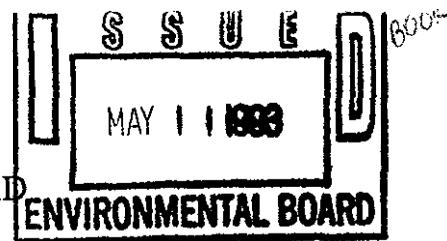


VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151



Re: Marcel and Stella Roberts
Declaratory Ruling #265

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to the applicability of 10 V.S.A. Chapter 151 (Act 250) to a nine-lot subdivision created on a tract of land in the Town of Lowell, previously owned by Herbert and Juanita Hodgeman and sold to Marcel Roberts. As is explained below, the Environmental Board concludes that an Act 250 permit was required prior to sale or offer for sale of any interest in, or commencement of construction on, the subdivision lots, and remains required prior to any such sale, offer for sale, or construction.

I. SUMMARY OF PROCEEDINGS

On July 17, 1991, District #7 Coordinator Cynthia Cook sent a letter to John R. Ponsetto, Esq., concerning "Lot #10, Hodgeman Subdivision, Lowell." In the letter, the District Coordinator stated that the lot is not subject to Act 250 because it is separated from the remainder of the Hodgemans' land by a town highway. The District Coordinator also stated that an Act 250 permit may be required for Lots #1 through #9.

On October 22, 1992, the District Coordinator issued Advisory Opinion #7-088A in which she addressed the applicability of Act 250 to the nine lots. The opinion concludes that Marcel Roberts controlled the creation of lots on the tract of land and that an Act 250 permit was required for the nine lots because Mr. Roberts has created other lots within the jurisdictional area of Environmental District #7 within a continuous period of five years. Marcel and Stella Roberts appealed that advisory opinion to the Executive Officer.

On January 21, 1992, Assistant Executive Officer Aaron Adler issued Advisory Opinion #EO-91-249. That opinion concluded that Marcel Roberts and Herbert Hodgeman were one "person" with respect to the creation of the nine lots because they were "affiliated for profit" within the meaning of 10 V.S.A. § 6001(14)(A)(iii). The opinion concluded that an Act 250 permit was therefore required prior to the sale, offer for sale of any interest in, or commencement of construction on the subdivision, because Mr. Roberts had already created other lots within Environmental District #7.

On February 20, 1992, Marcel and Stella Roberts (the Petitioners) filed a petition for declaratory ruling with the Board alleging that an Act 2.50 permit is not required for the subdivision. A prehearing conference was held on April 20. On April 28, Chair Elizabeth Courtney issued a prehearing conference report and order.

On July 15, 1992, the Board convened a public hearing on this matter with the following persons participating:

Petitioners by Robert F. O'Neill, Esq.
Herbert and Juanita Hodgeman (the Hodgemans) by Herbert Hodgeman

On July 22, 1992, the Petitioners filed copies of file cards that had been discussed at the July 15 hearing. The Board deliberated concerning this declaratory ruling petition on September 23 and December 16, 1992.¹ At about that time, the Board staff person assisting it on this matter, Eileen Hiney, resigned, and the Chair assigned Mr. Adler to the case.

On January 12, 1993, the Board issued a memorandum to parties concerning the status of this matter. On January 13, the Board received a letter from the Petitioners objecting to Mr. Adler's assistance. The Board deliberated on February 24. On March 3, the Board issued a memorandum to parties stating that it was: (a) overruling the Petitioners' objection to Mr. Adler's assistance, (b) taking notice of various documents specified in the memorandum, and (c) allowing the Petitioners an opportunity to respond to the matters noticed.

On March 10, 1993, the Petitioners filed a letter requesting clarification with respect to the documents discussed in the Board's March 3 memorandum. On March 12, the Chair issued a letter of clarification. On March 18, the Petitioners filed a letter containing legal argument regarding the noticed documents. The Board deliberated on March 24. 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.

