

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. § 6001 et seq.

Re: Rinkers Communications and Atlantic Cellular Company
Declaratory Ruling #314

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In this decision, the Environmental Board ("Board") concludes that construction of a 180 foot telecommunications tower and a 130 foot telecommunications tower on Mount Irish in the Town of Berlin ("Project") is not subject to 10 V.S.A. § 6001 et seq. ("Act 250").

I. BACKGROUND

On October 27, 1995, the District #5 Environmental Commission Coordinator ("District Coordinator") issued Jurisdictional Opinion #5-95-4 ("Jurisdictional Opinion") in which he determined that the Project is subject to Act 250.

On November 27, 1995, Rinkers Communications ("Rinkers") and Atlantic Cellular Company ("Atlantic") each filed a petition for a declaratory ruling with the Board. The petitions appeal the Jurisdictional Opinion and contend that the Project is not subject to Act 250.

On January 18, 1996, Board Chair John T. Ewing convened a prehearing conference with L. Brooke Dingleline, Esq. and Karl Rinker representing Rinkers and Kimberly M. Butler, Esq. representing Atlantic.

On January 30, 1996, Chair Ewing issued a Prehearing Conference Report and Order ("Prehearing Order") which is incorporated herein by reference. No party objected to the Prehearing Order.

The parties filed supplemental memoranda, lists of witnesses and exhibits, and proposed findings of fact and conclusions of law during February and March, 1996.

On April 16, 1996, Chair Ewing convened a second prehearing conference with Ms. Dingleline and Ms. Butler participating by telephone.

On April 17, 1996, the Board convened a hearing in the Town of Berlin with the following parties participating:

Rinkers by L. Brooke Dingleline, Esq. and
Atlantic by Kimberly M. Butler, Esq.

At the beginning of the hearing, the Board took official notice that the Town of Berlin has permanent zoning and

subdivision bylaws; none of the parties objected. During the hearing, the Board received testimony and heard opening and

See Petition of

Villae of Hardwick Electric Department, 143 Vt. 437, 445
(1983).

II. ISSUES

The issues before the Board are:

A. Whether, pursuant to 10 V.S.A. § 6001(3) and EBR 2(A) (2), "development" requiring a Act 250 permit because such development's "involved land," as defined under EBR 2(F), exceeds 10 acres.

1. Whether the utility right-of-way and the access right-of-way add sufficient acreage to the Project such that there are ten or more acres of involved land.

2.

B. "development," constitutes pursuant to 6081(a) a pre-existing development." 2(0), it is a "pre-

c. If the Project is a pre-existing development,

III. FINDINGS OF FACT

1. In the early 1950's, Interstate Equipment constructed a communications tower 120 feet in height ("**Original Tower**") on top of Mount Irish in the Town of Berlin, Vermont. The Original Tower was located on a 100 plus acre tract of land owned by Arthur Buck ("**100 Plus Acre Tract**").
2. Also in the early 1950's, Interstate Equipment constructed a road to access the Original Tower. The road was located on the 100 Plus Acre Tract.
3. Prior to construction of the Original Tower, the Washington Electric Cooperative ("**Cooperative**") purchased a utility right-of-way ("**Utility Right-of-Way**") to serve the 100 Plus Acre Tract.
4. The elevation of Mount Irish is approximately 2,130 feet above sea level.
5. The Original Tower was located within approximately 2.8 miles of the Barre-Montpelier Airport (also known as the Edward Knapp Airport).
6. A steady red beacon light existed on the top of the Original Tower in 1969. The Vermont Aeronautics Board installed and maintained the beacon light as a navigational device for airplanes landing at the Barre-Montpelier Airport. The Vermont Aeronautics Board disconnected the beacon light in approximately 1990.
7. Karl Rinker is the President of Rinkers, Incorporated. Rinkers, Incorporated does business as Rinkers Communications in Barre, Vermont.
8. In 1980, Rinkers purchased the Original Tower and began leasing the 100 Plus Acre Tract from the Estate of Arthur Buck. Shortly after purchasing the Original Tower, Karl Rinker began contemplating replacing it because it was old and rusty.
9. From 1980 through 1992, Rinkers negotiated to purchase a portion of the 100 Plus Acre Tract, but was only able to lease it intermittently.
10. From 1980 through 1992, various central Vermont companies rented space on the Original Tower from

Rinkers for two-way radio antennas. Additionally, Rinkers maintained a paging transmitter on the Original Tower which served Rinkers' customers, the Washington County Sheriff and Capital Fire Mutual Aid.

