

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

Re: Lawrence and Darlene McDonough  
Declaratory Ruling Request #306

MEMORANDUM OF DECISION AND DISMISSAL ORDER

This decision pertains to whether the Environmental Board may proceed with a declaratory ruling petition concerning eight different possible development scenarios for the same tract. As is explained below, the Board concludes that it may not do so, and dismisses the declaratory ruling petition without prejudice.

I. BACKGROUND

Lawrence and Darlene McDonough (the Petitioners) state that they own an approximately 90-acre tract located in the Town of Stratton, Vermont (the Tract).

The Tract has a history with respect to 10 V.S.A. Chapter 151 (Act 250). On June 5, 1975, the District #2 Commission issued Land Use Permit #2W0276 (the Permit), which pertains to the Tract. The Permit was issued to Anthony Cersosimo and authorized the creation of a private road 870 feet in length. The Permit was not appealed within 30 days pursuant to 10 V.S.A. § 6089(a). Mr. Cersosimo subsequently built the road.

The Tract subsequently was the proposed site of a 33-lot residential subdivision to be developed by Southview Associates. The District Commission denied a permit application for the proposed subdivision on April 23, 1986. The denial was based on 10 V.S.A. § 6086(a)(8)(A) (necessary wildlife habitat). At issue was the impact of the proposed project on a winter deeryard.

Southview Associates appealed the denial to the Environmental Board, which after de novo hearing issued a denial of the permit application on June 30, 1987. Re: Southview Associates, #2W0634-EB, Findings of Fact, Conclusions of Law, and Order, Southview Associates appealed the Board's denial to the Vermont Supreme Court, which affirmed the denial. In re Southview Associates, 153 Vt. 171 (1989).

Southview Associates then filed suit in federal court, claiming that the Board had taken the tract and that compensation was due under the Fifth and Fourteenth Amendments to the United States Constitution. This suit was dismissed by the United States District Court for the District of Vermont, and such dismissal was upheld by the Second Circuit Court of Appeals. Southview Associates v. Bongartz, No. 92-7209 (2d. Cir. Oct. 30, 1992).

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The above-referenced proceedings before Act 250 tribunals and state and federal courts regarding the Southview application have been collectively referred to as the Southview Litigation.

During October 1992, Cersosimo Lumber Company apparently undertook extensive logging operations on the Tract.

The Petitioners purchased the Tract in 1993. In 1994, the Petitioners requested an advisory opinion from the District #2 office concerning eight different development scenarios with respect to the Tract.

On April 19, 1994, Advisory Opinion #2-94 was issued in response to the Petitioners' request. The opinion declined to address the different scenarios because it concluded that the purpose of Act 250 advisory opinions is to instruct as to the applicability of actual development plans. The opinion also stated a belief that the Petitioners intend to lengthen the road built under the Permit and to create a multi-lot subdivision. The opinion concluded that an amendment to the Permit is required for the intended activities.

On September 6, 1994, the Petitioners filed an appeal of Advisory Opinion #2-94, seeking an executive officer advisory opinion.

On September 12, 1994, an addendum to Advisory Opinion #2-94 was issued concerning proposed logging on the Tract (the Addendum). The Addendum stated that the proposed logging constitutes commencement of construction on the Petitioners' intended project and that therefore an amendment to the Permit is needed prior to such logging.

On September 28, 1994, the Petitioners filed an amendment to their appeal to incorporate the Addendum.

On July 14, 1995, Executive Officer Advisory Opinion #EO-94-305 (the EO) was issued. The EO concluded that it is appropriate to address 'hypothetic&' in an advisory opinion, that a permit is required for each of the eight scenarios put forward by the Petitioners, and that a permit is required for proposed logging on the Tract.

On August 11, 1995, the Petitioners filed a petition for declaratory ruling. On August 18, the Board office notified the Petitioners of steps needed to complete their filing. In response, on September 1, the Petitioners made an additional submission to the Board.

On October 2, 1995, the Environmental Board Chair convened a prehearing conference in Montpelier.

On October 12, 1995, the Chair issued a prehearing conference report and order which is incorporated by reference. In relevant part, the prehearing report and order included a preliminary ruling that the Board cannot issue a declaratory ruling on eight different development scenarios. The report and order also contained a deadline for objecting to the preliminary ruling and an opportunity for the Petitioners to state, by a specified date, their specific development proposal for the Tract.

