

**VERMONT ENVIRONMENTAL BOARD**  
10 V.S.A. §§ 6001-6092

RE: Johnson Lumber Co.  
Declaratory Ruling #263

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision **pertains** to a petition for declaratory ruling filed by the A. Johnson Company ("A. Johnson") regarding whether logging activities and associated road improvements ("Alterations") made in 1990 on land owned by A. Johnson on Lewis Creek Road in Charlotte ("Property") require a land use permit pursuant to 10 V.S.A. §§ 600 I-6092 ("Act 250").

As explained below, the Environmental **Board** ("Board"? concludes that the Alterations did not constitute the "**commence[ment of] construction** on a subdivision or development. or [the] **commence[ment of]** development." 10 V.S.A. § 6081(a). Therefore, no Act 250 permit is or was required.

I. PROCEDURAL SUMMARY

On August 1, 1991, District #4 Environmental Commission **Coordinator** Louis Borie issued Jurisdictional Opinion M-092 ("Opinion") which considered whether the Alterations **required** an Act 250 permit. The Opinion found that the Alterations did not constitute the "commencement of construction" on a subdivision for purposes of Act 250 jurisdiction.

On November 18, 1991, Stephanie Kaplan, who was then Executive Officer of the Board, issued Advisory Opinion #EO-91-243 ("**EO-91-243**") in **which** she opined that the Alterations constituted the "commencement of construction" on a subdivision, pursuant to Environmental Board Rule ("**EBR**") 2(C), for which an Act 250 permit was required.

On December 17, 1991, A. Johnson appealed EO-91-243 to the Board by petition for declaratory **ruling** ("Petition"). A. Johnson contended that the Alterations were consistent both with accepted logging practices and its logging plans for the Property and were exempt **from** Act 250 jurisdiction.

On February 28, 1992, then Board Chair Elizabeth Courtney convened a prehearing conference in Essex Junction, VT, with the following individuals and organizations participating: A. Johnson by William Roper, Esq.; Annemarie **Poulin**; Mrs. Richard Hopp; Edward A. Evarts; and Deborah C. Davis.

On April 16, 1992, Chair Courtney issued a Prehearing Conference Report and Order which addressed party status issues and set forth a procedural schedule.

**Re: Johnson Lumber Company  
Declaratory Ruling #263  
Findings of Fact, Conclusions of Law, and Order  
Page 2**

On July 16, 1992, the Board issued a Memorandum of Decision regarding party status issues.

In September, 1992, A. Johnson filed an application for an Act 250 permit for a residential subdivision on the Property ("Application"). The Application was deemed complete on December 22, 1992.

On September 17, 1992, A. Johnson filed a Motion to Dismiss / Withdraw Because of Mootness and Motion to Continue regarding the Ption.

On January 20, 1993, the Board issued a Memorandum of Decision 1) denying the Motion to Dismiss / Withdraw Because of Mootness and 2) continuing the Petition pending final decision on the Application.

On March 11, 1996, A. Johnson filed a Memorandum on Status of Proceedings.

On January 2, 1997, A. Johnson filed a Status Report and Inquiry on Terminating Permit Application Requirement ("Report"). The Report stated that the parties were close to a negotiated agreement that would "significantly restrict" development on the Property and provide for a public easement along the banks of Lewis Creek ("New Proposal"). A. Johnson requested a continuance until June, 1997. The Report also contended that the New Proposal is so different from the development plan on which EO-91-243 is based that it "renders [EO-91-243] either inapplicable or moot and, in turn, should terminate the permit requirement imposed by" EO-9 1-243. Report at 3.

On February 18, 1997, A. Johnson filed a Supplemental Memorandum indicating that it had entered into a purchase and sale agreement with the Town of Charlotte to implement the New Proposal. The Supplemental Memorandum reiterated the Report's request that the Board find that no Act 250 permit is necessary if the Property is developed pursuant to the New Proposal. The Supplemental Memorandum stated that "no interested party has expressed an objection to such an opinion issuing from the Environmental Board." Supplemental Memorandum at 2.

On February 27, 1997, Board Chair John T. Ewing issued a Chair's Preliminary Ruling denying A. Johnson's request that it be "relieved" of the obligations imposed by EO-91-243. The Preliminary Ruling removed the Petition from inactive status. The Ruling became a final order on March 14, 1997 and is incorporated herein by reference.

