VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 1.51

Re: Northern Ski Works, Inc. and Lori Budney
Declaratory Ruling #281

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to whether a permit is required pursuant to 10 V.S.A. Chapter 151 (Act 250) for a ski shop operated by Northern Ski Works, Inc. on land owned by Lori Budney (collectively, the Petitioners) in the Town of Ludlow. As is explained below, the Environmental Board concludes that an Act 250 permit is not required.

I. SUMMARY OF PROCEEDINGS

On September 22, 1992, Assistant District #2 Coordinator Julia Schmitz issued Advisory Opinion #2-77, concluding that an Act 250 permit is not required for the above-referenced ski shop.

The opinion was appealed to the Executive Officer by Steven Rolka. On November 19, 1992, Associate General Counsel Aaron Adler issued Advisory Opinion #EO-92-271, concluding that an Act 250 permit was and is required.

On December 21, 1992, the Petitioners filed a request for reconsideration based on submission of further information or, alternatively, a petition for declaratory ruling. On December 22, the Associate General Counsel wrote to the Petitioners and informed them that reconsideration was denied because they had already had an opportunity to submit information and because the issues in this matter should be addressed by the Environmental Board. The Associate General Counsel therefore forwarded the matter to -Board Chair Elizabeth Courtney for treatment as a petition for declaratory ruling.

During the first part of 1993, the Board issued a notice of the declaratory ruling proceeding and parties filed statements of interest. The Petitioners objected to a statement of interest filed by Mr. Rolka. On June 2, 1993, the Board issued a memorandum of decision granting Mr. Rolka party status pursuant to Board Rule 14(B)(l)(a). That decision is incorporated by reference.

On June 24, 1993, the Petitioners filed prefiled testimony. On July 21, the Board convened a hearing in Ludlow, Acting Chair Rebecca Day presiding, with the following parties participating:

The Petitioners by Stephanie J. Lorentz, Esq.
Steven Rolka, pro se

After hearing testimony, and taking a site visit and stating its observations from the site visit on the record, the Board recessed the matter pending filing of proposed findings of fact and conclusions of law, review of the record, deliberation, and decision. At Mr. Rolka's request, the Board set a deadline of August 20 for the receipt of proposed findings of fact and conclusions of law. The Board also conducted a deliberative session.

On August 20, 1993, the Petitioners filed proposed findings of fact and conclusions of law. On August 24, Mr. Rolka did the same. On August 26, the Petitioners filed a motion to disallow Mr. Rolka's proposed findings of fact and conclusions of law on grounds of tardiness and reference to evidence not in the record. On August 30, Mr. Rolka filed a memorandum in opposition to the motion. On August 30, the Petitioners filed an amendment to their motion to disallow, attaching an affidavit from the Administrative Assistant of the Town of Ludlow.[1]

The Board deliberated concerning this matter on October 14, 1993. On that date, following a review of the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. 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.

II. ISSUES

Whether, pursuant to 10 V.S.A. §§ 6001(3) and 6081(a), the ski shop constitutes "development" requiring an Act 250 permit. In this regard, the main question is whether the ski shop *is* located on a tract of land, owned or controlled by Ms. Budney, consisting of more than an acre.

III. FINDINGS OF FACT

1. On September 25, 1984, John and Philomena Yorfino purchased a tract of land consisting of approximately one and a half acres located on Main Street in the Village of Ludlow.

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[1] *The Board denies the Petitioners' motion because it will disregard any statements in Mr. Rolka's proposed findings that are based on evidence not in the record and because the Board concludes that his tardiness does not prejudice the Petitioners.*

2. As of April 1992, Lori Budney began to look for a location for a retail ski shop in the Ludlow area. Ms. Budney is the majority shareholder in Northern Ski Works, Inc.

3. Sometime prior to June 1992, the Yorfinos decided to sell their Main Street tract, and listed the tract with a real estate broker. They listed the tract as consisting of one-and-a-half acres. The original listing price was $170,000. The listing price was, prior to June 1992, reduced to $140,000.

