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

RE: T.P.I.R. Associates, Inc.
Declaratory Ruling #273

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to whether, for purposes of determining jurisdiction under 10 V.S.A. Chapter 151 (Act 250), groups of lots will be attributed to a purchaser of those groups if the purchaser subsequently sells the lots individually. As is explained below, the Environmental Board concludes that the lots will not be so attributed where, under the Board Rules, the lots were created by predecessors-in-title, and the purchaser is and was not affiliated for profit, consideration, or beneficial interest derived from the creation of the lots.

I. SUMMARY OF PROCEEDINGS

On July 13, 1992, District #8 Coordinator Warren Foster issued Advisory Opinion #8-114, concerning the so-called "Maplewood Development" located in Bennington. The Maplewood Development consists of a 43-lot subdivision subject to Land Use Permit #8B0397 issued on November 19, 1987. The Advisory Opinion concerns whether, if T.P.I.R. Associates, Inc. (the Petitioner) purchases and conveys lots at the Maplewood Development, those lots will be attributed to the Petitioner for purposes of determining Act 250 jurisdiction over other lots. The Advisory Opinion concludes that the Maplewood lots would not be attributed to the Petitioner, but also states that there is an argument that the lots should be so attributed and suggests that the Petitioner seek a definitive answer from the Environmental Board in the form of a declaratory ruling.

On July 31, 1992, District #1 Coordinator Anthony Stout issued Advisory Opinion #1-166. This opinion concerns whether the Petitioner can purchase parcels of land which a previous owner has surveyed and laid out for subdivision without being attributed the lots for purposes of determining Act 250 jurisdiction. The opinion states that a second person can create the same subdivision by acquiring title to land that is still in the process of being divided. The opinion is based on a "continuum" theory of lot creation which ends with the sale of lots to separate owners. The opinion states that the District Coordinator is not comfortable with suggesting that no permit is required until the Board issues a declaratory ruling which addresses this issue.

On August 13, 1992, the Petitioner filed a request for a declaratory ruling. The request concerns two groups of lots which the Petitioner has purchased or intends to purchase for resale. One group consists of four lots on an approximately

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2-acre tract located in the town of Middletown Springs. The other group consists of 4 lots which are part of the Maplewood Development and subject to the above permit.

On October 15, 1992, Associate General Counsel Aaron Adler convened a prehearing conference in Pittsford. Only the Petitioner appeared at the conference. At the conference, the Petitioner stated that it did not believe that an evidentiary hearing was necessary and agreed that the Board could take notice of Re: Belock Farm Subdivision, Advisory Opinion #EO-91-244 (Nov. 22, 1991). This advisory opinion concerns a third set of lots purchased by the Petitioner. The facts of the matter are very similar to the present case.

On October 22, 1992, the Associate General Counsel issued a prehearing conference report and order. On October 28, the Petitioner filed a memorandum of law, affidavits, and exhibits. The Board deliberated on November 4. 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.

I ISSUE

The issue in this matter is whether, for purposes of determining Act 250 jurisdiction, lots should be attributed to a purchaser where the lots are being purchased as a group and have never been separately owned; were surveyed and laid out by a predecessor-in-title, who also recorded plans on the local land records; and the purchaser plans to re-sell them without changing the lay-out done by the predecessor. In stating the issue in such a limited fashion, we note that the Maplewood Development is already subject to an Act 250 permit, and that we are not determining whether a permit is required for the Middletown Springs lots by reason of the actions of owners who preceded the Petitioner in title.

II. FINDINGS OF FACT

Maplewood Develoopment

1. On November 19, 1987, the District #8 Environmental Commission issued Land Use Permit #8B0397 (the Permit) to Thomas Outwater and the Estate of Julia B. Hewitt. The Permit authorized the creation of a 43-lot subdivision serviced by approximately 2,300 feet of road located off Park Street Extension in Bennington, Vermont. The subdivision is known as the "Maplewood Development."

2. Plot plans for the Maplewood Development were recorded on the land records of the Town of Bennington at approximately the same time as the Permit was issued.

3. On November 25, 1987, the Estate of Julia B. Hewitt conveyed title to the Maplewood Development property to Tillerman, Inc., a corporation with which Mr. Outwater was closely associated. On that date, a mortgage was recorded from Tillerman, Inc. to First Vermont Bank and Trust Company (First Vermont) concerning the property.

4. On July 28, 1988, Tillerman, Inc. completed its first sale of a lot in the Maplewood Development by conveying Lot #3 to Christine R. Seifert. Between that date and December 6, 1991, Tillerman, Inc. sold 26 more Maplewood lots. In total, Tillerman, Inc. sold 27 of the Maplewood lots.

5. On February 12, 1992, Tillerman, Inc. conveyed all of its remaining interest in the Maplewood Development to First Vermont by deed in lieu of foreclosure.

6. On July 31, 1992, First Vermont conveyed 14 of the Maplewood lots to T.P.I.R. Associates, Inc. (the Petitioner). Each lot was conveyed by separate instrument. The lots were purchased for a total sum of $200,000, or $14,285.72 per lot.

