

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

Re: Nelson Lyford

Declaratory Ruling

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to whether a two lot subdivision requires a permit pursuant to 10 V.S.A. Chapter 151 ("Act 250"). As explained below, the Board concludes that an Act 250 permit was and is required.

I. PROCEDURAL SUMMARY

On December 23, 1996, the District #5 Environmental Commission Coordinator issued a project review sheet jurisdictional opinion which concludes that the creation of a two lot subdivision off Donahue Road in the Town of Barre ("Project") requires a permit pursuant to 10 V.S.A. Chapter 151 ("Act 250").

On January 22, 1997, Nelson Lyford ("Petitioner") appealed from the project review sheet jurisdictional opinion and filed a petition for a declaratory ruling ("Petition"). The Petitioner contends that the Project does not require an Act 250 permit.

On February 12, 1997, a Notice of Prehearing Conference and Petition for Declaratory Ruling was issued to the parties and interested persons.

On February 20, 1997, the Petitioner filed a request that the prehearing conference scheduled for March 3, 1997 be postponed.

On February 21, 1997, a memorandum to the parties was issued which postponed the prehearing conference until March 17, 1997.

On February 27, 1997, the Petitioner filed a second postponement request.

On March 6, 1997, a memorandum to the parties was issued which denied the Petitioner's second postponement request.

On March 17, 1997, Environmental Board Chair John T. Ewing convened a prehearing conference and, on April 2, 1997, issued a Prehearing Conference Report and Order ("Prehearing Order"). There were no objections to the Prehearing Order.

On April 10, 1997, the Petitioner filed a Motion to Dismiss this Petition. On April 11, 1997, the Chair issued a Proposed Dismissal Order.

On April 28, 1997, the Petitioner filed a request that the deadline for objections to

the Chair's Proposed Dismissal Order be extended to allow the Petitioner an opportunity to reconsider his Motion to Dismiss. On May 8, 1997, the Chair issued an Order which granted the Petitioner's request and extended the deadline until May 19, 1997.

On May 19, 1997, the Petitioner filed a request that this Petition proceed to adjudication by the Environmental Board.

On June 10, 1997, Board Chair Ewing issued a Notice of Hearing and Scheduling Order.

On June 12, 1997, Norman and Margaret Fournier, East Barre Fire District No. 1, Thomas F. and Sally T. Koch, and Elmer and Evelyn Koch, who are all parties in this Petition and who shall be collectively referred to herein as the "Appellees", filed a request that the scheduled hearing day be postponed due to a conflict.\*

On July 24, 1997, Chair Ewing issued a memorandum to the parties changing the dates for the submission of prefiled testimony and exhibits, and date of hearing.

The parties filed prefiled direct testimony and exhibits, and lists of rebuttal witnesses and exhibits, during August and September, 1997.

On September 23, 1997, the Petitioner filed a Motion to Prohibit Expansion of Issues, Motion in Limine and Supporting Memorandum.

On October 1, 1997, a hearing panel of the Environmental Board convened a hearing in this Petition with the following persons participating:

Nelson Lyford by Richard H. Saudek, Esq. and Jennifer L. Myka, Esq.  
Norman and Margaret Fournier, East Barre Fire District No. 1,  
Thomas F. and Sally T. Koch, and Elmer and Evelyn  
Koch by Thomas F. Koch, Esq.

The Environmental Board hearing panel recessed this Petition at the conclusion of

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\*The Prehearing Order granted party status to Norman and Margaret Fournier pursuant to EBR 14(A)(5); the East Barre Fire District No. 1 pursuant to EBR 14(A)(5); and Thomas F. and Sally T. Koch, and Elmer and Evelyn Koch pursuant to EBR 14(B)(1).

the hearing pending post-hearing filings by the parties, deliberation, and issuance of a final decision in this Petition.

On October 20, 1997, the Petitioner filed a Memorandum of Law and Facts.

On October 27, 1997, the Appellees filed a Memorandum in Response to the Petitioner's Memorandum of Law and Facts.

On November 25, 1997, the Environmental Board hearing panel issued a proposed decision to the parties. Pursuant to 10 V.S.A. § 6027(g), parties were allowed to request oral argument before the Environmental Board. In addition, parties were allowed to file written objections to the proposed decision.

On December 11, 1997, the Petitioner filed a request for oral argument, Memorandum of Petitioner, Request to Include Affidavit in Record, and Affidavit.

On December 17, 1997, the Environmental Board convened oral argument with the Petitioner and Appellees participating, 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 Denartment, 143 Vt. 437,445 (1983).

## II. OFFICIAL NOTICE

Under 3 V.S.A. § 810(4) of the Administrative Procedure Act ("APA"), notice may be taken of judicially cognizable facts in contested cases. This declaratory ruling is a contested cases under the APA. See 10 V.S.A. § 6007(c) and 3 V.S.A. § 801(b)(2). Under § 810(1) of the APA, "[t]he rules of evidence as applied in civil cases ... shall be followed" in contested cases. Under the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is ... (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); See In re Handy, 144 Vt. 610,613 (1984). The Board may take official notice of a judicially cognizable fact whether requested or not, and may do so at any stage of the proceeding. See V.R.E. 201(c) and (f). Under 3 V.S.A. § 809(g), the Board may make findings of fact based on matters officially noticed. Accordingly, official notice is hereby taken of the following:

1. State of Vermont Agency of Natural Resources Subdivision Permit EC-5-

2384 issued to Nelson and Bonnie Lyford on April 22, 1993.

2. Survey and Site Plan, Nelson and Bonnie Lyford Subdivision of Parker Estates - Bank Street, Barre Vermont, filed with the City of Barre Clerk's Office on August 16, 1994, and recorded in Map Book 4 at Page 4 1, of the Land Records of the City of Barre.
3. Warranty deed of Nelson H. Lyford and Bonnie J. Lyford to Rodney Campbell and Bonnie Campbell, dated October 27, 1994, and recorded in Book 158, Page 15, of the Land Records of the City of Barre.
4. Warranty deed of Nelson H. Lyford and Bonnie J. Lyford to Jason C. Parry and Crystal L. Parry, dated February 9, 1996, and recorded in Book 162, Page 25, of the Land Records of the City of Barre.
5. Warranty deed of Nelson H. Lyford and Bonnie J. Lyford to Rickey A. Burns and Lisa M. Burns, dated May 24, 1996, and recorded in Book 163, Page 36, of the Land Records of the City of Barre.
6. City of Barre, Vermont Subdivision Regulations, effective October 28, 1986.<sup>2</sup>

The Petitioner did not object to the taking of official notice in response to the November 25, 1997 proposed decision.

### III. ISSUE

As stated in the Prehearing Order, the issues are:

1. Whether, pursuant to 10 V.S.A. §§ 6001(19) and 6081 and EBR 2(B), the Project is a subdivision which requires an Act 250 permit.
2. Whether, if the Project is a subdivision, the Board, or any party to this Petition, is estopped from asserting jurisdiction over the Project because of a project

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<sup>2</sup>The Board takes official notice of the City of Barre Subdivision Regulations solely for the purpose of establishing on what date the City of Barre adopted Subdivision Regulations.

review sheet issued by the Assistant District #5 Coordinator regarding the Petitioner's Williamstown subdivision.