4. On June 18, 1992, Ms. Budney made a written offer, on a standard purchase and sale contract form, to buy a portion of the Yorfinos' Main Street tract, consisting of a house and approximately nine-tenths of an acre, for $135,000. The offer was contingent on "satisfactory subdivision of land by deferral, permit to be reviewed by purchasers [sic] attorney." The Yorfinos accepted this offer.

5. Subsequently, Ms. Budney and the Yorfinos executed a second contract which they substituted for the June 18, 1992 purchase and sale contract. This second contract was signed by the Yorfinos on June 27, 1992 and by Ms. Budney on July 2, 1992. The second contract describes a sale of a residence and approximately 0.9 acres located on South Main Street in Ludlow. The price in the second contract is $135,000. The second contract attached an addendum, called Addendum A, which in relevant part:

   a. Required Ms. Budney to have the Yorfinos' Main Street tract surveyed and subdivided, at her expense, into two parcels of approximately 0.9 and 0.6 acres each.

   b. Stated that the contract is contingent on Ms. Budney's obtaining all necessary and local permits "to effect a subdivision."

6. On September 1, 1992, the Yorfinos conveyed approximately .99 acres of their Main Street tract to Ms. Budney.

7. Prior to the conveyance to Ms. Budney, the Yorfinos' Main Street tract was in the shape of a reverse "L." The top of portion of the "L" fronted on Main Street. The bottom portion of the "L" fronted on the Black River.

8. The portion of the Main Street tract sold by the Yorfinos to Ms. Budney consists of the top portion of the "L." The Yorfinos retain the bottom

portion of the "L," consisting of slightly over half an acre.

9. Access to the half-acre portion of the Main Street tract retained by the Yorfinos can only be achieved by crossing the portion sold to Ms. Budney, by crossing a neighboring tract that fronts on Main Street and is owned by Village Pride of Ludlow, Inc., or by using the Black River. The retained parcel possesses no road frontage. The retained parcel is in a floodway.

10. Neither Ms. Budney nor Northern Ski Works, Inc. has, or has ever had, any property interest in the parcel retained by the Yorfinos, and at no time have they ever contracted to purchase that parcel.

11. On September 3, 1993, Ms. Budney and Northern Ski Works, Inc. began building a ski shop on the .99 acres of the Yorfinos' Main Street tract which had been conveyed to Ms. Budney. They did not engage in any construction on that tract prior to that date.

12. Within Environmental District #2 or within five miles of the Yorfinos' Main Street tract, neither Ms. Budney nor Northern Ski Works, Inc. has created any lots other than the .99 and .53 acre parcels.

13. The Village of Ludlow has zoning, but not subdivision, by-laws.

IV. CONCLUSIONS OF LAW

In relevant part, 10 V.S.A. § 6081(a) prohibits the commencement of construction on a development without a permit. The statute also prohibits the sale or offer for sale of any interest in, or commencement of construction on, a subdivision without a permit. (While the issue in this case is whether the Petitioners' project constitutes development, the authorities concerning subdivision are relevant, as will be explained below.)

In relevant part, 10 V.S.A. § 6001(3) defines the term "development" to include:

> [T]he construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes. "Development" shall also mean the construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality which

has not adopted permanent zonine and subdivision bvlaws.

(Emphasis added.)

Board Rule Z(A)(Z) interprets this definition as follows, stating that the term "development" includes:

> The construction of improvements for anv commercial or industrial purpose, including commercial dwellings, which is located on a tract or tracts of land of more than one acre owned or controlled bv a person. In municipalities with both permanent zoning and subdivision bylaws, this jurisdiction shall apply only if the tract or tracts of involved land is more than ten acres.

(Emphasis added.) The Vermont Supreme Court has upheld the validity of Rule 2(A)(2). In re Gerald Costello Garaee, No. 91-379, slip op. at 1 (June 26, 1992).

The Village of Ludlow has zoning, but not subdivision, by-laws. Consequently, the Petitioners' project, which does consist of improvements constructed for a commercial purpose, is a development if it is on a tract of land, owned or controlled by a person, consisting of more than one acre.