11. On January 31, 1992, Thomas Williams and **Susana E. D. Williams** purchased the 100 Plus Acre Tract from the Estate of Arthur Buck.
12. On April 10, 1992, Rinkers purchased 28.2 acres ("**28.2 Acre Tract**") of the 100 Plus Acre Tract and a right-of-way over the access road ("**Access Right-of-Way**") from Thomas Williams and **Susana E. D. Williams**.
13. The Access Right-of-Way is fifteen feet wide. Rinkers is solely responsible for maintaining the Access Right-of-Way and for the cost of such maintenance. Rinkers has performed routine maintenance of the Access Right-of-Way by placing water bars in the access road to prevent it from being washed out. Rinkers has not widened the road or changed it in any other way.
14. In June of 1992, Rinkers signed a lease agreement with P.C. Cellular of Vermont, L.P. ("**P.C.**") which enabled P.C. to rent space on Rinkers' Original Tower and provided P.C. with an option to build a 100 foot tower on the 28.2 Acre Tract. This option was never exercised by P.C.
15. In 1993, the Cooperative cleared the Utility Right-of-Way. Such clearing was part of the Cooperative's periodic routine maintenance of the Utility Right-of-Way and was not done at the request of Rinkers.
16. The Utility Right-of-Way is 50 feet wide and runs straight up Mount Irish. The length of the Utility Right-of-Way is less than the Access Right-of-Way. The Utility Right-of-Way contains approximately 2 acres and crosses several properties, including the Williams' tract.
17. On August 27, **1993**, Rinkers ordered a 120 foot communications tower package from UNR-Rohn which consisted of one 10 foot tower base section, one 10 foot tower section, five 20 foot tower sections, and various other tower assembly items. UNR-Rohn

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- shipped the tower package to Rinkers on October 8, 1993. Rinkers paid \$5,515.00 for the tower package.
18. In October and November of 1993, Rinkers removed the Original Tower and replaced it with a new 120 foot tower ("New Tower") in the same location on the 28.2 Acre Tract.
 19. Prescott Towers, Ltd. ("Prescott"), the company which installed the New Tower, completed its work by Nov. 16, 1993. As part of the installation, Prescott drilled new holes and set new anchors for the New Tower's guy wires. Rinkers paid \$5,000 for the installation of the New Tower.
 20. The New Tower was a replica of the Original Tower. Both towers were constructed of the same materials and both towers contained the same antennas at the same heights and locations.
 21. In October of 1993, Page Net, one of Rinkers new customers, indicated that it might want to add more antennas to the New Tower. During that same time period, Vermont Wireless expressed an interest in adding three to four antennas to the New Tower and Capital Fire Mutual Aid expressed an interest in moving its antenna higher on the New Tower. In the middle of construction of the New Tower, Karl Rinker realized that there might not be enough room on it for all of the antennas being discussed.
 22. On October 25, 1993, Linda Simons of the National License Corporation filed, at Rinkers' request, a Notice of Proposed Construction or Alteration with the Federal Aviation Administration ("FAA"), describing the proposed structure as a 180-foot tower with a 19 foot mast.
 23. On December 10, 1993, the FAA responded to Rinkers' Notice of Proposed Construction or Alteration. The FAA's response included a determination that the proposed extension of the New Tower to 180 feet should be lighted pursuant to an FAA Advisory Circular. The FAA determination was valid until July 19, 1994.
 24. At the time it received the FAA determination approving the proposed extension of the tower to 180-feet, Rinkers had not entered into any leases

for use of the extra tower space that would be provided by an extension of the New Tower. Rinkers continued to negotiate with Page Net, Vermont Wireless and other companies regarding rental of the proposed extension space.