In addressing issue #2, the parties were advised in the Prehearing Order that they may present evidence or legal argument as to whether the Williamstown project review sheet constitutes a binding jurisdictional determination.

#### IV. FINDINGS OF FACT

1. Nelson Lyford is the Petitioner. The Petitioner's spouse is Bonnie J. Lyford. The Petitioner and his spouse have subdivided parcels of land in Williamstown, Moretown, the Town of Barre, and the City of Barre.
2. Williamstown, Moretown, Barre Town, and Barre City are all located within the boundary of the District #5 Environmental Commission.
3. The Petitioner and his spouse acquired a parcel of land in Moretown containing approximately 3.7 acres by warranty deed of John P. O'Neill dated June 26, 1989, which is recorded in Book 45 at Page 708 of the Land Records of the Town of Moretown, Vermont ("Moretown Parcel").
4. The Petitioner and his spouse subdivided the Moretown Parcel into two lots as authorized by State of Vermont Agency of Natural Resources Subdivision Permit EC-5-2010 issued on May 14, 1990 ("1990 Moretown Parcel Subdivision"). There is no evidence of the Petitioner having partitioned a tract or tracts of land prior to May 14, 1990.
5. The Petitioner and his spouse subdivided lot #2 of the 1990 Moretown Parcel Subdivision into two lots as authorized by State of Vermont Agency of Natural Resources Subdivision Permit EC-5-20 1 O-1 issued on March 11, 1993 ("1993 Moretown Parcel Subdivision").
6. The 1993 Moretown Parcel Subdivision and the Project were created within a continuous period of five years of each other.
7. The Petitioner and his spouse acquired a parcel of land in Williamstown by warranty deed of George F. Schaub and Dorothy L. Schaub dated September 23, 1992 which is recorded in Book 76 at Page 243 of the Land Records of the Town of Williamstown, Vermont ("Williamstown Parcel #1").

8. The Petitioner and his spouse subdivided the Williamstown Parcel #1 into five lots as authorized by State of Vermont Agency of Natural Resources Subdivision Permit EC-52384 issued on April 22, 1993.
9. The five lot Williamstown Parcel #1 subdivision and the Project were created within a continuous period of five years of each other.
10. The Petitioner and his spouse acquired land in the City of Barre from the Northfield Savings Bank by warranty deed dated June 30, 1993 and recorded in Book 152 at Page 327 of the Land Records of the City of Barre ("NSB Deed"). The NSB Deed conveyed two contiguous parcels to the Petitioner and his spouse (individually, "Barre City Parcel #1" and "Barre City Parcel #2"; collectively, the "Barre City Parcels").
11. Barre City Parcel #1 is the same parcel of land described in a warranty deed dated October 28, 1916 and recorded in Book 22 at Page 548 of the Land Records of the City of Barre.
12. Barre City Parcel #2 is the same parcel of land described in a warranty deed dated October 11, 1902 and recorded in Book 7 at Page 506 of the Land Records of the City of Barre.
13. Prior to his purchase of the Barre City Parcels, the Petitioner, through legal counsel, contacted the District Coordinator with respect to the Barre City Parcels. In a letter dated January 25, 1993, Petitioner's then counsel informed the District Coordinator as to what the Petitioner proposed to do with the Barre City Parcels:

My client, Nelson Lyford, is considering the purchase of a parcel of land within the City of Barre which contains 2.5 acres. The land has all been subdivided into small lots shown as the Parker Land Plan of October 12, 13, & 14, 1916. No lot lines will be changed, however the proposal will show combining 2 lots together to make single lots that will comply with the City subdivision requirements.

14. In a letter dated January 28, 1993, the District Coordinator responded to the January 25 letter from Petitioner's then counsel. He stated, in part:

As I understand it, Mr. Lyford plans to purchase 2.5 acres of land off Warren Street. While I am not completely clear how many residential building lots he then plans to sell and/or place "double-

wides” on, I think he indicated 9 such lots would result. Please confirm this fact. I note that Mr. Lyford told me he has created one other lot within the last 5 years beyond the 6 lots cited in your letter, giving him a current count of 7 lots within 5 years. Please also confirm this fact.

Both you and he provided me with photocopies of what appear to be portions of plot plans from the City’s land records. Mr. Lyford provided one from 1893 and you provided one from 19 16. Please confirm that Mr. Lyford’s position is that the plans show 11 separate parcels on the 2.5 acres. Who created these plans? Are they City maps? In the deed to the 2.5 acres held by the current owner, are there references to the tract being divided into 11 lots or is it simply described as one 2.5 acre property? How was the property described in conveyances to prior owners?

15. In a letter dated February 1, 1993, Petitioner’s then counsel responded to the District Coordinator’s January 28 letter, in part, as follows:

The following information should provide you with answers to the questions you raised in your letter of January 28th.

1. The 1893 plan that Nelson gave you is the original plan of “Parker Square” surveyed by Joel Foster and it is recorded in the City Clerk’s office in Book 1 of the old Village Records on Page 235. It is on microfilm and also on file in the City Engineer’s office. The plan shows 11 separate parcels on the 2.5 acres.
2. No new lots will be created. Existing lot lines will be adhered to with the intent being to combine lots to end up with 5 residential house lots.
3. The definition in Subchapter 10, 5-902(d) “Existing subdivision” seems to fit this situation under both criteria. The plan has been on file many years prior to September 18, 1969, and based on this plan, many lots depicted thereon have been conveyed prior to September 18, 1969. The deeds that I have checked all refer to the Parker Plan of Lots or the Parker Square Plan. In this case, the deed to Donald and Cheryl Bliss refers to the “Plan of

Lots entitled 'Parker Square' as surveyed by Joel Foster, filed in Book 1, Page 235 of the Old Village Records." The Northfield Savings Bank foreclosed on the property and Nelson will be buying it from the bank with a reference in his deed to the above mentioned plan of lots.

16. On February 3, 1993, the District Coordinator issued a project review sheet advisory opinion ("Barre City PRS") to the Petitioner with respect to the Barre City Parcels which stated, in part, as follows:

On 2/3/93 I reviewed information concerning a project on a tract/tracts of land of 2.5 acres, proposed by Nelson Lyford. The project will be on Lands owned by Nelson Lyford in Barre City, Vermont, and is generally described as: reconfigure 11 pre-existing lots off Warren Street/Maple Avenue into 5 lots. (See January-February 1993 correspondence between Nelson Lyford, Ellen Andrews, Esq. and District Coordinator[.])

17. The Barre City PRS concluded that no Act 250 permit was required since there would be no substantial change to a pre-existing subdivision under 10 V.S.A. § 6081(b). The District Coordinator mailed the Barre City PRS solely to the Petitioner and the Petitioner's then counsel with a cover memorandum dated February 3, 1993, which stated:

Enclosed please find a Project Review Sheet in which I determine that no Act 250 review will be required for the proposed reconfiguration of lots. Please call with any questions.

cc: Ellen Andrews, Esq.

18. In a letter dated February 8, 1993, which the Petitioner received, Petitioner's then counsel stated to the Petitioner, in part:

In examining the title on the land that you are purchasing on Bank Street I note that the property is actually two parcels once owned by the City of Barre and conveyed to it and to its successors in title, Pike Industries, Inc. and Donald and Cheryl Bliss, as follows:

PARCEL NO. 1: Being all and the same land and premises conveyed to the City of Barre, Vt. by warranty deed of Earl E.