On March 17, 1997, Chair Ewing convened a status conference with the following organizations participating: A. Johnson by William E. Roper, Esq. and John W.

Re: **Johnson Lumber Company**  
**Declaratory Ruling #263**  
**Findings of Fact, Conclusions of Law, and Order**  
**Page 3**

Whitcomb, Esq.; Town of Charlotte by Marty Illick.

On March **25, 1997**, Chair Ewing issued a Status Conference Report and Order, which is incorporated herein by reference. Among other things, the Order set forth a procedural schedule for this matter.

On April 1, **1997**, the Board issued a Notice of **Second Prehearing** Conference and Public Hearing. The Notice was published in the legal notice section of the Burlington Free Press on April **3, 1997**.

On April 11, 1997, A. Johnson filed prefiled testimony, **prefiled** exhibits, a witness list, and an exhibit list with the Board.

On April 22, 1997, A. Johnson filed proposed **findings** of fact and conclusions of law.

On April **28, 1997**, Chair Ewing convened a second prehearing conference by telephone with the following party participating: A. Johnson by William E. Roper, Esq. and John W. Whitcomb, Esq.

On April **29, 1997** at **9:30** a.m., Chair Ewing as Hearing Officer convened a public hearing in Charlotte, Vermont. **The** following party participated: A. Johnson by William E. Roper, Esq. and John W. Whitcomb, Esq. After conducting a site **visit**, the Hearing Officer placed his observations on the record, accepted documentary and oral evidence, and heard oral argument.

Based upon a thorough review of the **record**, related argument, and the proposed **findings of fact and** conclusions of law, the Hearing Officer issued a proposed decision on June **10, 1997** which was sent to the Parties. The Parties were allowed to file written objections and request oral **argument before the** Board on or before June **27, 1997**. No party filed written objections or requested oral argument.

On July 9, **1997**, the Board convened a deliberation concerning this matter, and following a review of the **proposed** decision and the evidence and arguments presented, declared the record complete and adjourned. The matter is now ready for **final** decision. To the extent that any proposed **findings** of fact are included within. they are granted; otherwise, they are denied. **See Petition of Village of Hardwick Electric Department**, 143 Vt. 437,445 (1983).

**Re: Johosoo Lumber Company  
Declaratory Ruling #263  
Findings of Fact, Conclusions of Law, and Order  
Page 4**

## **II. ISSUE**

**When A. Johnson made the Alterations, whether it “commence[d] construction on a subdivision or development, or commence[d] development” for which it did and does need to obtain an Act 250 permit. 10 V.S.A. § 6081(a).**

## **III. FINDINGS OF FACT**

1. **A. Johnson** is primarily in the business of managing, harvesting, and milling timber products. It owns and operates a mill in Bristol, Vermont that mills the timber harvested **from** land it owns. **A. Johnson** owns property in the Champlain Valley **from** Bennington County to Franklin County, and in Washington County, Windsor County, and New York State. Approximately 1% of **A. Johnson’s** lands have been developed for purposes other than timber production.

2. **A. Johnson** owns a parcel of land of approximately 12.1 acres lying **northerly** of Lewis Creek Road and southerly of Lewis Creek in the Town of Charlotte (previously **defined** as the “Property”). It consists of two plateaus separated by a steep bank descending to Lewis Creek. The upper plateau, directly adjacent to Lewis Creek Road, consists primarily of a mixed wood stand of hemlock, white pine, and pioneer **hardwoods** on relatively heavy soils. The lower plateau, along Lewis Creek, consists primarily of white pine and scattered hardwoods on variable soils that range **from** gravel to heavy clay.

3. **The Property** is smaller than many of **A. Johnson’s** other holdings but is located more closely to the Bristol mill.

4. Between 1960 and 1990, the Property was allowed to grow with little intervention other than yearly visits to monitor for blowdown, insect and disease problems, and timber **trespass** or property line **encroachment**. During this period, the timber was generally considered **pre-commercial** in size or the quantities were too small to move the **area** up the priority list of necessary activities.

5. At all times pertinent to this **decision**, the Property was under the management of Tom Yager, Senior Forester for **A. Johnson**.

6. Under **evenaged** forest management, an entire stand will regenerate after a single cut, usually a clear cut or **shelterwood**, at a rotation age of 100 to 110 years. This

Re: **Johnson Lumber Company**  
**Declaratory Ruling #263**  
**Findings of Fact, Conclusions of Law, and Order**  
**Page 5**

is considered to be an unsuitable management practice for a stand on the banks of a **creek**.