25. On January 27, 1994, Rinkers filed with the Town of Berlin an Application For Subdivision of the 28.2 Acre Tract. The Town approved Rinkers' Application For Subdivision on February 17, 1994.
26. On February 2, 1994, the State of Vermont Department of Environmental Conservation issued Deferral of Permit Number DE-5-2898 to Rinkers for subdivision of the 28.2 Acre Tract.
27. On March 7, 1994, Rinkers conveyed 23.2 acres of the 28.2 Acre Tract to John Pellegrini and Rebecca Pellegrini for approximately \$6,000. Rinkers retained a five acre tract ("**5 Acre Tract**") on which the New Tower was located and reserved a **20-foot** wide right-of-way which provides access to the Tower Site over the parcel sold to the Pellegrinis.
28. The Access Right-of-Way contains approximately .93 acres (20 feet wide x 2,025 feet long).
29. In mid-April of 1994, Rinkers installed red lights on the New Tower at the 60 foot level and at the 120 foot level.
30. On April 28, 1994, Rinkers filed an Application For Zoning Permit with the Town of Berlin requesting permission to add a 60 foot extension to its New Tower. Just prior to Rinkers' filing of the Application for Zoning Permit, Page Net had told Rinkers that it definitely wanted to lease tower space for another antenna.
- 31. On May 26, 1994, the Town of Berlin issued a Zoning Permit to Rinkers, granting approval to add a 60 foot extension to the New Tower. The Zoning Permit became effective on June 10, 1994.**
32. On May 31, 1994, Rinkers ordered three 20 foot tower sections and various other tower assembly items from UNR-Rohn in order to construct the 60 foot tower extension. Rinkers paid freight charges of approximately \$1,500 for delivery of the tower

extension items. If Rinkers had ordered the tower extension items to be delivered with the tower replacement package in August of 1993, Rinkers would not have incurred the extra freight costs.

33. In June of 1994, Prescott Towers, Ltd. prepared the New Tower for the 60 foot extension by drilling new holes and installing new anchors for the guy wires. The new anchors were necessary because the tower extension required additional guy wires and repositioning of the existing guy wires. Rinkers paid approximately \$1,500 for the repositioning of guy wire anchors. If the repositioning of the guy wire anchors had been accomplished when the New Tower was constructed in the Fall of 1993, Rinkers would not have incurred the extra anchor repositioning costs.
34. On June 27, 1994, Karl Rinker submitted a Notice of Actual Construction or Alteration to the FAA, describing the construction as a "180' tower Rohn model 65."
35. On or about June 27, 1994, Prescott installed the three 20-foot sections, thereby extending the New Tower to 180 feet ("Extended Tower"). Rinkers paid Prescott \$2,880.72 for extending the tower.
36. After the tower extension, the red beacon lights were moved from the 60 foot level (middle) and the 120 foot level (top) of the New Tower to the 90 foot level (middle) and the 180 foot level (top) of the Extended Tower. The relocation of the lights was an extra expense for Rinkers.
37. In the Fall of 1994, Atlantic purchased the Vermont assets of P.C. On November 1, 1994, P.C. assigned to Atlantic its rights, duties, and obligations under its lease with Rinkers, including the option to build a 100 foot tower on the 28.2 Acre Tract (which was reduced to the 5 Acre Tract before Atlantic purchased P.C.). Prior to November 1, 1994, Atlantic had no contact with P.C. regarding P.C.'s lease with Rinkers.
38. Prior to November 1, 1994, Atlantic had no involvement with the 5 Acre Tract or the 28.2 Acre Tract and no contact with Karl Rinker.

39. Atlantic is not related to P.C. in any way. The two companies do not have any common directors, officers, or employees.
40. In late February of 1995, Atlantic renegotiated its lease with Rinkers to include an option to build a 130 foot tower because Rinkers' Extended Tower could not support the antennas Atlantic needed to install in order to improve its cellular coverage in the area.
41. On March 14, 1996, Atlantic and Rinkers (as co-applicant) received Land Use Permit #5W1235 authorizing the construction of a 130 foot communications tower with antennas and equipment building ("Atlantic's Tower) on the 5 Acre Tract.
42. On March 28, 1996, Atlantic filed a Notice of Proposed Construction or Alteration with the FAA for construction of a 130 foot tower with antennas and an equipment building on the 5 Acre Tract.
43. The Town of Berlin, Vermont has permanent zoning and subdivision bylaws.

IV. CONCLUSIONS OF LAW

When considering whether or not developments in existence before June 1, 1970 are subject to Act 250, the Board has looked first to whether the proposed changes themselves constitute a development and second to whether the proposed changes constitute a substantial change to a pre-existing development. See, e.g., Re: Town of Rutland, Declaratory Ruling #207 (May 5, 1989).

Development

Act 250 requires that a land use permit be obtained prior to commencing construction on a development or prior to commencement of development. 10 V.S.A. § 6081(a).

In towns with permanent zoning and subdivision bylaws, such as the Town of Berlin, "development" is defined as construction of improvements for commercial purposes on a tract or tracts of land, owned or controlled by a person, involving more than ten acres of land. 10 V.S.A. § 6001(3); EBR 2(A)(2). Therefore, the Project will not constitute development unless it includes more than ten acres of involved land.

