

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

Re: Edwin & Avis Smith and
Grice Brook Development
Declaratory Ruling **#292**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to a declaratory ruling petition filed by Edwin and Avis Smith and Grice Brook Development (the Petitioners) concerning whether a master plan must be filed with and approved by the District #6 Commission prior to the construction of a road to provide access to the Grice Brook Development in St. **Albans**. For the reasons explained below, the Board has determined that the road may be constructed (subject to approval by the District #6 Commission-) even though a master plan has not been filed as was required by Land Use Permit **#6F0391-EB** (the Permit).

I. BACKGROUND

On July 30, 1993, District #6 Environmental Coordinator Geoffrey Green issued Advisory Opinion **#6-084** concerning whether the proposed access road for the Grice Brook Development is subject to Condition 20 of the Permit. Condition 20 requires that a master plan be filed with and approved by the District #6 Environmental Commission prior to any further development of the land subject to the Permit. The Advisory Opinion concluded that because construction of the road constitutes development on land owned by Edwin and Avis Smith that was the subject of the Permit, the District #6 Commission must review and approve a master plan prior to allowing the road to be constructed.

On August 26, 1993, the Petitioners appealed Advisory Opinion #6-084 as a petition for a declaratory ruling. They also seek a declaratory ruling concerning the Coordinator's conduct.

On September 27, 1993, a prehearing conference was convened by former Board Chair Elizabeth Courtney. A prehearing conference report and order was issued on October 5, 1993. Attending the prehearing conference were Carl H. Lisman, Esq. on behalf of the Petitioners and Kurt **Janson**, Esq. on behalf of the State **Agency** of Natural Resources. The parties agreed that an evidentiary hearing may not be necessary and that **they** would file pertinent documents with the Board. The Board would review the documents and decide whether it had all the information necessary to resolve the matter. If the Board determined that no evidentiary hearing was necessary, it would issue a proposed decision and allow parties the opportunity for oral argument.

Edwin & Avis Smith and Grice Brook
Development Corporation
Declaratory Ruling Request #292
Findings of Fact, Conclusions of Law, and Order
Page 2

On October 13, Attorney **Janson** filed a letter stating **ANR's** position that it does not object to the requested declaratory ruling regarding the road. On that date Attorney Lisman filed exhibits for the Board's consideration.

On October 20, the Board considered the documents filed and decided that a hearing was needed to resolve the matter.

On December 1, the Board convened a public hearing in St. **Albans** Bay. The only participant in the hearing was the Petitioner, represented by Attorney Lisman and Sam Smith.

In addition to the exhibits filed in this matter, the Board takes official notice of the record in the proceedings concerning Land Use Permit #6F0391-EB and Declaratory Ruling #266, as well as those decisions.

The Board deliberated concerning this matter on December 1, 1993 and April 13, 1994. On April 13, 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

A. Preliminary Issue

1. Coordinator's conduct

In addition to appealing the Coordinator's advisory opinion, the Petitioners seek a declaratory ruling "**that** the District Coordinator has, by a consistent and persistent course of conduct, exceeded his authority for the sole purpose of preventing development or subdivision on the lands owned by Edwin and Avis **Smith.**" This request was included in the appeal document signed by Carl H. Lisman, attorney for the Smiths and Grice Brook.

At the prehearing conference, former Chair Courtney ruled that the actions of a district coordinator are not an appropriate subject for a declaratory ruling pursuant to either 10 V.S.A. § 6007(c) or Board Rule 3, and thus the second issue raised in the petition would not be addressed by the Board.

10 V.S.A. § 6007(c) states, in pertinent part:

Prior to the partition or division of land, or prior to commencement of development, any person ... request an advisory opinion from the district coordinator concerning the applicability of this chapter. An advisory opinion of a district coordinator may be appealed to the executive officer of the board, or directly to the board, in the discretion of the applicant. ... Appeals to the board are by means of a petition for declaratory ruling and **must be accompanied by a \$25.00 filing fee.**

Board Rule 3 states, in pertinent part:

(C) Any interested party seeking a ruling as to the applicability of any statutory provision or of any rule or order of the board may request an advisory opinion from a district coordinator, or if appropriate, the executive officer of the board. An advisory opinion of a district coordinator may be appealed to the executive officer of the board. An advisory **opinion** of the executive officer may be appealed to the environmental board by means of a declaratory ruling. ...

(D) Petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the board shall be filed with the board and shall be accompanied by a \$25.00 filing fee. ...

It is clear from the statute and the rule that the conduct of a district coordinator does not concern the applicability of Act 250 or a statutory provision or rule or order of the board. The Board wishes to confirm the former Chair's ruling that the conduct of a District Coordinator is not an appropriate subject **for a declaratory ruling.** **Procedures are available to the public if they believe that a state employee is acting outside the scope of his or her**

duties. These procedures do not include public harrassment or embarrassment of a state employee but do include an opportunity for a state employee to defend himself or herself in an appropriate forum. The Board believes that the filing of such a request by Mr. Lisman was inappropriate.

B. Substantive Issue

Whether the proposed road to the Grice Brook Development crosses land subject to the requirement of Condition 20 of the Permit that a master plan be submitted to and approved by the District #6 Environmental Commission prior to any further development of the lands subject to that permit.

