

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Richard and Marion D. Josselyn
Declaratory Ruling # 333

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This decision pertains to a petition for declaratory ruling regarding whether, pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250"), the renovation and conversion of a residential garage to a retail florist shop on 26-acres of land requires an Act 250 permit. As explained below, the Environmental Board ("the Board") concludes that no permit is required, because the proposed activity falls within the exemption for construction for farming purposes under 10 V.S.A. § 6001(3) and (22).

I. BACKGROUND

On October 1, 1996, the Assistant District #2 Coordinator ("District Coordinator") issued a Jurisdictional Opinion in the form of a Project Review Sheet, PIN # N596-0033 ("Jurisdictional Opinion"), in which she determined that an Act **250** permit is required for the renovation of a residential garage for use as a retail florist shop ("Project"). The Project is located off Route 100 in the Village of Ludlow, Vermont, on 26 acres of land owned by the Project applicants, Richard and Marion D. Josselyn ("Petitioners"). The District Coordinator concluded that the Project constitutes construction of improvements for commercial purposes on more than one acre of land, thereby triggering Act 250 jurisdiction.

On October 9, 1996, the Petitioners through their attorney, Matthew T. Birmingham, III, Esq., filed a petition for a declaratory ruling with the Board, pursuant to 10 V.S.A. § 6007(c). The Petitioners appealed the Jurisdictional Opinion, contending that the Project was "for the sole and limited purpose of selling flowers" and therefore no Act 250 permit should be required.

Notice of an Act 250 hearing in this matter was issued on November 4, 1996, and published in the Rutland Daily Herald on Thursday, November 7, 1996. A prehearing conference with respect to this matter was convened by Board Chair John T. Ewing on November 25, 1996, in Montpelier, Vermont. The only persons entering a timely appearance in this matter were the Petitioners, represented by attorney Birmingham.

A Prehearing Conference Report and Order ("Prehearing Order") was issued on December 5, 1996. No prefiled testimony was required, but exhibits were prefiled by the Petitioners in accordance with a schedule set forth in the Prehearing Order. A second prehearing conference was convened by the Chair on January 6, 1997.

On January 8, 1997, the Board Chair as Hearing Officer convened a hearing in this matter at the Ludlow Town Hall in Ludlow, Vermont. Those present and participating were the Petitioners, represented by attorney Birmingham. Following an introductory statement by counsel, the Hearing Officer recessed the proceeding to conduct a site visit of the Project and the associated acreage. Following the site visit, the Hearing Officer reconvened the hearing and placed his observations on the record.

The Hearing Officer heard testimony from Richard and Marion D. Josselyn. He also received into evidence the exhibits offered by the Petitioners. Following the recess of hearing, on January 24, 1997, the Petitioners filed proposed findings of fact and conclusions of law.

On February 13, 1997, the Hearing Officer issued his Proposed Findings of Fact, Conclusions of Law and Order in this matter. The parties were provided with an opportunity to file written objections and to present oral argument before the full Board in accordance with Environmental Board Rule ("EBR") 41(D). On February 19, 1997, the Petitioners wrote to the Board indicating that they would not be filing exceptions, briefs or a written request for oral argument.

The Board deliberated with respect to this matter on February 26, 1997. On that date, following a review of the proposed decision and record, the Board declared the record complete and adjourned the hearing. This matter is now ready for **final** 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. ISSUE

The sole issue on appeal is:

Whether the renovation and conversion of a residential garage to a retail florist shop located on a 26-acre tract of land in the Village of Ludlow constitutes construction of improvements for commercial purposes pursuant to EBR 2(A)(2) and therefore is "development" requiring an Act 250 permit.

III. FINDINGS OF FACT

1. Richard and Marion Josselyn own certain land and premises conveyed to them by Richard C. Joyce by deed dated August 24, 1982, and recorded in Book 80, Pages 59-60 of the Ludlow Land Records. This real property consists of a 26-acre tract of land off Route 100 in the Village of Ludlow, Vermont ("Project tract").