¹*A memorandum to parties from the Board dated January 12, 1993 erroneously states that the Board deliberated on December 2, 1992. In fact, the minutes of the Board's meetings for December 1992 show deliberation on December 16 rather than December 2.*

II. ISSUE

Whether, pursuant to 10 V.S.A. §§ 6001(19) and 6081(a), an Act 250 permit was and is required for the nine lots on an approximately 162-acre tract of land previously owned by the Hodgeman. Specific questions germane to the issue include:

- a. Whether Mr. Roberts controlled the creation of the nine lots.
- b. Whether Mr. Roberts and Mr. Hodgeman were one "person" with respect to the creation of the nine lots as that term is defined at 10 V.S.A. § 6001(14).

III. FINDINGS OF FACT

1. Herbert and Juanita Hodgeman owned approximately 178 acres of land in Lowell on Town Highways #15 and #20 separated into two parcels by Town Highway #20. The land consists of a 16.8-acre parcel located to the south of the highway and an approximately 162.09-acre parcel (the Tract) located to the north of the highway. The Hodgeman also owned another 50-acre parcel near Mt. Norris in Lowell (the Mt. Norris property).
2. In November 1987, the Hodgeman contacted All Seasons Realty of Newport, Vermont, concerning sale of the Tract, the 16.8-acre parcel, and the Mt. Norris property.
3. In August 1988, the Hodgeman hired Norbert Blais to perform a perimeter survey of the Tract and the 16.8-acre parcel and to survey out a 10.19-acre parcel surrounding a farmhouse located on the Tract. Mr. Blais prepared the survey, dated January 30, 1989, as requested.
4. In August 1988, the Hodgeman listed 50 acres of the 178 acres for sale with All Seasons Realty at a price of \$55,000. In February 1989, the Hodgeman listed an additional 105 acres for sale with All Seasons Realty at a price of \$82,500. At that time they also listed the Mt. Norris property for \$25,000. In June 1989, the Hodgeman listed the farmhouse and the surrounding 10.19-acre parcel for \$33,500. The Board will later refer to these listings as the Original Configuration.
5. As of June 1989, the Hodgeman had not had any offers to purchase any of the listed property.

6. In July 1989, Mr. Hodgeman, who resides in Texas, came to Vermont and met with Elaine Briere, a real estate broker associated with All Seasons Realty. At that time he suggested to Ms. Briere that he might create additional lots; he asked her to work with Mr. Blais to develop a plan to further divide the Tract.
7. In July 1989, subsequent to her meeting with Mr. Hodgeman, Ms. Briere met with Mr. Blais and suggested that he divide the Tract pursuant to her conversation with Mr. Hodgeman. With a pencil, Mr. Blais sketched a plot plan of a ten-lot subdivision, which included the 16.8-acre parcel south of Town Highway #20 and nine lots on the Tract.
8. Ms. Briere later discussed the plot plan with Mr. Hodgeman. They discussed access and views and set prices for each lot. Mr. Hodgeman directed Ms. Briere to market the lots.
9. The Hodgemans have not created any other lots within the jurisdictional area of the District #7 Environmental Commission or within a five-mile radius of the Tract.
10. Ms. Briere advised other brokers in her office that the Tract was for sale in a nine-lot configuration. All Seasons Realty did not advertise the Tract as nine lots because an offer to purchase all of the property owned by the **Hodgeman**s was made by Marcel Roberts before the lots were advertised.
11. Marcel Roberts is a real estate broker and the owner of Roberts Realty, which is located in Newport, with offices adjacent to All Seasons Realty. He also operates an auction business that handles farm liquidations. Mr. Roberts has previously created lots within the jurisdictional area of Environmental District #7, including a 12-lot subdivision in Derby for which the District #7 Environmental Commission issued Land Use Permit #7R0685 on September 15, 1988.
12. Mr. Roberts purchases property after it has been divided and then resells the lots. He does not want to purchase property before it has been divided because he wishes to avoid obtaining an Act 250 permit. He has made his desire to buy divided property known to real estate agents in the area.
13. In July 1989, after the sketch plot plan had been drawn by Mr. Blais, Ms. Joan Poutre, another real estate agent associated with All Seasons Realty, contacted Mr. Roberts.

