

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-9092

Re: Applewood Corporation Dummerston Management
Declaratory Ruling Request #325

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to whether the Town of Dummerston ("Dummerston") is a "ten acre" town under 10 V.S.A. Chapter 151 ("Act 250"). As explained below, the Environmental Board concludes that Dummerston does not have a subdivision bylaw and, therefore, an Act 250 permit is required for the conversion of an existing commercial building into a day care center on a seven acre tract in Dummerston ("Project") .

I. BACKGROUND

On April 10, 1996, the District #2 Coordinator issued Jurisdictional Opinion #2-97 ("JO-2-97") to Applewood Corporation Dummerston Management ("Petitioner") regarding the Project.

On May 9, 1996, the Petitioner appealed from JO-2-97 and petitioned for a declaratory ruling ("Petition").

On July 2, 1996, the Petitioner filed a Statement of Proposed Findings of Fact and Statement of the Case in compliance with the Notice of Prehearing Conference issued on June 20, 1996 ("Petitioner's Statement of Facts").

On July 8, 1996, the Town of Dummerston Planning Commission filed a letter stating that it intends to participate in this declaratory ruling proceeding.

On July 8, 1996, Environmental Board Chair John T. Ewing convened a prehearing conference and, on July 10, 1996, issued a Prehearing Conference Report and Order ("Prehearing Order").

On July 31, 1996, the Petitioner filed a memorandum of law.

On August 7, 1996, the New England Legal Foundation filed a memorandum of law in support of the Petitioner-1

On August 20, 1996, Chair Ewing issued a proposed decision to the parties. Pursuant to 10 V.S.A. § 6027(g),

'While the Board has accepted the memorandum, the New England Legal Foundation has not requested, nor is it granted, party status in this proceeding.

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parties were allowed to request oral argument before the Board. In addition, parties were allowed to file written objections.

On August 21, 1996, at the Petitioner's request, Chair Ewing extended the date for the submission of requests for oral argument, written objection, and legal memoranda in response to the proposed decision until September 11, 1996.

No party requested oral argument nor filed written objections or legal memoranda in response to the proposed decision.

On September 25, 1996, the Board convened a deliberation concerning this matter, and, following a review of the proposed decision and the evidence and arguments presented in the case, declared the record complete and adjourned. This Petition 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. See Petition of Village of Hardwick Electric Department, 143 Vt. 437, 445 (1983).

II. INCORPORATION OF PREHEARING ORDER

No party objected to the Prehearing Order. The Board incorporates the Prehearing Order herein. As a result: (i) pursuant to 10 V.S.A. § 6027(g) and Environmental Board Rule ("EBR") 41, the Chair serves as administrative hearing officer; (ii) official notice is taken of the Town of Dummerston Zoning Bylaw as adopted on June 27, 1979, and as amended: March 1981 ("Bylaw"); (iii) a hearing shall not be convened unless the Board requires otherwise; and (iv) the findings of fact made herein are based upon JO-2-97, the Petitioner's Statement of Facts, or the Bylaw.

III. ISSUE

Whether, pursuant to 10 V.S.A. §§ 6001(3) and 6081(a), EBR 2(A)(2), and 24 V.S.A. Chapter 117, Dummerston has adopted permanent zoning and subdivision bylaws.

IV. FINDINGS OF FACT

1. The Project consists of the renovation of a building which was constructed prior to June 1, 1970, and the operation of a day care center in the renovated building. The physical renovations will be both inside and out of the building. The Project is located on a

seven acre tract of land ("Project Tract").

2. The building formerly housed an automobile repair operation and later a juice manufacturing operation.
3. Eight mobile homes have been located on the Project Tract since 1962. The Petitioner will remove the mobile homes as part of the Project. The Project will accommodate 90 to 100 children and be operated by 15 staff members.
4. The Petitioner concedes that if the Bylaw is only a zoning bylaw, then the Project requires an Act 250 permit as a substantial change to a pre-existing development.
5. The Bylaw provides, in part:

ARTICLE I ENACTMENT, PURPOSE AND AMENDMENTS

Section 100 ENACTMENT

In accordance with the Vermont Planning and Development Act, 24 V.S.A., Chapter 117, hereinafter referred to as the "Act", Section 4401(b), there is hereby established a Zoning Bylaw for the Town of Dummerston which is set forth in the text and maps that constitute this Bylaw. This Bylaw shall be known as the "Town of Dummerston Zoning Bylaw."

