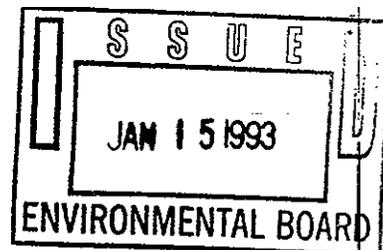


VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151



Re: Triple M Marketplace
Declaratory Ruling Request #274

MEMORANDUM OF DECISION

This decision pertains to a motion by Triple M Marketplace (Triple M) to dismiss a petition for declaratory ruling filed by Grand Union Co., Inc. (the Appellant) with respect to Triple M's supermarket in Brandon. As is explained below, the Environmental Board denies the motion.

BACKGROUND

On October 21, 1991, District #1 Coordinator Anthony Stout issued a project review sheet concerning an addition to an existing market on an approximately 1.7 acre parcel located in Brandon. The review sheet states that a permit is not required for the addition under 10 V.S.A. Chapter 151 (Act 250) because the addition is "not a substantial change."

On August 19, 1992, the District Coordinator issued Advisory Opinion #1-167. The opinion is addressed to Brian Sullivan, one of the attorneys for the Appellant. The opinion concerns a 30 by 60 foot addition to the rear of Triple M's supermarket which appears to be the same addition addressed by the October 1991 review sheet. The opinion states that an Act 250 permit is not required under 10 V.S.A. § 6081(b). That section exempts so-called pre-existing developments unless there is a substantial change to them.

On September 18, 1992, the Appellant filed an appeal and request for hearing concerning the advisory opinion with the Board.* On October 7, Triple M filed a motion to dismiss.

On October 23, 1992, the Board issued a notice of declaratory ruling petition, providing deadlines for parties to file statements of their interests and stake in this matter and identifications of all issues they deem relevant. The

¹10 V.S.A. § 6007(c) provides that appeals of advisory opinions may be made to the Executive Officer or to the Board and that appeals to the Board are by means of a petition for declaratory ruling. The Executive Officer does not hold hearings on appeals; the Petitioner's appeal states that it is to the Board and requests a hearing. Accordingly, the appeal is being treated as a petition for declaratory ruling.

DR 274M

Triple M Marketplace
Memorandum of Decision
Declaratory Ruling Request #274
Page 2

notice also stated that a motion to dismiss had been filed and that the Board would decide the motion in deliberative session unless oral argument was requested by a specified date.

On October 27, 1992, the Appellant filed an opposition to the motion to dismiss. On November 12, the Appellant filed a memorandum concerning its interest and stake in this matter and identifying relevant issues. No other parties made such a filing.

On November 30, Triple M filed a response to the Appellant's opposition to the motion to dismiss. On December 4, the Appellant filed a response to Triple M's November 30 filing.

No party having requested oral argument on the motion to dismiss, the Board deliberated on December 17, 1992.

DECISION

Triple M's motion to dismiss has three grounds: (a) that the Appellant's appeal is untimely; (b) advisory opinions should be considered binding; and (c) jurisdiction should be precluded on the basis of estoppel. We review the three grounds of the motion under Board Rule 18(D), under which we have the discretion to dismiss a matter for any reason provided by our rules, by statute, or by law.

1. Timeliness. The Appellant's argument that the appeal is untimely rests on the fact that the appeal was not filed within 30 days of the project review sheet and the apparently undisputed allegation that the Appellant knew of Triple M's addition more than 30 days before it filed the appeal.

10 V.S.A. § 6007(c) provides that:

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.

Board Rule 3(C) also provides that appeals from advisory opinions issued by district coordinators are to be filed within 30 days.

Project review sheets are advisory opinions; in fact, the review sheet at issue states that it is an advisory opinion. Thus, it falls within the above-referenced statute and rule and, if the statute and rule are interpreted literally, should have been appealed within 30 days of issuance.

However, we believe that the provision of a 30-day appeals period necessarily implies that the period is triggered upon notice. Unless a person has notice of the opinion, he or she cannot know that it exists to be appealed.

Based on the filings before us, we cannot say that the Appellant had notice of the review sheet when it was issued. In this regard, we note Triple M's allegation that the Appellant had notice of Triple M's addition, but this is not the same as having notice that an administrative determination, in the form of a review sheet, had been made that the addition does not need an Act 250 permit.