7. Under **unevenaged** forest management, at least four age classes of trees ranging **from** seedlings to sawtimber must exist in relatively equal quantities in the stand. Foresters employ a method **called group selection** to accomplish this. Group selection means that foresters establish small, disbursed groups of trees over the stand, achieving the unevenaged result in a controlled way. When pursuing unevenaged management, Mr. Yager looks to A. Johnson's entire land holdings and tries to balance the age **class** distribution over thousands **of acres**. **This can be achieved only** by performing the work in small segments over many years.

8. A. Johnson enrolled the Property in the Forest Use Value Appraisal Program. In 1990 a forest management plan ("1986 Plan") was in effect. The plan, which must be renewed **periodically**, is a broad, conceptual management **plan** for the parcel. How the plan is **specifically** implemented is typically **left** to the land owner provided that implementation **conforms** to the broad outline of the plan and the land owner utilizes acceptable **silvicultural** practices.

9. The 1986 Plan anticipated that much of the Property **required** attention and some harvesting. A. Johnson began revising the 1986 Plan **in** the autumn of 1990. The new plan was **approved in 1991** ("1991 Plan"). The 1991 Plan moved **from** the extensive approach of the **1986 Plan** to a more **conservative**, intensive approach **spreading** the work out over **10** to 15 years. This philosophical shift in timber management resulted from changes in the timber harvesting potential in many of **the** smaller tracts in the Champlain Valley.

10. A. Johnson **determined** that white pine was a **desirable** species for portions of the Property. Under **natural selection**, white **pine** was being forced **out by the more shade tolerant hardwoods**. **White pine grows best in light, deep, well-drained** soils (Colton), it requires full light (a clear cut of at least one-half acre), and it seeds best on bare **mineral** soils (cut in the summer and scarified).

11. Because a certain area of the lower plateau of the Property had exhibited excellent growth potential -- producing pine trees that were huger than the surrounding stand -- Mr. Yager determined that it was an appropriate area for a clear cut in which to regenerate white pine. This area was especially favorable to white pine because it hosted Coiton gravelly, sandy, loam soils near Lewis Creek. The surrounding soils were **Farmington, Stockbridge, and Vergennes** day, all of which are more suited to **hardwoods**.

12. In the summer of 1990, A. **Johnson clear** cut the area in the lower plateau

it identified as exhibiting excellent pine growth potential (the "Clear Cut"). The Clear Cut was approximately one to one and one-half acres. The size of the Clear Cut was determined by factors **necessary** to promote pine growth and by the **configuration** of the lot. A **clear** cut of less than one acre would have been too shady for white pine regeneration. A clear cut larger than one and one-half acres would have involved soils of a type not conducive to white pine growth.

13. A. Johnson has replanted the Clear Cut with white pine at least four times since the spring of 1991. **Approximately 200-300 trees were** planted each time.

14. In 1990, A. Johnson also conducted thinning throughout the Property.

15. When entering the Property in the summer of 1990, A. Johnson used a right-of-way reserved across an adjacent field owned by the L. Johnson family. The L. Johnson family is not related to the owners of A. Johnson. A. Johnson encountered difficulties using the right-of-way because part of it coincided with a residential driveway constructed on the L. Johnson property. A. Johnson anticipated that it might need to take legal action in order to enforce its rights along the right-of-way.

16. When the weather **turned** wet in the summer of 1990, one of A. Johnson's log trucks cut up a portion of the L. Johnson field along the right-of-way. A. Johnson was forced to abandon a load of **pulpwood** valued at **\$400-\$500**. In order to make the field passable for logging **trucks**, A. Johnson would have been required to run fabric through the middle of the field and cover it with a thick layer of gravel. Such an upgrade of the right-of-way would have been a costly undertaking.

17. A. Johnson decided to obviate the need for the right-of-way across the L. Johnson property by building a skidding road across the Property. Topography and site specific considerations dictated the location of the **new** skidding road ("**Skidding Road**").

18. In 1990, A. Johnson cut the Skidding Road by removing trees in its path. No excavation was done. Stumps were **left** within the roadbed.

