yvette Bourassa are "interested persons" for purposes of bringing a declaratory ruling petition.
 - (b) Whether a permit is required pursuant to 10 V.S.A. Chapter 151 for businesses formerly or currently owned by the Respondents in Clarendon, Clarendon Springs, or **Rutland**.
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4. On or before July 22, 1992, parties shall file lists of all witnesses and exhibits to be presented at the hearing.

5. On or before July 22, 1992, parties shall file prefiled testimony for all direct witnesses they intend to present at the hearing.

6. On or before August 12, 1992, parties shall file prefiled testimony for all rebuttal witnesses they intend to present at the hearing and revised lists showing rebuttal witnesses and exhibits.

7. On or before August 19, 1992, parties shall file in writing all objections to the prefiled testimony and exhibits previously identified, or such objections shall be deemed waived.

8. No individual may be called as a witness in this matter if he or she has not been identified in a witness list filed in compliance with this order. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. If prefiled testimony has not been submitted by the date specified, the witness will not be permitted to testify. Instructions for filing prefiled testimony are enclosed.

9. The Board may waive the filing requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.

10. Parties shall file an original and ten copies of **prefiled** testimony, legal memoranda, all exhibits which are $8\frac{1}{2}$ by 11 inches or smaller, and any other documents with the Board, and mail one copy to each of the parties listed on the attached Certificate of Service.

Parties are required to file only lists identifying exhibits which are larger than $8\frac{1}{2}$ by 11 inches that they intend to present, rather than the exhibits themselves. Exhibits must be made available for inspection and copying by any parties prior to the hearing.

11. The hearing will be recorded electronically by the Board or, upon request, by a stenographic reporter. Any party wishing to have a stenographic reporter present or a transcript of the proceedings must submit a request by

July 22, 1992. One copy of any transcript made of the proceedings must be filed with the Board at no cost to the Board.

12. Pursuant to Board Rule 16, this order will be binding on all parties who have received notice of the prehearing conference, unless there is a timely objection to the order, or a showing of cause for, or fairness requires, waiver of a requirement-of this order.

Dated at Montpelier, Vermont this 12th day of May, 1992.

ENVIRONMENTAL BOARD

Elizabeth Courtney
Elizabeth-Courtney', Chair
Ferdinand Bongartz
Terry Ehrich
Lixi Fortna
Arthur Gibb

Enclosure

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