Parker dated October 28, 19 16, and recorded in Vol. 22, Page 548 of the City of Barre Land Records.

(This parcel includes Lots Numbered 52, 53, 54, 55, and 56 together with a right of way 12 feet in width northerly of and adjoining the northerly line of land then owned by Virginia Restelli on Maple Avenue[.])

PARCEL NO. 2: Being a part of all and the same land and premises conveyed to the City of Barre, Vt. by warranty deed of W.G. Parker dated October 11, 1902, and recorded in Vol. 7, Page 506 of the City of Barre Land Records.

(This parcel includes Lots Numbered 57, 58, 59, 60, 61 and the unnumbered portion that extends the parcel out to Plain Street[.])

See attached Deed Description for a further and more particular description of the property being conveyed. Plans of Lots as referred to in the deeds are on file in the City of Barre Land Records and in the City Engineer's Office.

If you need further information to aid in your permit process, please let me know. I will have a full Attorney's Report and Opinion on Title ready for your Closing.

19. Subsequent to February 8, 1993, the Petitioner did not contact the District Coordinator to disclose that he had been advised that the purchase of the Barre City Parcels was the purchase of two separate parcels of land.
20. The NSB Deed described the property being conveyed to the Petitioner, in part, as follows:

The premises are also all and the same land and premises conveyed to Donald J. Bliss and Cheryl D. Bliss by deed of Pike Industries, Inc. dated July 1, 1988 and of record in Book 137, Page 70 of the Barre City Land Records wherein the subject premises are more particular described as follows:

Parcel No. 1: Being all and the same land and premises conveyed to the City of Barre, Vt. by warranty deed of Earl E.

Parker dated October 28, 1916, and recorded in Vol. 22, Page 548 of the City of Barre Land Records, said land and premises being further described therein as follows:

“Commencing on the westerly side of Bank Street at the northeasterly corner of land conveyed to the City of Barre by W. G. Parker; thence northeasterly along the westerly line of Bank Street 19 ½ rods; thence turning a right angle and running in a westerly or northwesterly direction in a straight line until said line intersects the easterly line of lots of W.G. Parker abutting on Maple Avenue as plotted on a plan now on file in the City Clerk’s Office of the City of Barre; thence turning an angle and running in a southerly or southwesterly direction along the easterly line of the lots above referred to, to the northwesterly corner of land now owned by the City of Barre, said last mentioned boundary line being parallel with the easterly line of Maple Avenue, and 8 rods distant therefrom; thence turning an angle and running easterly or southeasterly along the northerly line of land of the City of Barre to the point of beginning, together with the right to use in common with myself, and other, a right-of-way 12 feet in width northerly of an adjoining the northerline of land of Virginia Restelli.”

Parcel No. 2: Being a part of all and the same land and premises conveyed to the City of Barre, Vt. by warranty deed of W. G. Parker dated October 11, 1902, and recorded in Vol. 7, Page 506 of the City of Barre Land Records, said land and premises being further described therein as follows:

“Beginning at a point on the northwesterly side of Bank Street at the southerly corner of Lot No. 56 as shown by the above described plan (Plan of Lots entitled ‘Parker Square’ as surveyed by Joel Foster, filed in Book 1, Page 235 of the Old Village Records); thence northwesterly in a direct line at right angles with said Bank Street and in line of Lot No. 56 and a continuation of said line to a point eight (8) rods northeasterly of Maple Avenue, measured at right angles from said Avenue; thence southwesterly to a point opposite the westerly corner of Lot No. 61; thence **southerly in the line of land of H.M. Houston to the corner of Warren Street**; thence southeasterly in the line of Warren Street to a point where if the northwesterly line of Bank Street was

extended, the same would intersect Warren Street; thence  
northeasterly in the line of Bank Street to the point of beginning.  
Meaning to convey the land within the above bounds.”

21. The NSB Deed does not describe the Barre City Parcels as eleven parcels or lots. The NSB Deed conveyed two parcels to the Petitioner and his spouse.
22. On August 16, 1994, the Petitioner filed a subdivision plat of the Barre City Parcels entitled “Survey and Site Plan, Nelson and Bonnie Lyford Subdivision of Parker Estates - Bank Street, Barre Vermont,” with the City of Barre Clerk’s Office, which is recorded in Map Book 4 at Page 41, of the Land Records of the City of Barre (“Barre City Subdivision”).
23. The Barre City Subdivision is comprised of three lots, numbered lot 1, lot 2, and lot 3. The Barre City Subdivision has been approved by the City of Barre Planning Commission as a minor subdivision. The City of Barre Subdivision Regulations went into effect on October 28, 1986. The Petitioner’s predecessor in title to the Barre City Parcels became the owner of the Barre City Parcels after the City of Barre adopted Subdivision Regulations.
24. The boundary lines for lot 1, lot 2, and lot 3 of the Barre City Subdivision correspond approximately to the combination of, respectively, 5, 3, and 3 of the lots shown on the 1893 “Parker Square” plan and the “Parker Land Plan of October 12, 13, & 14, 19 16.” These two plans are inexact and lack the detail later incorporated on Petitioner’s subdivision plat and in the legal descriptions for the 3 lots in the Barre City Subdivision. The eleven Parker Square lots did not comply with the City of Barre Subdivision Regulations and the Petitioner needed to combine sufficient lots to comply with the Barre City Subdivision Regulations.
25. On October 27, 1994, the Petitioner and his spouse conveyed lot 3 of the Barre City Subdivision by warranty deed to Rodney Campbell and Bonnie Campbell, dated October 27, 1994, and recorded in Book 158, Page 15, of the Land Records of the City of Barre.
26. On February 9, 1996, the Petitioner and his spouse conveyed lot 1 of the Barre City Subdivision by warranty deed to Jason C. Parry and Crystal L. Parry, dated February 9, 1996, and recorded in Book 162, Page 25, of the Land Records of the City of Barre.
27. On May 24, 1996, the Petitioner and his spouse conveyed lot 2 of the Barre City

Subdivision by warranty deed to Rickey A. Burns and Lisa M. Burns, dated May 24, 1996, and recorded in Book 163, Page 36, of the Land Records of the City of Barre.