19. For much of its length, the Skidding Road follows an abandoned logging **road that begins** at the upper plateau adjacent to Lewis Creek Road. The abandoned logging road was last used in the 1950s.

20. In the mid-**1980s**, A. Johnson began contemplating the partial residential development of the Property ("Project"). It hired Steve Libby to design the Project.

**Re: Johnson Lumber Company  
Declaratory Ruling #263  
Findings of Fact, Conclusions of Law, and Order  
Page 7**

21. Mr. Libby was responsible for obtaining all necessary permits for the Project.

22. Among other necessary permits, the Project required approval by the Charlotte Planning Commission. Mr. Libby first began informal discussions with the Planning Commission at sketch plan hearings in 1985 or 1986. At the sketch plan phase, which routinely occurs before serious site engineering is done, A. Johnson presented the Project in its most basic conceptual terms in order to obtain a sense of what might be acceptable to the town. A. Johnson presented between three and four sketch plans of the Project to the Charlotte Planning Commission between 1986 and 1991. Each subsequent sketch plan proposed fewer house sites than the previous plan, beginning with 25 lots in 1986 and declining to 13 lots in 1990. Other changes were also made to each sketch plan in response to various community concerns. A. Johnson submitted the more detailed **preliminary** application to the Planning Commission in 1992.

23. In February, 1990, A. Johnson commissioned a map depicting the general plan for the Project as it was then contemplated ("Project Map"). The Project Map was developed as a means to describe the Project to the Charlotte Planning Commission at the sketch plan hearing phase. The Project Map details the general layout of the 13 residential lots then proposed, the **general** location of the road by which the residential lots would be accessed ("Project Road"), and the general location of some site features pertinent to the Planning Commission.

24. The design concept depicted by the Project **Map** is based on a goal of keeping lands along Lewis Creek **undeveloped**, while clustering house sites on the upland **areas** of the Property. The rugged topography of the upland portion of the tract dictated the location of the Project Road and the house sites. The only site **disturbance** contemplated for lands along Lewis Creek was for proposed leach fields.

25. The Project Map indicates the proposed location of the Project Road. **The** Skidding Road is **congruent with the** Project Road in many places, but the two roads are not identical. For example, on the eastern side of the brook that runs through proposed lots 5 and 6, the Project Road immediately curves to the northwest and continues in a straight line that ends in a **cul** de sac at the northern edge of proposed lot 10. In contrast, **after** crossing the brook, the Skidding Road continues in a relatively straight course to the northeast along an old logging road until it joins another old logging road and turns sharply to the northwest. In addition, prior to reaching the **cul de sac**, the **Skidding** Road veers sharply to the northeast and then follows a northerly course along the edge of proposed lot 11 until reaching the lower plateau.

Re: **Johnson Lumber Company**  
**Declaratory Ruling #263**  
**Findings of Fact, Conclusions of Law, and Order**  
**Page 8**

26. The Project Map indicates that the proposed leach fields would lie within the lower plateau of the Property. The Clear Cut was made within the lower **plateau**, to the southeast of the proposed leach fields.

27. The site of the proposed leach fields was chosen based on test pits dug and monitored throughout much of the lower plateau **from 1987 through 1989**. The location of the proposed leach field sites depicted on the Project Map were chosen in 1988 or 1989.

28. Because of community concern that the Property would have **insufficient** water for the Project, A. Johnson hired a dowsler to mark **well** sites on each of the proposed house lots at some time before 1990. Concurrently, A. Johnson had a detailed engineering study conducted on the Property in order to prepare the Project proposal to move beyond the sketch plan phase at the **Charlotte** Planning Commission. The engineering study was also included as support for A. Johnson's state subdivision permit application.

29. A. Johnson's application for a state subdivision permit is based on the Project as set forth in the Project Map. A. Johnson submitted the subdivision permit application at some time after it **performed** the work on the Skidding Road.

30. Mr. Libby was not aware of the Alterations until after they had occurred. Had he been consulted prior to the work, he would have advised against it for at least two reasons. First, **disruptions** in the **landscape** can **have** a negative affect on marketing a proposed development. Second, in light of community **concern** over the Project, Mr. Libby would have cautioned against forestry practices that could be misinterpreted as being commencement of **construction without an** Act 250 permit.