2. The Town and Village of Ludlow has zoning regulations, but no permanent subdivision regulations.
3. The Project tract is below 2500 feet in elevation.
4. The Josselyns acquired the Project tract from Mr. Josselyn's stepfather. The property had been in Mr. Josselyn's family for three generations.
5. For the past twelve years, Richard and Marion Josselyn have owned, operated and maintained a substantial tree farm on the Project tract where they grow approximately 1,200 Christmas trees for harvest and sale.
6. Richard Josselyn also maintains a Christmas tree farm in Mt. Holly, Vermont, consisting of approximately 3,000 trees, and another Christmas tree farm in Londonderry, Vermont, with approximately 8,000 trees.
7. On the Project tract, Richard and Marion Josselyn constructed a primary residence in 1995. At all times germane to their petition, the Josselyns have occupied the premises as a primary residence.
8. The Project tract is bisected by Jewell Brook. On the west side of Jewell Brook is located the Josselyn's home and a maintained lawn and garden area of approximately two acres. On the east of Jewell Brook is the balance of the Josselyn's property, including the tree farm and a woodland that they keep and maintain for firewood and recreational purposes. The Josselyns' access the eastern portion of their property over a wooden bridge that spans Jewell Brook. The Project tract has 85' of road frontage on Route 100.
9. The Josselyns' residence includes a two-car garage facing Route 100 but set back from the highway by a driveway area. The garage is 28' by 28' in dimension.
10. The Josselyns' propose to convert their garage into a retail florist shop.
11. Most of the items for sale in the Josselyns' proposed shop will be plants and plant products produced by Marion and Richard Josselyn at their Ludlow premises. Marion Josselyn intends to start flower, herb and tree seedlings under lights in the garage. She also intends to produce potted bulbs and house plants under lights in the garage. Perennials, herbs, trees and other plant items will be grown in the Josselyns' garden or tree farm and subsequently transplanted for sale in the shop. Richard Josselyn also intends to sell cut **Christmas trees**, harvested from the 26-acre tract, and supplement these with trees from his tree farms in Mt. Holly and Londonderry, Vermont. Richard and

Marion Josselyn also intend to sell wreaths and other decorations produced from their Christmas tree brush.

12. Ancillary to the sale of items produced on premises, the Josselyns plan to sell some books, cards, and other horticulturally-related gift items.
13. The Josselyns have made some renovations to their garage as part of the conversion to a retail florist shop. They have framed in the left garage door bay and installed a plate glass window. They also have installed a utility sink, a large florist's cooler, and a counter. They plan to install interior shelves, lighting and storage.
14. With the possible exception of an exterior business sign and shielded lighting, thk Josselyns do not intend to make any exterior changes to the converted garage or the area between the garage and Route 100. Customer parking will be located between the front of the garage and Route 100.
15. The Josselyns' retail shop will be served by municipal water and on-site sewage. There will be no public restroom on premises.
16. **At this time, the Josselyns** do not intend to employ persons to work at their shop.
17. The **shop** will be open six to seven day per week, from 9:00 a.m. to 5:00 p.m.

IV. CONCLUSIONS OF LAW

Act **250** requires that a Land Use Permit be obtained prior to the commencement of construction on a development or prior to commencement of development. 10 V.S.A. § 6081(a) (1993). "Development" is defined for purposes of Act 250 jurisdiction, in relevant part, as follows:

"Development" means the 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 zoning and subdivision bylaws. ... The word "development" shall not include construction for farming, logging or forestry purposes below the elevation of 2500 feet.

10 V.S.A. § 6001(3) (Supp. 1995) (Emphasis added).

EBR 2(A)(2) further clarifies the term “development,” but specifically excludes from Act 250 jurisdiction “construction for farming, logging or forestry purposes below the elevation of 2500 feet.

The Petitioners have begun to renovate their garage in furtherance of their purpose to establish a retail florist shop. They have constructed improvements on more than one acre of land in a municipality that does not have both permanent zoning and subdivision regulations. The Project is located on property below the elevation of 2500 feet. However, the question that the Board must decide is whether that construction is for a commercial purpose and therefore “development” requiring an Act 250 permit, or whether the construction is for “farming” purposes and therefore exempt from Act 250 jurisdiction.