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The Project is located on the 5 Acre Tract of land. However, there are three ways in which the Project may include more than ten acres of involved land.

1. The Addition of Involved Land Through the Rights-of-Way

The Access Right-of-Way and Utility Right-of-Way do not add sufficient acreage such that there are more than ten acres of involved land.

EBR 2(F) defines "involved land" as:

- (1) The entire tract or tracts of land upon which the construction of improvements for commercial or industrial purposes occurs; and
- (2) Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which is incident to the use of the project; and
- (3) Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which bear some relationship to the land actually used in the construction of improvements, such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship. ...

In determining the amount of involved land, the Board counts the acreage of the entire tract or tracts on which improvements are located, as well as any other involved land. See EBR 2(F); In re Stokes Communications Corp., 6 Vt. Law Week 210, 211 (1995); In re Costello Garage, 158 Vt. 655 (1992). EBR 2(F)(1) addresses the size of the tract upon which the improvements are located. In re Stokes Communications Corp., 6 Vt. Law Week at 211. EBR 2(F)(2) and (3) pertain to tracts which are physically separate from the improved tract. Id.

The Board concludes that the Access Right-of-Way adds involved land to the Project because it is incident to the use of the Extended Tower and it is controlled by Rinkers. See 10 V.S.A. § 6001(3) (listing roadways as incident to the use).

The Access Right-of-Way contains .93 acres of land.

Therefore, the Access Right-of-Way adds .93 acres of involved land to the **Project**.¹

The Board concludes that the Utility Right-of-Way does not add involved land to the Project. EBR 2(F)(1) does not apply because construction in such rights-of-way is exempt. See EBR A-3(c); Re: Grassroots Cable Systems of Vermont, Inc., Declaratory Ruling Request #254, Findings of Fact, Conclusions of Law, and Order (March 12, 1992). EBR 2(F)(2) and 2(F)(3) do not apply because the Utility Right-of-Way is not owned or controlled by Rinkers or Atlantic; it is owned and controlled by the Cooperative. See Re: Grassroots Cable Systems of Vermont, Inc., Declaratory Ruling Request #254, Findings of Fact, Conclusions of Law, and Order at 6 (acreage of above ground transmission rights-of-way not included in computing amount of "involved land" because the rights-of-way were not owned or controlled by the Petitioner). Therefore, the Utility Right-of-Way does not add involved land to the Project.

2. The Addition of Involved Land Through a Plan to Build a 180 Foot Tower

Rinkers' construction of a 120 foot tower in the Fall of 1993 (on the 28.2 Acre Tract) was not the first stage in a plan to construct a 180 foot tower.

EBR 2(F) provides:

In the event that a project is to be completed in stages according to a plan, or is part of a larger undertaking, all land involved in the entire project shall be included for the purpose of determining jurisdiction.

Jurisdiction under Act 250 does not attach to a "plan" until the activity is so settled in intention and purpose that it can be called ready to commence. In re Agency of Administration, 141 Vt. 68, 82 (1982); Re: Lawrence and Darlene McDonough, Declaratory Ruling Request #306, Memorandum of Decision and Dismissal Order at 4 (Dec. 22, 1995). Jurisdiction is triggered "only when the activity [is] about to impinge on the land" and attaches only to "activity which

¹This decision is based, in part, on the assumption that the access road for the Atlantic Tower will be the same as the access road for Rinkers' Extended Tower which is referred to in the foregoing findings of fact.

has achieved such finality of design that construction can be said to be ready to commence." In re Vermont Gas Svstems, 150 Vt. 34, 39 (1988) (quoting In re Aaency of Administration, 141 Vt. at 78-79).

In In re Asency of Administration, 141 Vt. at 90, the Vermont Supreme Court concluded that the State of Vermont's long range planning studies and the recommendations which resulted from those studies did not amount to a "plan" sufficient to trigger Act 250 jurisdiction. Instead, the Court concluded that such studies were mere "proposals" of directions in which the state might go, sometime in the future, in meeting its office space requirements. Id.

Similarly, Rinkers filing of a Notice of Proposed Construction or Alteration with the FAA on October 25, 1993 was a proposal of the direction in which Rinkers might go, sometime in the future, in meeting its telecommunications tower space requirements.

Upon receiving the FAA's approval of the proposed 60 foot extension on December 10, 1993, Rinkers was not ready to commence construction of the extension because it was uncertain whether an extension was warranted. Potential customers had approached Rinkers with proposals to add antennas to the tower during the Fall of 1993 but such proposals were not "plans" because they were still under negotiation and had not reached finality of design.