31. William Sayre, a partner with A. Johnson, is responsible for both the management **and** development of the company's land. Mr. Sayre was aware of both the logging activities conducted by Mr. Yager and the development activities conducted by Mr. Libby. He did not know when or if A. Johnson would obtain **all** necessary permits for the Project. Although he knew that portions of the lower plateau had soils compatible with the proposed leach fields, he was **concerned** solely with the regeneration of pine trees when he consulted with Mr. Yager prior to the Clear Cut. When they consulted regarding the Skidding Road, Mr. Sayre was concerned solely with the problematic access across the L. Johnson property.

32. Mr. Yager's decision to cut the Skidding Road, make the Clear Cut, and conduct general thinning in the summer of 1990 was based on his professional judgment

Re: **Johnson Lumber Company**  
**Declaratory Ruling #263**  
**Findings of Fact, Conclusions of Law, and Order**  
**Page 9**

as a forester **and upon** consultation with Mr. Sayre. Mr. Yager was aware that the proposed leach field would probably lie within the *lower* plateau but he did not **know** the precise location and he had observed that most of the percolation test sites were **further** north than the Clear Cut. Mr. **Yager** did not know the location of the Project Road. None of his decisions regarding the Skidding Road or the Clear Cut were made in order to be **consistent with any aspect** of the Project. Mr. **Yager's** decisions were made solely to promote pine regeneration and to achieve unrestricted access to the Property.

33. The future of the Project was uncertain in 1990 due to community opposition. A. Johnson **recognized** that it had an ongoing responsibility to manage the Property according to the Use Value Appraisal Program plans.

34. Both Mr. Libby and Mr. Sayre were aware that an Act 250 permit would be required prior to commencing any of the development proposals presented as sketch plans to the Charlotte Planning Commission.

35. The first planting of white pine in the Clear Cut occurred prior to the neighbor's request for a jurisdictional opinion from District #4 Environmental Commission **Coordinator** Lotus Borie, from which this request for declaratory ruling **arose**.

36. The Property is below the *elevation* of 2500 feet.

#### IV. **CONCLUSIONS OF LAW**

##### A. **Nature of Review**

A **petition** for declaratory ruling is conducted **de novo** to **determine** the applicability of any statutory provision or of any rule or order of the **Board**. 10 V.S.A. §6007(c) and EBR 3(D). Although the petition may come to the Board as an appeal of a **jurisdictional** opinion, the issue in a declaratory ruling **proceeding** is not whether a jurisdictional opinion or any part thereof, is correct. Thus, **facts** stated or **conclusions** drawn in the jurisdictional opinion are not considered by the Board. Provided a petition is timely filed, the only issue is the applicability of any statutory provision or of **any rule** or order of the Board over the **project** described in the jurisdictional opinion.

The burden of proof to demonstrate an exemption **from** Act 250 jurisdiction is on the person claiming the exemption. **Re: Weston Island Ventures**, Declaratory Ruling #169 at 5 (June 3, 1985), **citing Bluto v. Employment Security**, 135 Vt. 205 (1977). The burden of proof consists of both the **burdens** of production and persuasion. **Re: Pratt's**

Re: Johnson Lumber Company  
**Declaratory Ruling #263**  
**Findings of Fact, Conclusions of Law, and Order**  
Page 10

**Propane, #3R0486-EB**, Findings of Fact, Conclusions of Law, and Order at 4-6 (Jan. 27, 1987).

## **B. Commencement of Construction**

Act 250 provides that “[n]o person shall ... **commence construction** on a subdivision or development or commence development without a permit.” 10 V.S.A. §6081(a). Therefore, Act 250 regulates two types of projects: development and subdivisions.

### **1. Development**

“Development” is **defined**, in pertinent part, as the “construction of improvements” for commercial purposes on a tract that exceeds a **specified** acreage. 10 V.S.A. §6001(3); EBR 2(A)(2). The word “development” does not include construction for logging or forestry purposes below the elevation of 2500 feet. **Id.** Nevertheless, under certain **circumstances**, the cutting of trees and construction of skidding roads may constitute the “commencement of **construction.**” **Re: Capital Heights Associates**, Declaratory Ruling #167, Findings of Fact, Conclusions of Law, and Order at 3 (Mar. 27, 1985).