28. The boundary lines for lot 1, lot 2, and lot 3 of the Barre City Subdivision do not correspond to the boundary lines of Barre City Parcel #1 and Barre City Parcel #2. The north line of Barre City Parcel #1 lies somewhere in the middle of lot 2 of the Barre City Subdivision. The boundary lines for lot 1, lot 2, and lot 3 are depicted on the plat entitled "Survey and Site Plan, Nelson and Bonnie Lyford Subdivision of Parker Estates - Bank Street, Barre Vermont," which was filed with the City of Barre Clerk's Office on August 16, 1994, and recorded in Map Book 4 at Page 41, of the Land Records of the City of Barre.
29. The three warranty deeds by which the Petitioner and his spouse conveyed the Barre City Subdivision lots each describes the conveyed lot as being a part of the land and premises conveyed to the Petitioner and his spouse by the NSB Deed, and as being a lot--either 1, 2, or 3--on the plat which is recorded in Map Book 4, Page 4 1, of the Land Records of the City of Barre.
30. The Petitioner and his spouse acquired a parcel of land and an existing home in Williamstown by warranty deed of Helen T. Chase dated July 3 1, 1987, which is recorded in Book 6.5 at Page 502 of the Land Records of the Town of Williamstown, Vermont ("Williamstown Parcel #2")
31. The Petitioner and his spouse subdivided the Williamstown Parcel #2 into two lots as authorized by State of Vermont Agency of Natural Resources Subdivision Permit EC-5-2642 issued on February 2, 1995.
32. The Petitioner obtained a project review sheet from the District #5 Environmental Commission Assistant Coordinator regarding the creation of the two lots on the Williamstown Parcel #2 ("Williamstown Parcel #2 PRS").
33. The Assistant Coordinator issued the Williamstown Parcel #2 PRS on January 19, 1995 in which she concluded that no Act 250 permit was required with respect to the creation of the two lots on the Williamstown Parcel #2 because "one additional lot created--fewer than ten total in last 5 years."
34. The Williamstown Parcel #2 PRS refers to the seven lots authorized by EC-5-20 10, EC-5-20 10- 1, and EC-5-2384. The issuance of the Williamstown Parcel #2

PRS preceded the issuance of the State of Vermont Agency of Natural Resources Subdivision Permit EC-5-2642.

35. The Assistant Coordinator mailed a copy of the Williamstown Parcel #2 PRS solely to the Williamstown Planning Commission.
36. The Petitioner and his spouse acquired a 34 acre parcel of land in Barre Town by warranty deed of First Vermont Bank and Trust company dated December 17, 1993, which is recorded in Book 136 at Page 48 1 of the Land Records of the Town of Barre, Vermont ("Barre Town Parcel").
37. On December 13, 1995, the Town of Barre Planning Commission approved the Petitioner's subdivision of the Barre Town Parcel into two lots. This two lot subdivision is the Project. The Project was reviewed in the December 23, 1996 project review sheet jurisdictional opinion issued by the District Coordinator ("Barre Town PRS"). The two lots created by the Project are, respectively, 12.5 and 2 1.6 acres in size.
38. In the Barre Town PRS, the District Coordinator concluded that the Project required an Act 250 permit because "[t]hese 2 lots constitute 10 or more cumulative lots within 5 year period per 10 V.S.A. 600 1(19) and Maxham Declaratory Ruling[.]"
39. The Barre Town PRS identifies as prior permits State of Vermont Agency of Natural Resources Subdivision Permits EC-5-2384, EC-5-2642, EC-5-2010 and Amendments. The Barre Town PRS does not state how many lots were created by these permits, notwithstanding the District Coordinator's conclusion that the Project constituted 10 or more cumulative lots within a 5 year period.
40. The District Coordinator included a letter with the Barre Town PRS. The District Coordinator sent a copy of the Barre Town PRS and the letter to the Petitioner's then counsel. The letter stated, in part, that:

In arriving at the conclusions stated on the P.R. sheet, I relied upon and incorporated all facts gleaned from the correspondence between this office, interested party Thomas F. Koch, Ellen R. Andrews, Esq. and yourself during the period from April 15, 1996 to the present as well as the files available in the District Office for prior Lyford projects. These materials are in a file captioned

“Lyford 2 Lot Subdivision, Town of Barre” in the District  
[O]ffice Barre Town file.

41. In a letter dated April 15, 1996, and filed with the District Commission on **April** 16, 1996, Thomas F. Koch, Esq., one of the Appellees herein, informed the Assistant Coordinator, in part, that:

I understand that there may be some question about the subdivision in Barre City. Ed Stanak issued a project review in 1993 indicating that the intended project would not trigger Act 250. I believe that your office was informed at that time that Mr. and Mrs. Lyford would be purchasing eleven existing lots and then combining them so that they would end up with five lots. In fact, the City approved only three lots in the end, but more significantly, I do not believe that the Lyfords purchased eleven lots, but rather two lots, even if they did contain eleven lots according to an old map on file in the City Clerk’s office. A copy of the deed which Mr. and Mrs. Lyford received from the Northfield Savings Bank, clearly showing the conveyance in gross of two parcels of land, is enclosed. Accordingly, I believe that Ed Stanak’s ruling in 1993 was based on incomplete information, and, for purposes of the present jurisdictional question concerning the lots in Barre town, should be reconsidered.

42. In response to Appellee Koch’s letter dated April 15, 1996, the District Coordinator sent a memorandum to the Petitioner dated May 2, 1996. The memorandum states, in part:

As you will note from the enclosed letter dated April 15, 1996 from Thomas F. Koch, this office has been asked to determine whether this subdivision of the 30 acre tract in the Town of Barre requires a land use permit under Act 250. As you know, a “subdivision” under Act 250 means the creation of 10 or more lots, of any sizes, within a radius of 5 miles of any point on any lot, or within the jurisdictional area of the same District Commission, within any continuous period of 5 years. [ 10 VSA 600 1(19)]. Before rendering a response to Mr. Koch, I am interested in any **written facts and positions you may wish to provide.**

43. In issuing the Barre Town PRS, the District Coordinator relied, in part, on Appellee Koch's letter dated April 15, 1996, and received by the District Commission office on April 16, 1996. The Petitioner created the three Barre City Subdivision lots prior to his creation of the two lot Williamstown Parcel #2 subdivision.

V. CONCLUSIONS OF LAW

A. Burden of Proof

The burden of proof to show that a project is exempt from Act 250 is on the person claiming the exemption, in this case the Petitioner. 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).

B. The Project

Under 10 V.S.A. § 608 l(a), no person shall sell or offer for sale any interest in any subdivision located in this state, or commence construction on a subdivision or development, or **commence** development without a permit.

The requirement to obtain a permit under 10 V.S.A. § 608 l(a) does not apply to "a subdivision exempt under the regulations of the department of health in effect on January 2 1, 1970 or any subdivision which has a permit issued prior to June 1, 1970 under the board of health regulations, or has pending a bona fide application for a permit under the regulations of the board of health on June 1, 1970, with respect to plats on file as of June 1, 1970 provided such permit is granted prior to August 1, 1970."

Under 10 V.S.A. § 6001(19), a subdivision is defined, in part, as a "tract or tracts of land, owned or controlled by a person, which the person has 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, or within the jurisdictional area of the same district commission, within any continuous period of five years. In determining the number of lots, a lot shall be counted if any portion is within five miles or within the jurisdictional area of the same district commission."

Similarly, under EBR 2(B), "Subdivision" means "a person's partitioning or

dividing a tract or tracts of land into ten or more lots including all other lots which that person has created through subdivision within an environmental district, or within a five mile radius of any point of subdivided land if any lots have been created in any adjoining district, within any continuous period of five years after April 4, 1970.”

A “lot” is defined as “any undivided interest in land, whether freehold or leasehold, including but not limited to interests created by trusts, partnerships, corporations, cotenancies and contracts.” 10 V.S.A. § 600 1(11), EBR 2(J).

There is no definition for the term “parcel” in Act 250 or the Board’s rules. However, the term is defined in Black’s Law Dictionary as follows:

A part or portion of land. A part of an estate. “Parcel” as used with reference to land generally means a contiguous quantity of land in the possession of an owner. A contiguous quantity of land in possession of, owned by, or recorded as property of the same claimant person or company. Term may be synonymous with “lot.” (Citations omitted.)