14. Ms. Poutre called Mr. Roberts to see if he was interested in purchasing the subdivided lots and the Mt. Norris property. She provided him with a copy of the plot plan showing the lots which Mr. Blais had sketched.
 15. At hearing, Ms. Poutre testified that, before speaking with Mr. Roberts, she contacted at least 14 other people who had previously seen the Tract in the Original Configuration to see if they were interested in purchasing it in a nine-lot configuration. She also testified that file cards kept in the office would show the name and date of these contacts. Copies of the file cards submitted by the Petitioners do not corroborate this testimony. Instead, they only show contacts with people concerning the Original Configuration (see Finding 4, above). Most of the contacts listed on the cards occurred prior to July 1, 1989. All but one of the contacts listed as occurring after July 1, 1989 pertain to the Mt. Norris property, which is separate from the Tract. The remaining listed contact occurring after July 1, 1989 concerns the farmhouse lot as listed and described in Finding 4, above.
 16. A few days after speaking with Ms. Poutre, Mr. Roberts made an appointment with Mr. Hodgeman to view the Tract. Approximately two to three weeks later, Mr. Roberts and Mr. Hodgeman walked the Tract.
 17. Mr. Roberts then advised Ms. Poutre that he wished to purchase the Tract, but that he wanted Mr. Hodgeman to agree to move one of the lot lines.
 18. After Mr. Roberts made an offer on the Tract, Ms. Briere met with Mr. Hodgeman and discussed whether he could make more money selling each lot separately or selling all ten of the lots to Mr. Roberts. Ms. Briere explained that it might take several years to sell the lots separately. Mr. Hodgeman preferred to sell all of the lots at once.
 19. On August 12, 1989, Mr. Roberts signed a purchase and sale contract. Mr. Hodgeman signed the contract on August 14, 1989.
 20. The total purchase price for the property as stated in the contract is \$95,000. The property which is the subject of that contract is described as follows: 1) HOUSE AND 10.19 ACRES, 2) LOT - 168.7 Acres, and 3) 50 ACRES+- (3 PARCELS). The contract contains the following condition: "Seller has proposed subdivision for land and buyer is purchasing as such with minor changes."
 21. A final plot plan for the Tract, dated September 11, 1989, was prepared by Mr. Blais. The final plot plan reflected the change in one lot requested by Mr. Roberts. The fee for the plot plan and the final survey performed by Mr. Blais was \$2,875.50. Mr. Blais was paid this amount at the closing by a check
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drawn on Mr. Hodgeman's attorney's trust account from proceeds paid by Mr. Roberts.

22. On September 26, 1989, the Hodgemans conveyed the Tract and the **16.8-acre** parcel located to the south of Highway #20 to Mr. Roberts in ten deeds. The sale price for each of the nine lots on the Tract was as follows:

<u>Lot</u>	<u>Price</u>
1	\$10,000.00
2	\$ 9889.00
3	\$ 9,226.00
4	\$ 7,815.50
5	\$12,225.00
6	\$10,557.00
7	\$10,672.50
8	\$ 3,511.00
9	\$ 3,504.00

23. On September 26, 1989, Mr. Roberts sold Lot #1 to Joseph and Darlene Lamphere for \$32,000. Mr. Roberts has sold one additional lot since then.

24. On October 2, 1989, a plot plan with respect to the Tract was filed on the land records of the Town of Lowell. The plan filed is entitled "Plan of Land Located in Lowell, Vermont, prepared for Herbert H. Hodgeman." The plan is dated September 11, 1989 and bears Mr. Blais's stamp.