Because the tract on which the project is located is owned by Ms. Budney and is presently .99 acres, the central question in this case is whether the Petitioners control the adjoining, approximately half-acre, parcel retained by the Yorfinos.

In the case of In re Vitale, 151 Vt. 580 (1989), the Vermont Supreme Court ruled that a .58 acre parcel, adjacent to a .99 acre parcel, was controlled by the owner of the .99 acre parcel, who had constructed a concrete step manufacturing business on the larger parcel. Accordingly, the Court upheld a determination by this Board that the relevant tract of land under the control of a person was in fact 1.57 acres.

In the Vitale case, the owner had contracted to buy the full 1.57 acres and did so in two separate lots. The result was that the owner ultimately bought both lots. Specifically, on November 1, 1985, the owner bought the .99 acre parcel and began constructing improvements on it. The owner delayed accepting the deed to the .58 acre parcel until after it had completed constructing those improvements, actually accepting the deed to the smaller parcel on November 26, 1985. Id. at 580-581. Based on these and other circumstances, the Court upheld this Board's

conclusion that the owner had controlled the full 1.57 acres "at the time of construction of improvements." Id. at 58.5.

The facts before the Board in the present case are different in this respect from the facts in the Vitale case. At the time that the Petitioners constructed improvements on the .99 acre parcel, the Petitioners had no interest whatsoever in the .53 acre parcel. They did not own the .53 acre parcel, did not and do not have an agreement to buy that parcel, and have not purchased that parcel. While the Petitioners may maintain some ability to affect use of the retained parcel because the .99 acre parcel is one possible means of access to the retained parcel, such an ability, standing alone, is not enough to confer control within the meaning of the statute.

Thus, at the time the Petitioners constructed improvements on the .99 acre parcel, they did not own or control the .53 acre parcel. Further, they do not presently own or control the .53 acre parcel and there is no evidence that they intend to purchase that parcel. Therefore, the relevant tract of land consists of .99 acres. Since this amount is less than an acre, the Petitioners' project does not constitute development, and an Act 250 permit is not required.

This result is consistent with the Board's recent decision in Re: U.S. Quarried Slate Products. Inc.. Scotch Hill Leasing Corp., and Victor Genier, Declaratory Rulings #279 and #283 (Reconsidered) (October 1, 1993). In that decision, the Board found that a quarry operation, located in a town with permanent zoning and subdivision bylaws, constitutes development despite the fact that the quarry operator planned to continue quarry operations on a 9.9 acre tract which the operator had purchased. This was because construction commenced at a time when the relevant tract of land was greater than ten acres. In the present case, construction did not commence prior to the reduction in the size of the tract.

In making this ruling, the Board recognizes that Petitioner Budney did exert sufficient control to have caused the subdivision of the Yorfinos' former one-and-a-half acre Main Street tract. This would result in the attribution to Ms. Budney of the .99 and .53 acre parcels as two lots for purposes of determining whether Act 250's definition of subdivision applies. Specifically, 10 V.S.A. § 6001(19) provides in relevant part that the term "subdivision" means:

> [A] tract or tracts of land, owned or controlled bv 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.

(Emphasis added.)

The Board believes that a buyer such as Petitioner Budney, who makes an offer contingent on the division of a parcel, and who arranges and pays for the survey and division of that parcel, controls that parcel for the purposes of applying the definition of subdivision. In re Eastland, Inc., 151 Vt. 497, 500-501 (1989). But neither of the Petitioners has created any other lots with five miles of the .99 and .53 acre parcels or within Environmental District #2, and therefore no subdivision has been created as that term is defined at 10 V.S.A. § 6001(19).

The members dissenting from todays decision argue that the phrase "owned or controlled by a person" is the same in both the definitions of development and subdivision, and that identical language should be given the same meaning wherever it occurs. But while the two definitions may use the same phrase, the contexts differ. Under the definition of subdivision, Act 250 regulates the activity of dividing land, and it would therefore be anomalous to state that someone who can cause the occurrence of the regulated activity does not have control. In contrast, under the definition of development, Act 250 regulates the construction of improvements for, among other things, commercial or industrial purposes, not the activity of dividing land.