Black’s Law Dictionary 1002 (5th ed. 1979).<sup>3</sup>

In Re: Maida Z. Maxham, Declaratory Ruling #196, Findings of Fact, Conclusions of Law, and Order at 3 (Jan 14, 1988), the Board stated that “[a] ‘piece’ or ‘parcel’ of land connotes a contiguous area that can be identified as a separate land mass.” Thus, unless the context demands otherwise, the word “parcel” is synonymous with the word “lot” as that word is defined in 10 V.S.A. § 6001(11) and EBR 2(J).

Therefore, in determining whether the Project is a subdivision, the Board must determine (a) how many lots the Petitioner has created in addition to the Project; and (b) whether these lots were created within a continuous period of five years in relation to the Project. The parties were specifically informed in the Prehearing Order that “[t]his may include lots in Williamstown, the Town of Barre, and the City of Barre.”

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<sup>3</sup>While not applicable, “lot” is defined, in part, in Black’s as “one of several *parcels* into which property is divided. Any portion, piece, division or *parcel* of land. . . A lot is commonly one of several other contiguous *parcels* of land making up a block. . . See also *parcel*.” Black’s Law Dictionary 853 (5th ed. 1979). (Emphasis added.)

i. 1990 Moretown Parcel Subdivision

The 1990 Moretown Parcel Subdivision was in existence on May 14, 1990. The Project was in existence on December 13, 1995. More than five years separates the 1990 Moretown Parcel Subdivision and the Project. Therefore, the two were not created within a continuous period of five years of each other. Accordingly, the 1990 Moretown Parcel Subdivision does not count towards whether the Project requires an Act 250 permit.

ii. 1993 Moretown Parcel Subdivision

The Petitioner created the 1993 Moretown Parcel Subdivision by subdividing lot #2 of the 1990 Moretown Parcel Subdivision into two lots. The 1993 Moretown Parcel Subdivision was in existence no later than March 11, 1993. The Project was in existence no later than December 13, 1995. The 1993 Moretown Parcel Subdivision and the Project were created within a continuous period of five years of each other. Accordingly, the creation of the 1993 Moretown Parcel Subdivision counts as the first and second lots towards the ten lot jurisdictional threshold in relation to the Project.

iii. Williamstown Parcel #1

The Petitioner acquired the Williamstown Parcel #1 as a parcel of land and subdivided it into five lots. The five lots were in existence no later than April 22, 1993. The Project was in existence no later than December 13, 1995. The five lots created by the subdivision of the Williamstown Parcel #1 and the Project were created within a continuous period of five years of each other. Accordingly, the subdivision of the Williamstown Parcel #1 counts as lots three through seven towards the ten lot jurisdictional threshold in relation to the Project.

iv. Barre City Subdivision

The Petitioner and his spouse acquired the Barre City Parcels as two parcels of land, that is, Barre City Parcel #1 and Barre City Parcel #2, and subdivided the Barre City Parcels into three lots, that is, the Barre City Subdivision. The three lots were in existence no later than August 16, 1994. See EBR 2(B)(2).<sup>4</sup> The Project was in existence no later than December 13, 1995. The three lots created by the Barre City Subdivision and the Project were created within a continuous period of five years of each other.

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<sup>4</sup>EBR 2(B)(2) states, in part, that a subdivision “shall be deemed to have been created with the first of any of the following events ... the filing of a plot plan on town records.”

Accordingly, the Barre City Subdivision counts as lots eight through ten towards the ten lot jurisdictional threshold in relation to the Project.

v. Williamstown Parcel #2

The Petitioner and his spouse acquired the Williamstown Parcel #2 as a parcel of land and subdivided it into two lots. The two lots were in existence no later than February 2, 1995. The Project was in existence no later than December 13, 1995. The two lots created by the subdivision of the Williamstown Parcel #2 and the Project were created within a continuous period of five years of each other. Accordingly, the subdivision of the Williamstown Parcel #2 counts as lots eleven and twelve towards the ten lot jurisdictional threshold in relation to the Project.

vi. Barre Town Parcel

The Petitioner and his spouse acquired the Barre Town Parcel as a parcel of land and subdivided it into two lots. The two lots were in existence no later than December 13, 1995. Accordingly, these two lots constitute the thirteenth and fourteenth lot for the five year period commencing on March 11, 1993 and ending on March 11, 1998.

Accordingly, based on the findings of fact, the Board concludes that, pursuant to 10 V.S.A. §§ 6001(19) and 6081 and EBR 2(B), the Project is a subdivision which requires an Act 250 permit.

C. Limitation of Board's Order to the Project

The Board cannot as part of this declaratory ruling proceeding order that an Act 250 permit be obtained for the Barre City Subdivision or the Williamstown Parcel #2 subdivision. 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. Although it may come to the Board as an appeal of a jurisdictional opinion or project review sheet, the issue in a declaratory ruling is not whether a jurisdictional opinion or project review sheet, or any part thereof, is correct. Thus, facts stated or conclusions drawn are not considered by the Board. Provided a petition is timely tiled, the only issue is the applicability of any statutory provision or any rule or order of the Board over the project described in the jurisdictional opinion or project review sheet. The Project at issue is the Petitioner's creation of two lots on the Barre Town Parcel. Thus, in this Petition the Board can only order that the Project requires a permit, and that the Barre Town Parcel is subject to Act 250 jurisdiction.

While the Board is not ordering as part of this declaratory ruling that an Act 250 permit be obtained for the Barre City Subdivision or the Williamstown Parcel #2 subdivision, the Board notes that under EBR 3(C)(3), a district coordinator may reconsider, or accept a request for reconsideration of, a jurisdictional opinion at any time upon an adequate showing of a failure to disclose material facts or fraud. Thus, the absence of an order in this decision does not mean that the Barre City Subdivision and the Williamstown Parcel #2 subdivision will forever evade an order of jurisdiction by the District Coordinator and, if necessary, this Board. Rather, it only means that such an order must come about pursuant to EBR 3(C)(3).

D. Barre City Subdivision as Three Lots

The Petitioner contends that the Barre City Subdivision does not count towards the ten lot jurisdictional threshold with regard to the Project because the three lots are pre-existing lots pursuant to the 1893 "Parker Square" plan or the "Parker Land Plan of October 12, 13, & 14, 1916." The Board disagrees.

The Board's prior rulings make clear that fundamental to the creation of a subdivision or lot is the partitioning or division of land. This is because the definition of subdivision in 10 V.S.A. § 6001(19) and EBR 2(B) requires that there be ten lots (which is synonymous with parcel) which the person has partitioned or divided. Where a person has acquired two lots or parcels separately, that person cannot be said to have partitioned or divided them if the person sells the two lots or parcels in the exact same configuration in which they were acquired, even where the two lots or parcels are contiguous. Re: New England Land Associates, Declaratory Ruling #289, Findings of Fact, Conclusions of Law and Order at 6 (May 26, 1994).