The term “farming” has several different meanings for purposes of determining Act 250 jurisdiction. It is defined at 10 V.S.A. § 6001(22)(1993), in relevant part, as:

- (A) the cultivation or other use of land for growing food, fiber, Christmas trees, maple sap, or horticultural and orchard crops; or . . .
- (C) the operation of greenhouses; or . . .
- (E) the on-site storage, preparation and sale of agricultural products principally produced on a farm.

In construing Act 250, the Board’s goal is to effect the intent of the Legislature. The Board presumes that the Legislature intended the plain meaning of the statutory language. If the meaning of the statute is plain on its face, the Board enforces the statute according to its express terms. If the statutory language is unclear or ambiguous, the Board may consider the legislative history of Act 250 in order to ascertain the intent of the legislature. Re: Vermont Egg Farms, Inc., Declaratory Ruling #3 17, Findings of Fact, Conclusions of Law, and Order at 7-8 (June 14, 1996).

In this case, the Board concludes that the Act 250 definition of “farming” is plain on its face. “Farming” encompasses, among other things, the cultivation or other use of the land for the growing Christmas trees and horticultural crops. 10 V.S.A. §6001(22)(A). It also encompasses “the operation of greenhouses” and “the on-site storage, preparation and sale of agricultural products principally produced on a farm.” 10 V.S.A. § 6001(22)(C) and (E). The Josselyns have commenced construction of improvements with the aim of growing, preparing and selling at their Ludlow property various horticultural products principally produced at their premises. It is apparent that the growing of Christmas trees and horticultural crops on the premises constitutes “farming” and so does the subsequent preparation and sale of these products on-site. While it

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may be debatable whether the growing of seedlings under lights in the converted garage will constitute "the operation of a greenhouse," the growing and processing of an agricultural product may occur within the confines of a building and still constitute "farming" as that term is used in Act 250. See Re: Vermont Egg Farms, Inc., Declaratory Ruling #3 17, Findings of Fact, Conclusions of Law, and Order (June 14, 1996) (a project consisting of five laying barns, two pullet barns, an egg washing and grading station, a feed mill and other facilities constitutes construction for "farming" exempt under Act 250).

Although the term "agricultural products" as used in 10 V.S.A. §6001(22)(E) is not expressly defined in Act 250, one can safely assume that it includes the items listed in 10 V.S.A. § 600 1(22)(A), including Christmas trees and horticultural crops. "Horticulture" is defined as "[t]he science or art of cultivating fruits, vegetables, flowers and plants." Webster's II New College Dictionary (1995). As such, it is a subdivision of agriculture. "Horticultural crops," therefore, may include fruits, vegetables, flowers and other plants or plant parts. Therefore, the on-site storage, preparation and sale of various flowering plants, herbs, ornamental trees, and the flowers or foliage thereof, if primarily produced on the Josselyn premises, constitutes "farming" for the purpose of determining Act 250 jurisdiction.

The Petitioners propose to grow their plant material on-premises, either under lights in the converted garage or in the tree nursery or garden. Although they intend to sell some books, cut flowers and gift items not produced at their Ludlow property, these items will be ancillary to the sale of horticultural products produced on premises. Most of the items for sale -- potted flowering plants, herbs, house plants, Christmas trees, wreaths and flower arrangements -- will be grown from seed or otherwise propagated and prepared on-site for retail sale. Because the renovation and conversion of the garage by the Petitioners is intended to facilitate the retail sale of horticultural products, and these horticultural products will be primarily produced on the Josselyn premises, this Project constitutes "construction for farming" excepted from the definition of "development" contained in 10 V.S.A. § 6001(3) (1993) and EBR 2(A)(2). Therefore, the Project does not require an Act 250 permit. 10 V.S.A. § 6081(a) (1993).

The Board cautions the Petitioners that an Act 250 permit will be required if the facts should change in the future such that the retail items for sale in their shop are not principally agricultural products produced on premises. The "farming" exemption, like all exemptions, is to be read narrowly and only found to apply when the facts clearly support the exemption's application.

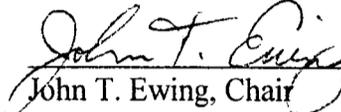
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V. ORDER

An Act 250 permit is not required for the Petitioners' Project in the Village of Ludlow.

Dated at Montpelier, Vermont, this 28th day of February, 1997.

VERMONT ENVIRONMENTAL BOARD



John T. Ewing, Chair