Section 110 PURPOSE

It is the purpose of this Bylaw to provide for orderly community growth, to provide for the public health, safety and welfare and to further the purposes (sic) established in the Act in Section 4302.

Section 120 APPLICATION OF BYLAW

The application of this Bylaw is subject to Sections 4405, 4406, 4407, 4408, and 4409 of the Act.

Except as hereinafter provided, no "Land Development" as such term is defined by this Bylaw may be commenced in the Town of Dummerston, unless in conformity with the regulations herein spec-

ified for the district in which it is located.
Any use not permitted by this Bylaw shall be
deemed prohibited.

Section 130 INTERPRETATION

This Bylaw is intended to repeal the previous
Zoning Regulations, but is not intended to repeal,
annul or impair any other regulations or permits
issued.

Where this Bylaw imposes a greater restriction
upon the use of a structure or land than is
required by any other statute, ordinance, rule or
regulation, the provisions of this Zoning Bylaw
shall control.

In any case where the restrictions within this
Zoning Bylaw overlap or conflict in their
application to a particular structure, use or
parcel of land, those provisions which would
impose the greater restriction upon such
structure, use or parcel of land shall control.

Section 140 AMENDMENTS

This Bylaw may be amended according to the
requirements and procedures established in
Sections 4403 and 4404 of the Act.

Section 150 SEPARABILITY

The invalidity of any article or section of this
Bylaw shall not invalidate any other part.

ARTICLE II ESTABLISHMENT OF ZONING DISTRICTS AND ZONING MAP

Section 200 PURPOSE OF ZONING DISTRICTS

The purpose of establishing zoning districts in
the Town of Dummerston is to further the public
health, safety, and welfare of the Town.
Specifically, the districts seek to provide an
orderly, attractive, compatible, and logical
growth pattern by allocating various functional
uses to areas best suited for them.

Section 201 ESTABLISHMENT OF ZONING DISTRICTS

The Town of Dummerston is hereby divided into the following Zoning Districts as shown on the Official Zoning Map:

Districts

FR	Forest Reserve
RS	Reserve
CN	Conservation
RR	Rural Residential
RC	Rural Commercial
CI	Commercial/Light Industrial
V	Village

* * *

Section 245 GENERAL REQUIREMENTS FOR ALL DISTRICTS

- a. Site Plan Approval is required for all uses except one and two-family dwellings, accessory uses thereto, agricultural uses, and signs permitted under Section 669(a) and (b) of this Bylaw.
- b. The minimum building setback requirement from all permanent watercourses shall be 50 feet unless otherwise specified in this Bylaw.
- c. The maximum building height limits of this ordinance shall apply to all principal and accessory buildings but shall not apply to chimneys, flag-poles, church spires, water towers, non-commercial antenna structures, and energy producing structures.

* * *

Section 701 ZONING PERMIT, FEE

No "Land Development" as defined by this Bylaw may commence, unless a zoning permit shall have been duly issued by the Administrative Officer, as provided for in Section 4443 of the Act. The fee for such zoning permit shall be established by the Board of Selectmen.

* * *

Section 720 CONDITIONAL USE PERMITS

No Zoning Permit shall be issued by the Administrative Officer for any use or structure which requires a Conditional Use Permit in this Bylaw until the Board of Adjustment grants such approval. In considering its action, the Board of Adjustment shall make findings on general and specific standards, hold hearings and attach conditions as provided for in Section 4407(2) of the Act.