IV. CONCLUSIONS OF LAW

Act 250 provides that "[n]o person shall sell or offer for sale any interest in any subdivision located in this state, or commence construction on a subdivision ... without a permit." 10 V.S.A. § 6081(a). The statute defines subdivision as follows:

"Subdivision" means a tract or tracts of land, owned or controlled by a person, which the person has partitioned or divided for purposes of resale into 10 or more lots within a radius of five miles of any point on any lot, or within the jurisdictional area of the same district commission, within any continuous period of five years. In determining the number of lots, a lot shall be counted if any portion is within five miles or within the jurisdictional area of the same district commission.

10 V.S.A. § 6001(19).

10 V.S.A. § 6001(14)(A) provides that “person:

(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

Under these authorities, an individual may be attributed lots if one of the following two statements is true: (a) the individual exercised control over the relevant land to cause its partition or division into lots (or plans to do so), or (b) the individual is affiliated with another individual who partitioned or divided the relevant land into lots (or plans to do so), provided that the affiliation is for profit, consideration, or beneficial interest derived from the partition or division. See Re: Stevens & Gyles, Declaratory Ruling #240 (May 8, 1992). See also In re Eastland, Inc., 151 Vt. 497, (1989) (affirming a Board holding that the creation of lots may be attributed to a person because of that person’s exercise of control over a tract of land).

The Petitioners contend that the nine lots were fully created by Mr. Hodgeman prior to the time they were conveyed to Mr. Roberts and that therefore neither of the above two statements can be true.

The Board analyzes this contention in light of Board Rule 2(B), which provides in relevant part:

A subdivision shall be deemed to have been created with the first of any of the following events.

- (1) The sale or offer to sell or lease the first lot within a tract or tracts of land with an intention to sell, offer for sale, or lease 10 or more lots. A person’s intention to create a subdivision may be inferred from the existence of a plot plan, the person’s statements to financial agents or potential purchasers, or other similar evidence;
- (2) The filing of a plot plan on town records;
- (3) The sale or offer to sell or lease the tenth lot of a tract or tracts of land, owned or controlled by a person, when the lot is within an environmental district or within a five mile radius of any point on any other lot created by that person within any continuous period of five years after April 4, 1970.

The Board has stated previously that this portion of Rule 2(B) interprets the words "partitioned" and "divided" as used in 10 V.S.A. § 6001(19). Re: Black Willow Farm, Declaratory Ruling #202 at 8 (June 30, 1989). The Board also has applied this portion of Rule Z(B) to determine when lots were created in order to evaluate whether an individual divided the relevant land or was affiliated with another individual who so divided it. Re: T.P.I.R. Associates, Declaratory Ruling #273 (Nov. 24, 1992).

Viewed in light of Rule 2(B), the Board believes that the facts show a process of land division begun by Mr. Hodgeman, joined in by Mr. Roberts, and then completed by Mr. Roberts. Specifically, the Hodgemans listed various portions of the Tract, amounting to three lots, with All Seasons Realty in late 1988 and early 1989. When these lots did not sell, Mr. Hodgeman decided to pursue the creation of additional lots.

Mr. Roberts then entered the picture through contact from the listing agent, All Seasons Realty, the offices of which are next door to those of Mr. Roberts' real estate office. Mr. Roberts is someone known to realtors in the Newport area, and therefore undoubtedly to All Seasons Realty, as a person who wants to buy divided land in order to avoid Act 250.

The processes of dividing the land and of negotiation between Messrs. Hodgeman and Roberts then proceeded concurrently. Messrs. Hodgeman and Roberts walked the Tract together and thereafter Mr. Roberts made an offer to purchase the Tract and stated that one of the lot lines should be moved.

The purchase and sale agreement that was then concluded between the parties indicates that the process of subdivision was still ongoing. The purchase and sale agreement on its face establishes that Mr. Roberts was purchasing not nine lots and the 16.8-acre parcel, but the farmhouse with the surrounding 10.19-acres and a 168.7-acre lot. This is not consistent with the testimony and arguments that Mr. Roberts was purchasing lots that had already been created.