III. FINDINGS OF FACT

1. Edwin and Avis Smith own a farm near exit 19 of Interstate 89 in St. Albans. The farm is approximately 448 acres in size and is divided by Interstate 89 and Route 104. In 1988 the Smiths applied for an Act 250 permit to subdivide 8.48 acres of the farm into 14 lots for residential housing and 1,400 feet of access road. After the District #6 Commission denied the application, the Smiths appealed to the Environmental Board.
2. Sam Smith is the son of Edwin and Avis Smith, and Rachel Smith is Sam Smith's wife. Sam and Rachel Smith are shareholders in Grice Brook Development Corporation (GBDC).
3. At the District Commission proceedings concerning Edwin and Avis Smith's proposed 14-lot subdivision, ANR opposed the project. During the Board proceedings, ANR and the Smiths reached a settlement that was expressed in a Stipulation. In essence, the Smiths agreed that, prior to any further subdivision or development of their land, they would submit to the District Commission a masterplan for the future development of the entire 448-acre property. In return for this agreement, ANR withdrew its objection to the project.
4. On May 11, 1989, the Environmental Board issued the Permit to Edwin and Avis Smith authorizing them to create a 14-lot subdivision on 8.48 acres of a 448-acre tract of land. The Permit incorporated the

Stipulation. Condition 20 of the Permit, which contains the same language as paragraph 5 of the Stipulation, states the following:

Prior to the further development or subdivision of the Permittees' Land, the Permittees shall submit to the District Commission, for review and approval, a conceptual master plan that incorporates at least the following: ...

5. The Stipulation contains the following pertinent provision:

WHEREAS, the Applicants are the owners of approximately 448 acres of land (the "land") in the Town of St. Albans, the approximate boundaries of which are depicted on Exhibit A; ...

6. During the hearing concerning Land Use Permit Application #6F0391-EB, Sam Smith drew a line on a map to delineate the lands included in the 448-acre parcel owned by Edwin and Avis Smith. This is the map identified in the Stipulation as Exhibit A. The Stipulation was marked in that proceeding as Board Exhibit 8. The map was marked as Board Exhibit 10. Although Bellevue Park is included within the lines, Sam Smith asserts that the line was intended to encompass all land owned by Edwin Smith at the time of the #6F0391-EB proceeding and that Bellevue Park was exempt from the master plan requirement.
7. In July, 1989, GBDC applied to the District #6 Environmental Commission for a permit to construct a 48-unit condominium project on an 11-acre tract of land adjacent to the Edwin Smiths' 448-acre property. The 11-acre tract of land was previously sold by the Edwin Smiths to Sam Smith. Grice Brook proposed to construct a **1,600-foot** long road in a 60-foot wide right-of-way from Route 104 over a portion of the land owned by the Edwin Smiths that is subject to the master plan requirement.
8. On March 7, 1990, the Environmental Board's Executive Officer issued Advisory Opinion EO-89-189. The Opinion upheld the District #6 Coordinator's determination that the master plan required by Condition 20 of the Permit

must be submitted and approved prior to the filing of an application for a permit for Grice Brook due to the location of the road. The Opinion was not appealed.

9. On June 11, 1991, the District #6 Commission held a hearing on a master plan that GBDC submitted in conjunction with the Grice Brook application. The Commission concluded that the master plan did not comply with the requirements of Condition 20 of the Permit and accordingly denied approval of the master plan.
10. Subsequently, the Smiths filed several more master plans, all of which were ruled incomplete applications by the District Coordinator. On March 24, 1992, Edwin and Avis Smith and Sam and Rachel Smith filed a petition for a declaratory ruling as an appeal from the Coordinator's February 24 determination that the application was substantially incomplete. On November 3, 1992, the Board issued Declaratory Ruling #266 in which it ruled that the information submitted to the District Commission-with its application for master plan approval was sufficient for the limited purpose of allowing the application to be accepted into the process to be reviewed by the District Commission. In its decision, the Board delineated the information which the Petitioners would need to submit to the District Commission in order for the Commission to determine whether the Petitioners' master plan provides adequate protection for the natural resources on the land.
11. Instead of filing a master plan with the District Commission, the Petitioners moved the location of the access road to the Grice Brook Development.
12. The road proposed to provide access to the Grice Brook Development from Route 104 is now proposed to cross lands known as "**Bellevue Park.**" Bellevue Park is owned by Edwin and Avis Smith and is the site of a pre-existing subdivision.
13. Attorney **Lisman's** notes of the hearing concerning Land Use Permit Application #6F0391-EB indicate that Bellevue Park was not included in the lands subject to the master plan requirement.

14. During the hearing concerning Declaratory Ruling #266, Sam Smith drew a line on a map (Exhibit 11C) to delineate the boundaries of the land subject to the master plan requirement. Bellevue Park was not included within the red line.
15. In a letter to Sam Smith dated February 24, 1992, the District #6 Coordinator stated: "Finally, I would like to point out that although Bellevue Park is exempt from the master plan review criteria, it is not exempt from Act 250."

IV. CONCLUSIONS OF LAW

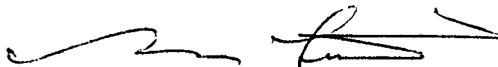
Since Bellevue Park apparently was not intended to be included in the lands subject to the master plan requirement of Condition 20 of the Permit, the Board concludes that the access road for the Grice Brook Development which crosses land known as Bellevue Park is not subject to the master plan requirement, provided it does not cross any other part of the 448 acres subject to Condition 20.¹

V. ORDER

The access road to the Grice Brook Development which crosses land known as Bellevue Park is not subject to the master plan requirement of Condition 20 of Land Use Permit #6F0391-EB, provided it does not cross any other part of the 448 acres subject to the master plan requirement and is not used as infrastructure for any future development.

Dated at Montpelier, Vermont this 21st day of April, 1994.

ENVIRONMENTAL BOARD



Arthur Gibb, Chair
Lixi Fortna
Samuel Lloyd
William Martinez
Steve E. Wright

¹This does not imply that the road that crosses Bellevue Park is in any way exempt from Act 250 review.

2017

1

1

1

1