* * *

Section 725 SITE PLAN APPROVAL

No zoning permit shall be issued by the Administrative Officer for any use or structure, except for one-family and two-family dwellings, accessory uses thereto, agricultural uses, signs permitted under Section 669(a) or (b) of this Bylaw, or land subdivision until the Planning Commission grants Site Plan Approval

Section 726 SUBMISSION OF SITE PLAN MAP AND SUPPORTING
DATA

The Owner shall submit two sets of site plan maps and supporting data to the Planning Commission which shall include the following information presented in drawn form and accompanied by written text. The Planning Commission may waive, or vary the submission requirements at its discretion.

1. Name and address of the owner of record and adjoining lands. Name and address of person or firm preparing the map. Scale of map, north point and date.
2. Survey of the property showing existing features, including contours, structures, large trees, streets, utility easements, rights of way, land use and deed restrictions.
3. Site plan showing proposed structure, locations and land use areas; streets, driveways, traffic circulation, parking and loading spaces and pedestrian walks; landscaping plans, including site grading, landscape design, lighting and screening.

4. Construction sequence and time schedule for completion of each phase for buildings, parking spaces and landscaped areas of the entire development.

Section 727 SITE PLAN REVIEW PROCEDURE

In considering its action the Commission shall consider and may impose appropriate conditions and safeguards only with respect to the adequacy of traffic access, circulation and parking, landscaping and screening.

The Commission shall review the site plan map and supporting data before approval or approval with stated conditions, or disapproval, is given, and shall take into consideration the following objectives:

- a. Harmonious relationship between proposed uses and existing adjacent uses.
- b. Maximum safety of vehicular circulation between the site and the street network.
- c. Adequacy of circulation, parking and loading facilities with particular attention to safety.
- d. Adequacy-of landscaping, screening and setbacks in regard to achieving maximum compatibility and protection of adjacent property.

* * *

ARTICLE VIII -- DEFINITIONS

Doubt as to the precise meaning of any word used in this Bylaw shall be clarified by the Board of Adjustment.

* * *

LAND DEVELOPMENT -- The division of a parcel into two or more parcels, the construction, reconstruction, conversion, structural alteration, relocation or enlargement of any building or other structure, or of any mining, excavation of landfill, and any change in the use of any building or other structure, or land, or extension of use of land. (24 V.S.A. Section 4303 (3) [1].

* * *

SUBDIVISION -- [A] tract or tracts of land, owned or controlled by a person, which have been 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, and within any continuous period of 10 years after the effective date of this chapter. In determining the number of lots, a lot shall be counted if any portion is within five miles. (10 v.S.A. 6001(19)).

4. All of the zoning districts defined in Bylaw Section 201 include a list of permitted uses and conditional uses subject to area dimensional and coverage requirements.
5. The Bylaw contains the provisions required by 24 V.S.A. Chapter 117 necessary to be a zoning bylaw. The Bylaw does not contain the mandatory subdivision bylaw requirements set forth in 24 V.S.A. § 4413.
6. There is no evidence regarding whether Dummerston has adopted a plan pursuant to 24 V.S.A. § 4385. There is no evidence regarding whether, if Dummerston has adopted a plan pursuant to 24 V.S.A. § 4385, a subdivision bylaw would implement the purposes of such plan.
7. There is no evidence as to what **was** warned for adoption pursuant to the Bylaw's adoption on June 27, 1979, and as amended in March 1981.
8. The Project has the potential to result in significant impacts with respect to Criteria 1(B) (waste disposal), 2 (water supplies), 5 (traffic), 7 (municipal services), 8 aesthetics, 9(F), and 10 (town plan).

V. CONCLUSIONS OF LAW

Pursuant to 10 V.S.A. § 6007(c) and EBR 3(D), a petition for declaratory ruling is conducted de novo to determine the applicability of any statutory provision or of any rule or order of the Board.

The burden of proof to show that a development is exempt from Act 250 is on the person claiming the exemption. Re: Weston Island Ventures, Declaratory Ruling #169 at 5 (June 3, 1985), citing Bluto v. Employment Security, 135 Vt. 205 (1977). The burden of proof consists of the burdens of

production and persuasion. ~~Re: John Gross Sand and Gravel,~~
Declaratory Ruling #280 at 9 (July 28, 1993); ~~Re: Pratt's~~
Propane, Findings of Fact, Conclusions of Law and Order
#3R0486-EB at 4-6 (Jan. 27, 1987).