Further, the Appellant is an adjoining landowner and therefore an interested party entitled to seek and appeal an advisory opinion under 10 V.S.A. § 6007(c) and Rule 3(C). The Appellant appears to have sought and received Advisory Opinion #1-167 and appealed that opinion within 30 days. Accordingly, we decline to dismiss the appeal on the basis of timeliness.

2. The "Binding" Nature of Advisory Opinions. The Appellant argues that the October 1991 review sheet should be considered binding. We do not see how the review sheet can bind the Appellant, who does not appear to have been notified of it.

3. Estoppel. Triple M appears to argue that the Board is barred from asserting jurisdiction under the doctrine of equitable estoppel. That doctrine may bar the assertion of Act 250 jurisdiction, if all of its elements are met, including the heavy burden which must be met if estoppel is asserted against the state. In re McDonald's Corn., 146 Vt. 380 (1985). But a claim that the state is estopped is not a basis for dismissing a request for a jurisdictional ruling filed by an adjoining landowner, since the landowner is not the state. Moreover, evaluating the applicability of equitable estoppel involves a fact-based determination that can only be made through an evidentiary hearing.

Based on the foregoing, we decline to dismiss this petition and therefore deny the motion. Instead, we will issue an order which includes a statement of the issues in this matter and which sets a schedule for filing of testimony and for holding a hearing.

ORDER

1. Triple M's motion to dismiss is denied.
2. The issues in this matter shall be:
 - a. Whether, pursuant to 10 V.S.A. § 6001(3), Triple M's supermarket is a development.
 - b. If so, whether, pursuant to 10 V.S.A. § 6081(b) and Rule 2(O), Triple M's supermarket is exempt because it qualifies as a pre-existing development.
 - c. Whether, pursuant to 10 V.S.A. § 6081(b) and Rule 2(G), Triple M's addition constitutes a substantial change to a pre-existing development.
 - d. If the addition constitutes a substantial change, whether the Board is barred by the doctrine of equitable estoppel from declaring that an Act 2.50 permit is -required.
3. On or before March 3, 1993, parties shall file final lists of witnesses and exhibits and prefiled testimony for all witnesses they intend to present.
4. On or before April 7, 1993, parties shall file prefiled rebuttal testimony and revised lists showing rebuttal witnesses and exhibits.
5. On or before April 21, 1993, parties shall file in writing (a) all requests for observations at a site visit and (b) all evidentiary objections to the prefiled testimony and exhibits previously identified, or such objections shall be deemed waived. All responses to the evidentiary objections must be filed in writing on or before May 5, 1993.
6. The Environmental Board will convene a site visit and hearing in this matter on May 19, 1993, to be confirmed by subsequent notice with location.
7. 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 attached.

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

9. Parties shall file an original and ten copies of prefiled testimony, legal memoranda, all exhibits which are 8% 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% 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.

10. To save time at the evidentiary hearing, the Board will require that parties label their prefiled testimony and exhibits themselves and submit lists of exhibits which the Board can use to keep track of exhibits during the hearing. With respect to labeling, each person is assigned a letter as follows: M for Triple M Market and A for the Appellant. Prefiled testimony and exhibits shall be assigned consecutive numbers: for example, the Appellant will number its exhibits A1, A2, A3, etc. If an exhibit consists of more than one piece (such as a site plan with multiple sheets), letters will be used for each piece, i.e. A2A, A2B, etc. The labels on the exhibits must contain the-words ENVIRONMENTAL BOARD, D.R. #274, the number of the exhibit, and a space for the Board to mark whether the exhibit has been admitted and to mark the date of admission. Label stickers which can be used by the parties are available from the Board on request; parties must complete the information sought on the stickers prior to the hearing.

Concerning preparation of lists of exhibits, each list must state the full name of the party at the top and the Boards case number. There must be three columns, from left to right: NUMBER, DESCRIPTION, and STATUS. The list must include exhibits and prefiled testimony. An example is as follows:

TOWN OF BRANDON
LIST OF EXHIBITS
R E : . #

<u>Number</u>	<u>Description</u>	<u>Status</u>
T1	Prefiled testimony of John Smith	
T2A-D	Plan dated _____, sheets A1 through A4	

The Board will use the status column to mark whether the exhibit has been admitted.

11. The hearings 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 **March 3, 1993**. One copy of any transcript made of proceedings must be filed with the Board at no cost to the Board.

ENVIRONMENTAL BOARD



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3m.mem(awp8)