The Petitioner and his spouse acquired the Barre City Parcels as two lots of land and subdivided them into three lots: lot 1, lot 2, and lot 3. The boundary lines for lot 1, lot 2, and lot 3 do not correspond to the boundary lines of Barre City Parcel #1 and Barre City Parcel #2 as those parcels were described in the NSB Deed. Rather, the north line of Barre City Parcel #1 as described in the NSB Deed lies somewhere in the middle of lot 2. Thus, unlike the facts in New England Land Associates, when the Petitioner conveyed the Barre City Subdivision lots, they were no longer in the exact same configuration in which they were acquired.<sup>5</sup>

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<sup>5</sup>If the Petitioner had re-sold the Barre City Parcels in the exact configuration in which he had acquired them, then these two lots would not have counted towards any ten lot jurisdictional threshold since there would not have been a partition or division of land.

Because the Barre City Parcels existed as two lots when Act 250 went into effect, they do not meet the definition for a pre-existing subdivision. The Parker Square lots which constitute the Barre City Parcels merged into two parcels as of October 28, 1916, that is, the day Earl E. Parker conveyed Barre City Parcel #1 to the City of Barre.<sup>6</sup> Thus, the Barre City Parcels fail to constitute ten or more lots in existence prior to the enactment of Act 250. See 10 V.S.A. §§ 6001(19) and 6081(a) and (b); Re: Hanlev Lane Construction Co., Inc., Declaratory Ruling #313, Findings of Fact, Conclusions of Law, and Order at 11 (June 12, 1996). Since the Barre City Parcels do not constitute ten or more lots, they do not satisfy the definition of subdivision. Where there is no subdivision, there can be no pre-existing subdivision. Re: David Enman (St. George Property), Declaratory Ruling #326, Findings of Fact, Conclusions of Law, and Order at 13 (Dec. 23, 1996). Since the Barre City Parcels are not a pre-existing subdivision, their division into the Barre City Subdivision counts as lots created with respect to the ten lot jurisdictional threshold in relation to the Project.

The Board's conclusion that the Petitioner and his spouse acquired two lots of land, and not eleven, is partially based on the NSB Deed. To construe a deed, the Board will look first at the language of the instrument because it presumably declares the intent of the parties. Okemo Mountain, Inc. v. Town of Ludlow, 164 Vt. 447, 451 (1995) citing Within&on v. Derrick, 153 Vt. 598, 603 (1990) (in construing a deed, first reference is to the instrument itself, as it is deemed to declare the understanding and intent of the parties). The NSB Deed contains a description for only two parcels of land, and not eleven parcels described by a specific reference to an enumerated Parker Square lot. Unlike Withington, this proceeding does not pertain to the location of a boundary between two landowners, or the area of land which was conveyed. Thus, the Board concludes that the reference to the Parker Square plat in the NSB Deed does not mean that the NSB Deed conveyed eleven separate parcels. Cf. Withington, at 603 citing to Spiller v. Scribner, 36 Vt. 245, 247 (1863) and Pennsylvania Game Comm'n v. Keown, 80 Pa. Commw. 471, 474, 471 A.2d 937, 939-40 (1984).

The Board's conclusion that the NSB Deed conveyed two parcels of land and not eleven also is partially based on the advice the Petitioner received from his then legal counsel. Former counsel's advice is indicative of the intent of the NSB Deed. Former counsel advised the Petitioner that the Barre City Parcels were two parcels, and not eleven. Had the intent of the NSB Deed been to convey eleven lots, it simply could have

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<sup>6</sup>The October 28, 1916 date applies because the Parker Square lots which constitute Barre City Parcel #2 were merged as of October 11, 1902, that is the day on which W. G. Parker conveyed Barre City Parcel #2 to the City of Barre.

contained eleven parcel descriptions each with a reference to the Parker Square plat lot being conveyed. Instead, the NSB Deed references the Parker Square plat lots to establish a portion of the boundary of the two Barre City Parcels. Thus, the reference in the NSB Deed to the Parker Square lots was in aid of the description of the two conveyed parcels, and not eleven lots.

The Board's conclusion also is partially based on the manner in which the Barre City Subdivision lots were described in the warranty deeds to their respective purchasers. The three warranty deeds by which the Petitioner conveyed the lots each describes the conveyed lot as being a part of the land and premises conveyed to the Petitioner and his spouse by the NSB Deed, and as being a lot--either 1, 2, or 3--on the plat which is recorded in Map Book 4, Page 41, of the Land Records of the City of Barre. Thus, these three warranty deeds each convey a lot depicted on the 1994 plat, and not one of the parcels described in the NSB Deed nor a lot as depicted on the two Parker Square plats.

The Board's conclusion that the NSB Deed is the conveyance of two parcels and not eleven lots is also consistent with the requirements of 24 V.S.A. § 4406(1), existing small lots. While not controlling in the context of Act 250, 24 V.S.A. § 4406(1) is instructive with regard to the Barre City Parcels' status as two separate parcels, and not eleven lots.

Under 24 V.S.A. § 4406(1), "[a]ny lot in individual and separate and non-affiliated ownership from surrounding properties in existence on the effective date of any zoning regulation ... may be developed ... even though not conforming to minimum lot size requirements ..." Where a non-conforming lot is not in individual and separate and non-affiliated ownership from surrounding properties, it is merged into the surrounding property. See Wilcox v. Village of Manchester Zoning Board of Adjustment, 159 Vt. 193, 196 (1992) citing Drumheller v. Shelburne Zoning Board of Adjustment, 155 Vt. 524, 529 (1990). The eleven Parker Square lots failed to meet the requirement of individual and separate and non-affiliated ownership since 19 16 or, at the latest, since Donald J. Bliss and Cheryl D. Bliss became the owner of the Barre City Parcels on July 1, 1988. Certainly when the Petitioner became the owner of the Barre City Parcels, the eleven Parker Square lots ceased to fulfill the requirement of individual and separate and non-affiliated ownership. Thus, even if the eleven lots were not merged in 19 16, they were merged no later than July 1, 1988, and this is prior to the date on which the Petitioner became the owner of the Barre City Parcels. Thus, when the Petitioner created the Barre City Subdivision, he did so by subdividing two parcels into three.

Additionally, the Parker Square plans were inexact and lacked the specificity required for real estate conveyancing, requiring the subsequent, specific descriptions

contained in the warranty deeds for the three Barre City Subdivision lots, all of which are based on the plat entitled "Survey and Site Plan, Nelson and Bonnie Lyford Subdivision of Parker Estates - Bank Street, Barre Vermont," which was tiled with the City of Barre Clerk's Office on August 16, 1994, and recorded in Map Book 4 at Page 41, of the Land Records of the City of Barre. The Board is persuaded that the Petitioner's 1994 survey, and the legal descriptions for the three Barre City Subdivision lots, do not correspond precisely to the 1893 and 1916 Parker Square plans and the lots shown thereon.

Accordingly, as of October 28, 1916, the individual Parker Square lots merged, respectively, into Barre City Parcel #1 and Barre City Parcel #2 such that the Petitioner has subdivided the two Barre City Parcels into the three Barre City Subdivision lots. Therefore, the Barre City Subdivision counts as three lots towards the ten lbt jurisdictional threshold with respect to the Project.