V. ORDER

An Act 250 permit is not required for the Petitioners' retail ski shop located on a .99 acre tract in the Village of Ludlow.

Dated at Montpelier, Vermont this 18th day of October, 1993.

ENVIRONMENTAL BOARD

Rebecca Day (by ADA)

Rebecca Day, Acting Chair

Members in favor:

Ferdinand Bongartz
Lixi Fortna**
Arthur Gibb
Samuel Lloyd
William Martinez
Robert Opel
Anthony Thompson

Member dissenting:

Rebecca Day*

*Dissenting opinion of Acting Chair Day is attached.

**Member Forma concurs in this decision except that she dissents with respect to the statement that Petitioner Budney controlled the subdivision of the original one-and-a-half acre tract.

DISSENTING OPINION

This case presents the question of whether a buyer who controls the subdivision of a tract controls the tract for purposes of applying the definition of development found in Act 250 at 10 V.S.A. § 6001(3). I believe that the answer is yes, and therefore! that the size of the tract of land imputed to the Petitioners' control is one-and-half acres. Accordingly, an Act 250 permit is required.

Let us review the facts. The Yorfinos listed their former one-and-a-half acre tract as a single tract, undivided. Petitioner Budney offered to buy a .9 acre portion of that tract. The offer was contingent on the tract's subdivision. The subdivision occurred, with Petitioner Budney paying for the survey, and the Yorfinos conveyed a .99 acre parcel to Petitioner Budney. The Petitioners then built a commercial ski shop on the .99 acre parcel.

The .53 acre parcel retained by the Yorfinos is, for all practical purposes, useless to anyone except the Petitioners and the neighboring business of Village Pride of Ludlow, Inc. Vehicular access to the retained parcel from Main Street in Ludlow would have to be over one of the two tracts on which those businesses are located. Such access does not presently exist, and there is no evidence in the record that any rights-of-way to the .53-acre parcel were retained by the Yorfinos. The only other possible access to the retained parcel is by the Black River, and rivers are not the avenues of commerce that they once were. Moreover, the retained parcel is in a floodway, implying that development of the parcel will be severely restricted, if it even is allowed.

Based on these facts, it is clear that Petitioner Budney controlled the subdivision of the Yorfinos' one-and-a-half acre tract into two lots. Thus, for purposes of applying Act 250's definition of subdivision at 10 V.S.A. § 6001(19), Ms. Budney controlled the entire one-and-a-half acre tract and would be attributed the two lots created out of it. This is because the definition of subdivision refers to, in relevant part, a tract or tracts of land "owned or controlled by a person ..." See In re Eastland. Inc., 151 Vt. 497, 500-501 (1989).

The definition of development uses the same language. In relevant part, Rule 2(A)(2) refers a tract or tracts of land of more than one acre "owned or controlled by a person."

Thus, the language - "owned or controlled by a person" - is the same under the definitions of subdivision and development. Therefore, if Petitioner Budney

exercised control over the tract sufficient to meet the definition of subdivision, then she exercised control over the tract sufficient to meet the definition of development. Identical language should not have different meanings.

Yet this is just what the majority does, citing its conclusion that, at the time improvements were constructed, the Petitioners did not have any control over the .53 acre retained parcel.

I believe that the Petitioners did and continue to have control over the retained parcel. Petitioner Budney caused the creation of that parcel, which is now functionally useless to anyone but the Petitioners or the neighboring business. The Petitioners continue to have a significant measure of control over the retained parcel because the ski shop's .99 acre parcel is one of only two tracts over which there could be vehicular access to the retained parcel.

I believe that these are just the kind of factors recognized by the Supreme Court, in applying the definition of development, as demonstrating control over a tract. In re Vitale, 151 Vt. 580, 584 (1989).

I recognize that the Petitioners have sought legally to avoid Act 2.50 jurisdiction and do not fault them for such an attempt. But I believe that it has not been successful and that an Act 250 permit is required.

Rebecca Day (by AOA)
Rebecca Day, Acting Chair

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