Rinkers continued to negotiate with the potential customers during the early part of 1994 but the negotiations did not lead to any agreements regarding lease of space on the proposed tower extension. On March 7, 1994, Rinkers conveyed 23.2 acres of its 28.2 Acre Tract to John and Rebecca Pellegrini and retained the 5 Acre Tract on which the New Tower was located.

In April, 1994, Page Net told Rinkers that it definitely wanted to lease tower space for another antenna. On April 28, 1994, Rinkers filed an Application For Zoning Permit with the Town of Berlin requesting permission to add a 60 foot extension to its New Tower. On May 26, 1994, the Town of Berlin issued a Zoning Permit to Rinkers, granting approval of the 60-foot extension: On June 27, 1994, Prescott installed the three 20 foot sections, thereby extending the New Tower to 180 feet.

Rinkers incurred extra costs when it chose to extend the New Tower. These extra costs included freight charges for the

special delivery of the 60 foot tower extension items, the duplicative work of drilling new holes and installing new anchors for the relocation of guy wires, and the duplicative work of adding red lights to the New Tower in April of 1994 and relocating the lights on the Extended Tower in June of 1994. Rinkers could have avoided these extra costs by initially constructing a 180 foot tower.

Based upon the foregoing, the Board concludes that Rinkers' construction of the New Tower in the Fall of 1993 (on the 28.2 Acre Tract) was not the first stage in a plan to construct a 180 foot tower.² A sequence of events, by itself, does not imply the existence of a plan without further evidence that the activity has achieved such finality of design that construction can be said to be ready to commence. In this case, the evidence does not indicate finality of design such that construction was ready to commence on the 28.2 Acre Tract. Therefore, Rinkers did not have a plan to which Act 250 jurisdiction attached.

3. The Addition of Involved Land Through
Atlantic's Plan to Build a 130 Foot Tower

Atlantic's proposed construction of a second telecommunications tower was not part of a plan that existed before the acreage of Rinkers' tract was reduced to less than 10 acres.

Pursuant to EBR 2(F), if a project is to be completed in stages according to a plan, or is part of a larger undertaking, all of the land involved in the entire project shall be included for the purpose of determining jurisdiction.

Atlantic's plan to construct a 130 foot telecommunications tower arose after the 28.2 Acre Tract was reduced to the 5 Acre Tract. Rinkers conveyed 23.2 acres of its 28.2 Acre Tract to John and Rebecca Pellegrini on March 7, 1994, thereby retaining the 5 Acre Tract. On November 1, 1994, P.C. assigned its lease with Rinkers to Atlantic, including the option to construct a 100 foot tower on Rinkers' tract. Prior to November 1, 1994, Atlantic had no involvement with the 5 Acre Tract or the 28.2 Acre Tract and no contact with Karl Rinker. Additionally, prior to November 1, 1994, Atlantic had no contact with P.C. regarding P.C.'s lease with

²Rinkers' New Tower did not require an Act 250 permit because it was not a substantial change pursuant to EBR 2(A)(5) and 2(G).

Rinkers. Atlantic and P.C. are not related in any way.

In late February of 1995, Atlantic renegotiated its lease with Rinkers to include an option to build a 130 foot tower because Rinkers' Extended Tower could not support the antennas Atlantic needed to install in order to improve its cellular coverage in the area. Therefore, Atlantic's proposed construction of a second telecommunications tower was not part of a plan that existed before the 28.2 Acre Tract was reduced to the 5 Acre Tract.

4. Conclusion

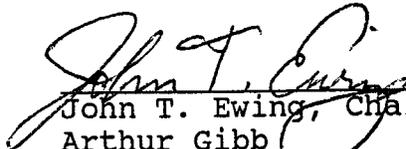
Based upon the foregoing facts and authorities, the Board concludes that the Project includes 5.93 acres of involved land. Because its "involved land" does not exceed ten acres, the Project does not constitute "development" requiring an Act 250 Permit.³

V. ORDER

An Act 250 permit is not required for the Project.

Dated at Montpelier, Vermont this 23rd day of May, 1996.

ENVIRONMENTAL BOARD


John T. Ewing, Chair
Arthur Gibb
Marcy Harding
Rebecca M. Nawrath
Robert Page, M.D.
Steve Wright

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'Because the Board concludes that the Project does not constitute "development," it is not necessary for the Board to determine whether it is pre-existing or whether a substantial change has occurred or is proposed with respect to the site.