The Middletown Springs Prooerty

7. In July 1989, Michael B. Moore purchased approximately 42 acres located off Fitzgerald Road in the Town of Middletown Springs, Vermont. At the same time, Mr. Moore executed a mortgage of the Middletown Springs property to the Howard Bank. This mortgage was subsequently assigned to First Vermont.

8. On September 26, 1989, Mr. Moore filed a plot plan concerning the Middletown Springs property in the land records of the Town of Middletown Springs. The plot plan divides the property into four lots. By no later than December 19, 1990, Mr. Moore had constructed an access road to serve the four lots.

9. Sometime prior to November 19, 1991, Mr. Moore died. On that date, First Vermont received title to the Middletown Springs property from the Estate of Michael B. Moore through a Judgement Order and Decree of Foreclosure and a Certificate of Non-Redemption.

10. Sometime during 1992, First Vermont and the Petitioner executed a contract for the sale of the Middletown Springs property to the Petitioner.

The Petitioner

11. The Petitioner is a Massachusetts corporation, Its corporate officers are George Klemm (president), Michael Munro (vice president), Robert Iacuessa (vice president) and Brett Thompson (treasurer).

12. Neither the Petitioner nor any of its officers has been or is affiliated with Tillerman, Inc., Thomas E. Outwater, the Estate of Julia B. Hewitt, Michael Moore, or the Estate of Michael Moore for profit or otherwise.

13. Neither the Petitioner nor any of its officers was involved in the planning, surveying, or construction of infrastructure at the Maplewood Development or the Middletown Springs property.

14. Neither the Petitioner nor any of its officers is associated with First Vermont except as purchaser and borrower.

15. The Petitioner proposes to re-sell all of the Maplewood and Middletown lots without change.

First Vermont

16. First Vermont had and has no relationship with Tillerman, Inc., Thomas E. Outwater, the Estate of Julia B. Hewitt, Michael Moore, or the Estate of Michael Moore, except for the taking of deposits and the making of loans.

17. First Vermont was not involved in the planning, surveying, or construction of infrastructure at the Maplewood Development or the Middletown Springs property.

IV. CONCLUSIONS OF LAW

Under 10 V.S.A. § 6081(a), an Act 250 permit is required prior to sale or offer for sale of any interest in, or commencement of construction on, a subdivision. 10 V.S.A. § 6001(19) defines "subdivision" to mean:

> [A] tract or tracts of land, owned or controlled by a person, which the person has partitioned or divided for the purpose 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.

(Emphasis added.)

10 V.S.A. § 6001(14)(A) states in relevant part that "person":

> (i) shall mean an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial, entity, including a joint venture or affiliated ownership; .
>
> (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 partitioned or divided the relevant land 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). We therefore examine whether either of these two statements applies to the Petitioner with respect to the Maplewood Development and Middletown Springs lots.

A. Partition or Division of Land

The question raised by the advisory opinions below is whether the Petitioner should be considered to have partitioned or divided the lots in question by selling them individually. The underlying concept appears to be that the lots are not truly created until they are sold to separate individuals, and in the present case, none of the lots purchased or to be purchased by the Petitioner have been so sold.

This interpretation does not account for Board Rule 2(B), which provides in pertinent 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.

We have 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).

Applying Rule 2(B) to the facts as found above, it is clear that under Rule 2(B)(1) the subdivision known as the Maplewood Development was created by Thomas Outwater and Tillerman, Inc. no later than July 28, 1988, the date that Tillerman, Inc. made the first sale of a Maplewood lot.

It is also clear under Rule 2(B)(2) that the subdivision of the Middletown Springs property was created by Michael B. Moore no later than September 26, 1989, the date Mr. Moore filed a plot plan on the town records.

The Petitioner had no association with these lots until 1992, when it purchased 14 Maplewood lots and executed a contract to buy the Middletown springs lots. Under our rules, both of these subdivisions were already created before the Petitioner entered the picture. Thus, under the circumstances of the case, we conclude that the Petitioner cannot be considered to create the lots in question by reselling them without change.

B. Affiliation with Lot Creators

Based on the foregoing findings of fact, we conclude that the Petitioner was and is not affiliated within the meaning of 10 V.S.A. § 6001(A)(14)(iii) with Mr. Outwater, Tillerman, Inc., and Mr. Moore. Accordingly. for purposes of determining Act 250 jurisdiction, the Maplewood and Middletown Springs lots are not attributable to the Petitioner by reason of that statutory provision.

V. ORDER

For purposes of determining Act 250 jurisdiction, T.P.I.R. Associates, Inc. will not be attributed any of the following lots if it sells them without change:

a. The 14 lots, located at the Maplewood Development in Bennington and subject to Land Use Permit #8B0397, which it has purchased from First Vermont.

b. The four lots, located off Fitzgerald Road in Middletown Springs, which it has contracted to purchase from First Vermont.

ENVIRONMENTAL BOARD

Elizabeth Courtney, Chair
Ferdinand Bongartz
Terry Ehrich*
Lisi Fortna
Arthur Gibb
Samuel Lloyd
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*Member Ehrich was Acting Chair of the District #8 Commission at the time that Land Use Permit #8B0397 was issued for the Maplewood Development and he signed that permit on behalf of the District Commission. Mr. Ehrich believes that he may participate in this matter because it does not involve a challenge to the Permit.

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