On October 31, 1995, the Board received a copy of an objection by the Petitioners to the preliminary ruling. On November 2, the Chair issued a memorandum offering an opportunity for oral argument on the objection and for responses to the objection.

On November 13, 1995, the Petitioners filed a request for oral argument. On November 14, ANR filed a response to the objection.

The Board convened oral argument on November 29, 1995. Only ANR appeared; the Petitioners did not appear. On hearing from ANR that it only wished to respond to the Petitioners' arguments, the Board recessed and conducted a deliberative session.

On December 1, 1995, the Board issued a status update. On December 20, 1995, the Board deliberated further concerning the Petitioners' objection.

## II. ISSUE

Whether the Board may issue a declaratory ruling concerning eight different possible development scenarios for the same tract.

## III. DISCUSSION

The Petitioners seek the Board to issue a declaratory ruling which determines the applicability of Act 250 to each of eight possible development scenarios they have outlined. Despite prior opportunity, they have declined to state which, if any, of the eight scenarios constitutes their intended plan for the Tract. For three separate and independent reasons, the Board concludes that it may not issue a declaratory ruling on the eight scenarios.

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First, the Vermont Supreme Court's precedent is clear that declaratory rulings concern "actual" controversies. In Town of Cavendish v. Vermont Public Power Supply Authority, 141 Vt. 144 (1982), the Court explained that declaratory rulings before administrative boards are like declaratory judgment actions in court, and that there must be "an *actual* controversy" to confer jurisdiction to hear the case. Id. at 147 (emphasis added). The "actual controversy" requirement cannot be waived by the parties or the tribunal. Id. The setting out of eight different possible scenarios suggests that at least seven of them will not occur. Therefore, at least seven of the eight scenarios are not "actual."

Second, the Court has stated that Act 250 jurisdiction should be determined based upon proposed activities which are "settled in intention and purpose ...." In re Agency of Administration, 141 Vt. 68, 82 (1982). The setting out of eight different scenarios means that the Petitioners have not yet settled on their development proposal for the Tract.

Third, the Court has stated that, in a declaratory ruling, it is not the Boards function to issue guidelines or to outline for petitioners activities which will or will not require permits. In re Orzel, 145 Vt. 355, 360 (1985). Rather, the Board is to determine the applicability of the statute to a particular set of facts. Town of Cavendish, supra at 147; Orzel, supra at 360. The request to determine eight development scenarios constitutes a request for guidelines as to which activities will or will not require a permit and as such is not appropriate for a declaratory ruling.

These limitations exist because declaratory rulings **turn** on the specific facts of a case and because of the need to ensure that the Board process is not flooded with requests that are essentially advisory in nature.

Accordingly, the Board cannot issue a declaratory ruling on the eight different scenarios put forward by the Petitioners. The Board therefore will dismiss their petition. Such dismissal will be without prejudice so that, once the Petitioners settle on a particular activity for the Tract, they may obtain an answer from the Board on whether an Act 250 permit is required.

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III. ORDER

1. The petition for declaratory ruling filed by Lawrence and Darlene McDonough on August 11, 1995 is dismissed without prejudice.

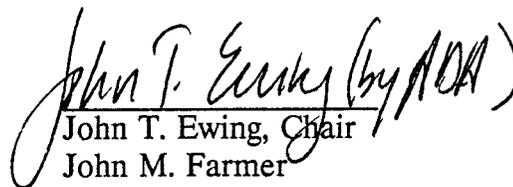
2. Should the Petitioners decide to undertake a particular activity on the Tract, they may, and are encouraged to, seek a declaratory ruling from the Board on the applicability of Act 250 prior to commencement of the activity. Any petition for declaratory ruling shall include a site-specific plan showing the proposed activity.

3. Other parties also may file a petition for declaratory ruling with the Board should they receive information that the Petitioners have settled on particular activity for the Tract.

4. Unless and until such time as the Board may issue a declaratory ruling to other effect, the Petitioners are on notice through Advisory Opinion #2-94, the Addendum, and the EO of the applicability of Act 250 to the Tract.

Dated at Montpelier, Vermont this 22nd day of December, 1995.

ENVIRONMENTAL BOARD

  
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