“Commencement of construction”\* is **defined** as

the construction of the first improvement on the land or to any structure or facility located on the land including work preparatory to construction such as clearing, the staking out or use of a right-of-way or in any way incidental to altering the land **according to a plan or intention to improve or to divide land** by sale, lease, partition, or otherwise **transfer an interest in the land.**

EBR 2(C) (emphasis supplied). “Construction of improvements’ means any physical action on a project site which initiates development for any purpose enumerated in **Rule 2(A).**” EBR 2(D).

#### **a. Settled Plan**

Act 250 jurisdiction does not attach to a “plan” until the activity is “so settled in intention and purpose that it can be called ready to commence.” **In re Agency of Administration**, 141 Vt. 68, 82 (1982). **Accord In re Vermont Gas Systems**, 150 Vt. 34, 39 (1988); **Re: Rinkers Communications and Atlantic Cellular Company**, Declaratory

Re: Johnson Lumber Company  
Declaratory Ruling #263  
Findings of Fact, Conclusions of Law, and Order  
Page 11

Ruling #3 14, Findings of Fact, Conclusions of Law, and Order at 10-11 (May 23, 1996);  
Re: Lawrence and Darlene McDonough, Declaratory Ruling #306, Memorandum of  
Decision and Dismissal Order at 4 (Dec. 22, 1995).

In In re Agency of Administration, the Vermont Supreme Court considered whether the State of Vermont's long range planning studies and the recommendations resulting **from** those studies constituted a "plan" **sufficient** to trigger Act 250 jurisdiction. In concluding that jurisdiction did not attach, the Court emphasized that the documents were **recommendations and proposals** regarding the manner in which the state might meet future office space requirements. 141 Vt. at 90-91. The Court cautioned that its decision should not be read to imply that "the mere fact that a plan may be altered over time is **sufficient** to remove it **from** Act 250 jurisdiction." Id. at 91.

[1] Similarly, beginning in 1986, A. Johnson began to submit sketch plan proposals to the Charlotte Planning Commission outlining ways in which it might develop the Property. At the sketch plan phase, A. Johnson presented the Project in its most basic conceptual **terms** to determine what proposal might be acceptable to the community. The sketch plan proposals changed over the years, in large measure to address community **concern and** opposition to the Project. In 1990, the year in which the Alterations occurred and four years **after** the submission of the **first** sketch plan, A. Johnson was still at the sketch plan phase before the Planning Commission. The **future** of the Project was uncertain in 1990 due to community opposition. The **Board concludes that in 1990**, A. Johnson's Project plan could not be considered "so settled in intention and purpose that it **[could] be called ready to commence.**" Id. at 82. Therefore, under the facts presented to **the Board**, A. Johnson did not "commence construction on a . . . development, or commence development" when it made the Alterations. 10 V.S.A. § 6081 (a).

In reaching this **conclusion**, the Board considers it significant that the Clear Cut and the Skidding Road are not congruent with the leach fields and the Project Road as set forth in the Project Map. The Project Map represents the proposal pending before the Planning Commission at the time the Alterations were made. Although the Board is unwilling to rely on **an inference** drawn **from** the **chronology of events without additional** evidence, it **would** have **considered** it significant if the Alterations had more closely resembled the proposed **site** features outlined on the Project Map. Cf. Re: Black Willow Farm, Declaratory Ruling #202, Findings of Fact, Conclusions of Law, and Order at 10 (June 30, 1989) (**Board unwilling to infer intent to subdivide a parcel based purely on a chronology of events without further evidence to confirm the inference**). Furthermore, the Board might have reached a **different** conclusion if, subsequent to the Alterations, A. Johnson had amended its proposals to the Planning Commission in order to conform the Project to the location of the Clear Cut and the Skidding Road.

Re: **Johnson Lumber Compaay**  
**Declaratory Ruling #263**  
**Findings of Fact, Conclusions of Law, and Order**  
**Page 12**

By reaching this conclusion today, the Board in no way retreats from its holding in **Capital Heights, supra**, in which it found that there was no commencement of construction where a property owner's logging activities were "completely unrelated" to a **developer's** plans to build a residential development. **Id.** at 4. Nor is the decision reached today necessarily dispositive of whether a party has "**commence[d]** construction on a ... development, or **commence[d]** development" when the Board is faced with these issues in future cases. Rather, "commencement of construction" involves a highly fact-specific inquiry and analysis.

b. **Forestry / Loggiag Purpose**

**[2]** The Board concludes that there is a second, independent basis for determining that A. Johnson did not "commence construction on a . development, or commence development." 10 V.S.A. § 6081(a). When A. Johnson undertook the Alterations, it did so upon the professional advice of its Senior Forester, Tom Yager. Mr. Yager **determined that the area** of the Clear Cut hosted appropriate soils for the regeneration of white pine. Such regeneration was consistent with the evolving management philosophy of A. Johnson. In addition, although A. Johnson dug and monitored test pits throughout the lower plateau in the late 1980s. the Clear Cut was to the southeast of the proposed leach field site identified on the Project Map.