E. Estoppel

Since the Board concludes that the Project is a subdivision such that an Act 250 permit is and was required, the Board must consider whether it or any party to this Petition is estopped from asserting jurisdiction due to the Williamstown Parcel #2 PRS. The Board will also similarly consider the Barre City PRS.

i. elements

The doctrine of equitable estoppel is comprised of four elements and "is based upon the grounds of public policy, fair dealing, good faith, and justice." Dutch Hill Inn, Inc. v. Patten, 131 Vt. 187, 193 (1973).

The party asserting estoppel has the burden of establishing: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that its conduct shall be acted upon, or the conduct must be such that the party asserting estoppel has a right to believe it is intended to be acted upon; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped. Fisher v. Poole, 142 Vt. 162, 168 (1982).

In addition to its elements, and consistent with the requirement of good faith, estoppel will not be invoked in favor of a party "whose own omissions or inadvertence contributed to the problem." Town of Bennington v. Hanson-Walbridae Funeral Home, Inc., 139 Vt. 288 (1981).

a. Barre City PRS

Based on the preceding findings of fact, the Board concludes that it is not estopped by the Barre City PRS. Assuming that elements (2) and (4) are in the Petitioner's favor, the findings of fact demonstrate: (a) that the District Coordinator did not know all the relevant facts under element (1); and (b) the Petitioner was not ignorant of the true facts under element (3).

Before issuing the Barre City PRS, the District Coordinator conducted a two-part inquiry in his January 28, 1993 letter of the Petitioner's former attorney. The District Coordinator first inquired as to whether the Parker Square plats showed 11 separate parcels, and second, whether the deed to the Barre City Parcels held by the then current owner had "references to the tract being divided into 11 lots or is it simply described as one 2.5 acre property?" The Petitioner's then counsel responded on February 1, 1993 by confirming that the Parker Square plats depicted separate lots and that the deed to Mr. and Mrs. Bliss refers to old Parker Square plats. However, she did not disclose to the District Coordinator that the deed held by Mr. and Mrs. Bliss described the property as being divided into *two parcels* even though she so informed the Petitioner of this by letter on February 8, 1993. Subsequent to February 8, 1993, the Petitioner failed to disclose to the District Coordinator that the purchase of the Barre City Parcels was the purchase of two contiguous yet separate parcels of land.

The actions and statements of Petitioner's then counsel are attributable to the Petitioner, regardless of the Petitioner's actual knowledge of his counsel's statements. See Fancher v. Benson, 154 Vt. 583,587 (1990) (veterinarian that conducted pre-purchase physical examination of horse on behalf of buyer was buyer's agent for purposes of determining the animal's health, and any information disclosed to her on that subject was functionally the same as disclosure to the buyer); Estate of Thomas C. Sawver v. Crowell, 151 Vt. 287,291 (1989)(the knowledge of an agent acting within the scope of his or her authority is chargeable to the principal, regardless of whether that knowledge is actually communicated); Neet v. Silver Street Partnership, 148 Vt. 99, 105 (1987)(agent's apparent authority derives from conduct of the principal, communicated or manifested to a third party, which reasonably leads the third party to rely on the agent's authority).

Because the Petitioner knew that he was purchasing two lots instead of eleven, and because this fact was never communicated to the District Coordinator, the Board concludes it is not estopped by the Barre City PRS to assert jurisdiction over the Project. Moreover, the Petitioner's omission to fully inform the District Coordinator after the receipt of counsel's February 8 letter contributed to the confusion with regard to the Project. Accordingly, the Petitioner failed to act in good faith, and estoppel, an equitable

remedy, is inappropriate in such circumstances. See Agency of Natural Resources State of Vermont v. Godnick, 162 Vt. 588,593 (1994).

The Board has concluded that the Barre City Subdivision constitutes the Petitioner's eighth, ninth, and tenth lot within a continuous five year period in relation to the Project such that the Project requires an Act 250 permit. The Barre City PRS does not estop this requirement.

b. Williamstown Parcel #2

Based on the preceding findings of fact, the Board concludes that it is not estopped by the Williamstown Parcel #2 PRS. Again, assuming that elements (2) and (4) are in the Petitioner's favor, the findings of fact demonstrate: (a) that the Assistant Coordinator did not know all the relevant facts under element (1); and (b) the Petitioner was not ignorant of the true facts under element (3).

As stated in the Williamstown Parcel #2 PRS, the Assistant Coordinator concluded that no Act 250 permit was required with respect to the creation of the two Williamstown Parcel #2 lots because "one additional lot created--fewer than ten total in last 5 years." In reaching this conclusion, the Williamstown Parcel #2 PRS does refer to the seven lots authorized by EC-5-201 0, EC-5-201 O-1, and EC-5-2384, but does not refer to or count the three Barre City Subdivision lots. Since the three Barre City Subdivision lots preceded the creation of the two Williamstown Parcel #2 lots, they should have been counted with respect to whether the Williamstown Parcel #2 subdivision required a permit. The Petitioner should have informed the Assistant Coordinator about the three Barre City Subdivision lots. Had the Assistant Coordinator known that the Petitioner had created ten lots within a five year period, her conclusion would have been that the so-called "one additional lot created" required an Act 250 permit as the eleventh lot within a five year period. Because the Petitioner knew about the three Barre City Subdivision lots and did not inform the Assistant Coordinator about them, the Board concludes it is not estopped by the Williamstown Parcel #2 PRS to assert jurisdiction over the Project.

The Board notes that the Assistant Coordinator's conclusion that only one additional lot was created is clearly erroneous. The plain meaning of the applicable definitions for "subdivision" and "lot" cannot be construed such that the division of one lot into two lots counts as only one lot. We construe a statute consistent with its purpose, subject matter, effects and consequences, and the reason and spirit of the law. In re Spring Brook Farm Foundation, 164 Vt. 282,287 (1995) citing to Nash v. Warren Zoning Bd. of Adjustment, 153 Vt. 108, 112 (1989). We avoid construing statutory language in a way that produces an irrational result. Santi v. Roxbury Town School District, \_\_\_\_ Vt.

, 685 A.2d 301, 304 (1996) citing to State v. Quinn, 165 Vt. 136, 140, 675 A.2d 1336, 1338 (1996). As the facts in this Petition demonstrate, residential lots result in the construction of homes.

Under the Assistant Coordinator's interpretation, nine lots could be subdivided into eighteen lots with eighteen houses resulting without any Act 250 review. "The purpose of Act 250 is 'to protect and conserve the lands and the environment of the state and to insure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests.'" 1969, No. 250 (Adj. Sess.), § 1. cited Spring Brook Farm, 164 Vt. at 287. The Assistant Coordinator's conclusion that only one lot was created is irrational and contrary to the purpose of Act 250. Had there been no other factors to consider, the Board may have been estopped with respect to the Williamstown Parcel #2 PRS. See My Sister's Place v. City of Burlington, 139 Vt. 602, 609 (1981). However, whether the Williamstown Parcel #2 subdivision is counted as one or two lots, the Petitioner has exceeded ten or more lots within a five year period due to the Barre City Subdivision.