Further, the purchase and sale agreement contains the condition that "the Seller has proposed subdivision for land and buyer is purchasing as such with minor changes." This, too, is inconsistent with the assertion that the property had, in fact, been divided. The language of the purchase and sale agreement states that it had not been; subdivision had merely been "proposed."

The final plot plan for the subdivision was not created until September 11, 1989, nearly a month after the execution of the purchase and sale agreement. This plot plan reflected Mr. Roberts' direction concerning the lot lines. Approximately two weeks later, the Hodgemans sold the Tract in nine deeds to Mr. Roberts and the plot plan was paid for out of the proceeds of that sale. On the same day, Mr.

Roberts, and not the Hodgемans, made the first sale of a separate lot out of the nine-lot subdivision. On October 2, at a time when Mr. Roberts had already purchased the Tract, the plot plan was filed on town records.

Thus, applying Rule 2(B)(1), the first sale of a lot occurred on September 26, 1989, when Mr. Roberts made the first sale of a separate lot. For the reasons discussed above with respect to the purchase and sale agreement, the Board does not consider the sale by the Hodgемans to Mr. Roberts to be a sale of lots but rather of the entire Tract.

Moreover, applying Rule 2(B)(2), the plot plan was not filed on town records until after Mr. Roberts purchased the Tract.

Under Rule 2(B), both of these events mark the creation of a subdivision. Both of them occurred after Mr. Roberts owned and controlled the Tract. Moreover, none of the events listed in Rule 2(B) as marking the creation of subdivision occurred prior to the time the Tract was conveyed to Mr. Roberts. Instead, the facts show a subdivision that was still in the process of creation when he became involved, and the facts demonstrate his influence over that process.

The Board concludes that Mr. Roberts did exercise control over the Tract resulting in its subdivision:

- (a) He became involved with the Tract at a time when Mr. Hodgeman was still in the process of dividing it;
- (b) He exercised influence over where one of the lot lines was placed;
- (c) He completed a purchase and sale agreement with Mr. Hodgeman while the subdivision process was still ongoing;
- (d) By reason of that agreement, he had an equitable ownership interest in the property when the final plot plan was created (Eastland, supra, 151 Vt. at 500);
- (e) He paid for the final plot plan through his purchase of the Tract;
- (f) After purchasing the Tract, he made the first sale of a separate lot there; and
- (g) The plot plan was filed on town records after he purchased the Tract.

Further, and independently, the Board concludes that Messrs. Hodgeman and Roberts are considered one person with respect to the nine lots because they were affiliated for profit, consideration, or beneficial interest derived from the division of the Tract. Mr. Roberts joined with Mr. Hodgeman to complete the division of the Tract. Mr. Roberts did so to derive profit from resale of the lots, as is evidenced by his sale of Lot #1 for \$32,000 on the same day that he bought Lot #1 for \$10,000. In addition, Mr. Hodgeman was able to sell his property to Mr. Roberts by attempting to divide it prior to sale and deriving from that division the proceeds of the sale.

Prior to, and within five years of, the time that the Tract was divided into nine lots, Mr. Roberts had created at least 12 lots within District #7. Accordingly, an Act 250 permit was required prior to sale or offer for sale of any interest in, or commencement of construction on, the lots, and remains required.

V. ORDER

An Act 250 permit was required prior to sale or offer for sale of any interest in, or commencement of construction on, the nine lots created on the above-referenced Tract located in Lowell, and remains required prior to any such sale, offer for sale, or construction.

ENVIRONMENTAL BOARD



Elizabeth Courtney, Chair

Ferdinand Bongartz

Terry Ehrich

Lii Fortna

Samuel Lloyd

Steve Wright

Member dissenting: Arthur Gibb