Similarly, A Johnson **determined** that it could **eliminate access** problems on the L. Johnson property **only** by initiating legal proceedings and by making significant financial expenditures in connection with improving the right-of-way. **Mr.** Yager, in consultation with Mr. Sayre, determined that access problems would best be addressed by the creation of the Skidding Road. Topography and site specific considerations dictated the **location** of the Skidding Road. The road was prepared by removing trees along its path. No excavation or stump-removal was done. For much of its length, the **Skidding Road** follows an abandoned logging road. It diverges significantly in at least two locations **from** the Project Road.

The Board concludes that both the Clear Cut and the Skidding Road were **prepared** for logging or **forestry** purposes. By making the Alterations. A. Johnson did not "commence construction on a ... development, or commence development." Therefore. it did not and does not need to obtain an Act 250 permit in connection with the Clear Cut **and** the Skidding Road. 10 V.S.A. §6081(a).

2. **Subdivisioa**

No person may "commence construction on a subdivision" without an Act 250

Re: **Johnson Lumber Company**  
**Declaratory Ruling #263**  
**Findings of Fact, Conclusions of Law, and Order**  
**Page 13**

**permit.** 10 V.S.A. §6081(a). As set forth more fully in **IV.B. 1.** above, “commencement of construction” is **defined** as “the construction of the **first** improvement on the land ... including work preparatory to **construction** such as clearing . . . according to a plan or intention to improve or to divide land ..” EBR 2(C). A “subdivision” is defined to include the partition or division of a tract of land into ten or more **lots** by a person within a continuous period of five years. 10 V.S.A. § **6001(19)**; EBR 2(B). There is no logging or forestry exemption **from** the definition of subdivision.

**[3]** The Project Map presented to the Charlotte Planning Commission in 1990 proposed to subdivide the upper plateau of the Property into 13 house sites. For the reasons set forth in **IV.B. 1 .a.** above, however, the Board concludes that, in 1990, A. Johnson’s plan to subdivide the Property was not “so settled in intention and purpose that it [could] be **called** ready to commence.” **In re Agency of Administration**, 141 Vt. at 82. The Board is unwilling to **infer** an intent to subdivide a parcel of land based purely on the chronology of events without additional evidence to confirm the inference. **Re: Black Willow Farm, supra** at 10. The record in the instant case reveals no such additional evidence. In fact, the Alterations were in several ways inconsistent with the site **features** proposed on the Project **Map**. By making the **Alterations**, A. Johnson did not “commence **construction** on a subdivision.” 10 V.S.A. § 6081(a). **Therefore**, it did not and does not need to obtain an Act 250 permit in connection with the Clear Cut and the Skidding Road. 10 V.S.A. § 6081(a).

V. ORDER

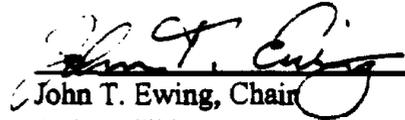
By making the Alterations, A. Johnson did not “commence construction on a subdivision or development, or commence development.” A. Johnson did not and does not need to obtain an Act 250 **permit** in connection with the Skidding Road and Clear Cut. 10 V.S.A. § 6081(a).

\*\*\*\*\*

Re: **Johnson Lumber Company**  
**Declaratory Ruling #263**  
**Findings of Fact, Conclusions of Law, and Order**  
**Page 14**

Dated at **Montpelier**, Vermont this 10th day of July, 1997.

**ENVIRONMENTAL BOARD\***

  
\_\_\_\_\_  
**John T. Ewing, Chair**

Arthur Gibb

**Marcy Harding**

**William Martinez**

Rebecca M. Nawrath

Robert H. Opel

Robert G. Page, M.D.

Steve E. Wright

Board member Samuel Lloyd did not participate in the deliberation concerning this matter.

HAUSERS\DONNAR\DECISION\JOHNSLUM.DR