The Board has concluded that the Williamstown Parcel #2 subdivision constitutes the Petitioner's eleventh and twelfth lot within a continuous five year period in relation to the Project such that the Project requires an Act 250 permit. The Williamstown Parcel #2 PRS does not estop this requirement.

c. Non-binding project review sheet advisory opinions

Related to the issue of estoppel is whether the two project review sheet advisory opinions can be considered as binding upon anyone who did not receive notice of them. The Barre City PRS was sent to the Petitioner and his then attorney. The Williamstown Parcel #2 PRS was sent to the Petitioner and the Williamstown Planning Commission. Thus, none of the Appellees ever received a copy of the project review sheet advisory opinions when they were issued. The Board has ruled in the past that a project review sheet advisory opinion cannot bind a person who had no notice of its issuance. Re: Trinkle M Marketnlace, Declaratory Ruling Request #274, Memorandum of Decision at 3 (Jan. 15, 1993). Accordingly, the Appellees cannot be estopped by the two project review sheet advisory opinions.<sup>7</sup>

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<sup>7</sup>Indeed, prior to statutory and regulatory amendments which became fully effective on January 2, 1996, there was no procedure for ensuring that an advisory opinion, which includes project review sheets, could become binding. With the amendments, however, a jurisdictional opinion can become a binding jurisdictional determination provided it is served

F. Petitioner's Motions

On September 23, 1997, the Petitioner filed a Motion to Prohibit Expansion of Issues and Motion in Limine. At the hearing, the Chair stated that the Board's decision would rule on these two motions. In its motions, the Petitioner requested five separate orders. As explained below, the Board denies the request for the five orders.

i. Evidence concerning Barre City Subdivision

The Petitioner requests an order that none of the evidence regarding the Barre City Subdivision be considered by the Board. As explained above, the Prehearing Order specifically told all parties that the Board's inquiry as to whether the Petitioner had created ten or more lots "may include lots in Williamstown, the Town of Barre, and the City of Barre." The Petitioner did not object to the Prehearing Order. Moreover, the evidence regarding all of the Petitioner's subdivision activity is relevant to the jurisdictional issue before the Board. Accordingly, the Board denies the Petitioner's request for an order.

ii. Board members disregard Barre City Subdivision evidence

The Petitioner requests an order that Board members who read the **prefiled** testimony disregard that which pertains to the Barre City Subdivision. As explained above in sub-paragraph (i), the evidence regarding the Barre City Subdivision is admissible. Accordingly, the Board denies the Petitioner's request for an order.

iii. Issues limited to that in the Prehearing Order

The Petitioner requests an order that only the issues identified in the Prehearing Order be decided by the Board. Since the Prehearing Order is final, there is no need for a second order confirming that the issues in this Petition are those stated in the Prehearing Order. Accordingly, the Board denies the Petitioner's request for an order consistent with the Board's conclusion that only the Project can be subject to an order of jurisdiction as a result of this Petition.

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upon the appropriate persons. See 10 V.S.A. § 6007(c) and EBR 3(C).

- iv. Exclude Appellees' evidence and argument regarding Barre City Subdivision

As explained above in sub-paragraph (i), the evidence regarding the Barre City Subdivision is admissible. Further, as noted above in subsection C, the Barre City Subdivision and the Williamstown Parcel #2 subdivision may be reviewed in a separate proceeding pursuant to EBR 3(C)(3). Accordingly, the Board denies the Petitioner's request for an order.

- v. Right to withdraw a project after it has commenced

The Petitioner requests the Board to order that, even if the Project does require an Act 250 permit, the Petitioner may withdraw the Project and avoid Act 250 jurisdiction.<sup>8</sup> The Board has already concluded that the Petitioner has subdivided the Barre Town parcel into two lots and that an Act 250 permit is required. The Board has generally held that when Act 250 jurisdiction is triggered, subsequent events cannot defeat the triggering of jurisdiction nor can jurisdiction be waived. See Re: John Rusin, #8B0393-EB, Findings of Fact, Conclusions of Law, and Order (June 10, 1994), aff'd In re John Rusin, 162 Vt. 185 (1994); Re: Wildcat Construction Co., Inc., #6F0283-1-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 4, 1991), aff'd In re Wildcat Construction, 160 Vt. 63 1 (1993); Re: Bernard and Suzanne Carrier, Declaratory Ruling #246, Findings of Fact, Conclusions of Law, and Order at 26 (Dec. 7, 1995); Re: Charles and Barbara Bickford, #5W1186-EB, Findings of Fact, Conclusions of Law, and Order at 25 (May 22, 1995); Re: City of Barre Sludge Management Program, Declaratory Ruling #284 (Oct. 7, 1994); Re: Richard Farnham, Declaratory Ruling #250 (July 17, 1992); and Re: Stevens and Gyles, Declaratory Ruling #240 (May 8, 1992). Accordingly, the Board denies the Petitioner's request for an order. The Barre Town Parcel is subject to Act 250 jurisdiction regardless of whether the Petitioner obtains an Act 250 permit for the Project.

- G. Arguments raised by Petitioner's December 11, 1997 Filing and at the December 17, 1997 Oral Argument

- i. Affidavit

The Petitioner's filing in response to the November 25, 1997 proposed decision included an affidavit. At oral argument, the Appellees objected to the affidavit being

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<sup>8</sup>The Petitioner also raised this issue in its Memorandum of Law and Facts filed on October 20, 1997.

made part of the evidentiary record in this Petition. The Board advised the parties that it would take the issue under advisement.

The parties in this Petition filed prefiled direct testimony and exhibits, and lists of rebuttal witnesses and exhibits, during August and September, 1997. Appellees' exhibit "Koch 7" was a copy of the February 8, 1993 letter from the Petitioner's former counsel to the Petitioner wherein she advised the Petitioner that he was purchasing two parcels of land. The Petitioner had the opportunity to address Koch 7 at the hearing held on October 1, 1997. Having not done so, the Board declines to re-open the evidence and accept the affidavit into this Petitioner's evidentiary record.

ii. Request for Submission of Further Legal Memoranda

The Petitioner also requested at oral argument that he be allowed to file an additional legal memorandum. The Board declined to accept another legal memorandum since the Chair's November 25, 1997 memorandum to parties set December 11, 1997 as the deadline for such memoranda, and specifically informed the parties that the Board would consider this Petition in deliberative session on December 17, 1997.

iii. Substantive Issues

The Board has considered the arguments raised by the Petitioner in response to the November 25, 1997 proposed decision. After a review of the record in this Petition, the Board concludes that the hearing panel's proposed decision is sound for the reasons stated therein. Accordingly, the Board adopts the proposed decision as modified herein as the Board's final decision pursuant to EBR 41.

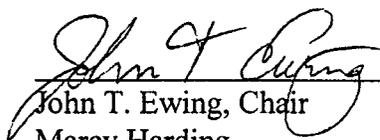
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VI. ORDER

1. Official notice shall be taken of those items identified above in Section II.
2. The Project is a subdivision which requires an Act 250 permit. The Barre Town Parcel is subject to Act 250 jurisdiction regardless of whether the Petitioner obtains an Act 250 permit for the Project.
3. The Williamstown Parcel #2 PRS and the Barre City Subdivision PRS do not estop the Board from ordering that the Project requires an Act 250 permit or that the Barre Town Parcel is subject to Act 250 jurisdiction.

Dated at Montpelier, Vermont this 24th day of December, 1997.

VERMONT ENVIRONMENTAL BOARD

  
\_\_\_\_\_  
John T. Ewing, Chair  
Marcy Harding  
Sam Lloyd  
Rebecca Nawrath  
Dr. Robert Page