Under 10 V.S.A. § 6081(a) no person shall commence construction on a development or commence development without a permit. Pursuant to 10 V.S.A. § 6001(3), "Development" is defined, in part, as "the construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality which has not adopted permanent zoning and subdivision bylaws."

EBR 2(A) (2) similarly provides that a project is a "development" where there is the construction of improvements for a commercial purpose on a tract or tracts of land of more than one acre if a municipality lacks both permanent zoning and subdivision bylaws.'

While pre-existing developments are exempt from the permit requirement in 10 V.S.A. § 6081(a), under 10 V.S.A. § 6081(b), a substantial change to a pre-existing development requires a permit. EBR 2(A)(5) similarly provides that a substantial change to a pre-existing development requires a permit.

24 V.S.A. Chapter 117 authorizes a municipality to adopt a subdivision bylaw pursuant to specific procedural and substantive requirements. These requirements must be strictly complied with by a municipality to adopt a valid subdivision bylaw. In re Cottrell, 158 Vt. 500, 504 (1992).

Generally, the adoption of a subdivision bylaw requires that a municipality: (i) create a planning commission and adopt a town plan; (ii) have the planning commission prepare the proposed subdivision bylaw, or cause it to be prepared pursuant to its direction, and hold at least one public hearing on the proposed subdivision bylaw; (iii) deliver, at least 15 days prior to the first public hearing, a copy of the proposed subdivision bylaw to (a) the chair of the

²In 1985 the Legislature ratified the Board's rules such that they have the same effect as any law passed by the Legislature in the first instance. In effect, the ratified Board rules have "become part of the Act 250 legislative scheme codified at chapter 151 of Title 10." In re Barlow, 160 Vt. 513, 521 (1993); In re Spencer, 152 Vt. 330, 336 (1989).

planning commission of each abutting municipality, or, where there is no planning commission, the clerk of the abutting municipality; (b) the regional planning commission's executive director; and (c) the department of housing and community affairs within the agency of development and community affairs; (iv) have the town's legislative body convene one or more public hearing, after public notice, on the proposed subdivision bylaw; and (v) be adopted by a town-wide vote. See 24 V.S.A. §§ 4385, 4401, 4403, and 4404. The subdivision bylaw's purpose must be to implement the town plan. Once effective, the subdivision bylaw constitutes a specific implementation of the town plan which governed its creation. See In re Molgano, 5 Vt. Law Week 314, 315 (1994) (zoning bylaw implements town plan).

The Bylaw can be a subdivision bylaw only if the Dummerston Planning Commission proposed it as such pursuant to, and in accordance with, the above adoption procedures. There is no evidence regarding whether the Dummerston Planning Commission proposed the Bylaw as only a zoning bylaw or, instead, as a zoning bylaw and a subdivision bylaw. There is no evidence regarding what Dummerston's legislative body reviewed. There is no evidence as to what was warned prior to the town vote that resulted in the Bylaw's adoption. There is no evidence regarding whether the Bylaw, if it were also a subdivision bylaw, constitutes a specific implementation of the town plan which governed its creation.

The only evidence before the Board as to what Dummerston thought it was adopting, and what it in fact adopted, is the Bylaw itself.

The Bylaw contains numerous self-describing references as a zoning bylaw. Its provisions are consistent with what 24 V.S.A. Chapter 117 requires and authorizes with regard to a zoning bylaw. There is no doubt that the Bylaw was intended to be, and functions as, a zoning bylaw. Equally clear is that the Bylaw was not intended to be, nor does it function as, a subdivision bylaw.

Under 24 V.S.A. § 4413(a), "Subdivision regulations", a subdivision bylaw shall contain procedures for the submission and processing of plats; standards for the design and layout of streets, curbs, gutters, street lights, fire hydrants, shade trees, water, sewage and drainage facilities, public utilities and other necessary public improvements. The subdivision bylaw may empower the planning commission to waive certain aspects of compliance

with the preceding, but the subdivision bylaw must still contain such provisions.

The Bylaw completely lacks the mandatory requirements set forth in 24 V.S.A. § 4413(a), nor does the Petitioner offer any evidence or argument as to how the Bylaw satisfies the requirements set forth in 24 V.S.A. § 4413(a).

Instead, the Petitioner contends that the definition of "Land Development" at 24 V.S.A. 4303(3), and the Bylaw's use of that definition, means that the Bylaw is a subdivision bylaw. The Board rejects this contention for two reasons.

First, the Bylaw's regulation of the division of a parcel into two or more parcels is consistent with what a zoning by-law may regulate with regard to permitted and conditional uses. Both types of uses in the Bylaw's districts require compliance with minimum area dimensional and coverage requirements. Both the Administrative Officer and the Board of Adjustment may regulate the division of land within the districts to ensure compliance with these requirements. See 24 V.S.A. §§ 4442 and 4443. In both instances, the exercise of this authority does not satisfy what is statutorily required for there to be a *subdivision bylaw*. Thus, the Bylaw's use of the words "Land Development" and "Subdivision" does not transform the Bylaw into a subdivision bylaw.

Second, the Petitioner's contention confuses what is authorized in 24 V.S.A. § 4407(5) with what is authorized under 24 V.S.A. § 4401(b) (2). The former authorizes a zoning bylaw to provide for site plan approval by the planning commission. The latter authorizes a planning commission to approve, modify or disapprove all plats of land pursuant to a subdivision bylaw. The Bylaw provides for site plan approval pursuant to 24 V.S.A. § 4407(5). However, the Bylaw does not provide for site plan approval pursuant to 24 V.S.A. § 4401(2) subject to a subdivision bylaw which satisfies 24 V.S.A. § 4413.

The Petitioner has failed to meet its burden of production and persuasion with regard to the issue before the Board. There is no evidence regarding whether the procedural and substantive requirements necessary to adopt a subdivision bylaw were fulfilled by Dummerston's adoption of the Bylaw. Rather, the evidence before the Board overwhelmingly demonstrates that the Bylaw includes a zoning bylaw, but does not also include a subdivision bylaw.

The Board concludes that the Bylaw is not a subdivision bylaw because it fails to comply with 24 V.S.A. § 4413. Therefore, development for purposes of Act 250 in Dummerston is the construction of improvement for a commercial or industrial purpose on one--not ten--acres of land.

The Project Tract is seven acres. The Project includes the construction of improvements both inside and out of the building. The Project has the potential to result in significant impacts with respect to Criteria 1(B) (waste disposal), 2 (water supplies), 5 (traffic), 7 (municipal services), 8 aesthetics, 9(F), and 10 (town plan). The Petitioner concedes that if Dummerston is a "one-acre" town, then the Project requires an Act 250 permit as a substantial change to a pre-existing development. Accordingly, the Project requires an Act 250 permit prior to the commencement of its construction.

VI. ORDER

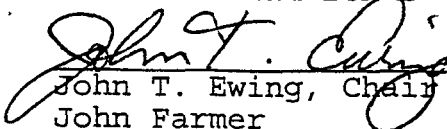
1. The Bylaw is not a subdivision bylaw. Dummerston has not adopted permanent zoning and subdivision bylaws pursuant to 10 V.S.A. §§ 6001(3) and 6081(a), EBR 2(A)(2), and 24 V.S.A. Chapter 117.

2. In Dummerston, under 10 V.S.A. § 6001(3) and EBR 2(A)(2) the construction of improvements for commercial or industrial purposes on more than one acre of land constitutes "development" and, as such, requires an Act 250 permit.

3. The Project is a substantial change to a pre-existing development under 10 V.S.A. § 6081(b) and EBR 2(A)(5). Accordingly, the Project requires an Act 250 permit prior to the commencement of its construction.

Dated at Montpelier, Vermont, this 25th day of September, 1996.

ENVIRONMENTAL BOARD


John T. Ewing, Chair

John Farmer
Arthur Gibb
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William Martinez
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