

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

RE: Pizzagalli Properties (Burger King)  
Declaratory Ruling Request #361

**CHAIR'S PRELIMINARY RULING**

This proceeding concerns a proposal to construct and operate a Burger King Restaurant on the north side of South Park Drive in the Town of Colchester, Vermont ("Project"). Pursuant to Environmental Board Rule 16(B) and as explained in more detail below, Vermont Environmental Board ("Board") Chair Marcy Harding concludes that there is no jurisdiction over the Project under 10 V.S.A. §§ 6001-6092 ("Act 250").

**I. PROCEDURAL SUMMARY**

On May 26, 1987, the District #4 Environmental Commission ("District Commission") issued Land Use Permit #4C0676R and accompanying Findings of Fact and Conclusions of Law and Order (collectively, the "Permit") to the predecessors in interest of Pizzagalli Properties ("Petitioner") and to Mountaha Handy. The Permit authorized the construction of Phase I of a business park consisting of three buildings totaling 63,566 square feet and 2.710 feet of roadway (now known as South Park Drive) located off Routes 2 and 7 in Colchester, Vermont ("Permit Site").

On October 10, 1997, the then Coordinator of the District Commission ("Coordinator") issued a Project Review Sheet ("PRS") concluding that the Project necessitated an amendment to the Permit. Petitioner did not formally receive a copy of the PRS until April 14, 1998.

On April 20, 1998, Petitioner tiled a Petition for Declaratory Ruling, alleging that the PRS is in error.

On May 7, 1998, W2L2 Partnership ("W2L2") filed a request for party status.

On May 11, 1998, Starbuck Associates ("Starbuck") tiled a request for party status.

On May 19, 1998, Restaurants of Northern Vermont ("RNV"), the Project proponent, filed a letter supporting Petitioner's position and indicating an intention to

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Petitioner is the successor in interest to Pizzagalli Investment Company and San Remo Realty Company.

participate in the prehearing conference in this matter.

On May 20, 1998, the Chair convened a prehearing conference with the following entities participating:

Petitioner by Robert Bouchard and Michael Tomkowicz  
W2L2 by Gary G. Lavigne  
RNV by Peter Collins, Esq. (via telephone)

On May 25, 1998 and May 28, 1998, Petitioner and RNV filed documents of which the Chair takes official notice below.

## II. OFFICIAL NOTICE

Under 3 V.S.A. §810(4), notice may be taken of judicially cognizable facts in contested cases. In addition, "[t]he rules of evidence as applied in civil cases shall be followed" in contested cases before administrative bodies. Id. §810(1). Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is 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, 612 (1984). Official notice of a judicially cognizable fact may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. §810(4); V.R.E. 201(c) and (f). Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed; See V.R.E. 201(e). Findings of fact may be based upon officially noticed matters. 3 V.S.A. §809(g).

At the prehearing conference, Petitioner orally waived its right to an evidentiary hearing provided that official notice was taken of the following documents and facts:

- a. Warranty Deed of Maria Bemadini dated June 3, 1968 transferring legal interest in the Project site to Orero J. Bemadini and Norma P. Bemadini and recorded in the Town of Colchester Land Records at Book 12, pages 377-79.
- b. Norma P. Bemadini is now the record owner of the Project site
- c. Warranty Deed of Maria Bemadini dated May 27, 1968 transferring legal interest in a portion of the Permit Site to San Remo Realty Corporation and recorded in the Town of Colchester Land Records at Book 12, pages 3 24-27.

d. Quit-Claim Deed of Norma P. Bemadini dated July 10, 1981 transferring legal interest in the strip of land that became South Park Drive to San Remo Realty Corporation and recorded in the Town of Colchester Land Records at Book 71, pages 366-67.

e. The Purchase and Sale Contract dated August 1994 by and between B & S Food Service, Inc. ("B & S") or its designee and Norma Bemadini concerning the Project site.

f. The Permit.

g. Land Use Permit #4C0676-R-1 dated August 10, 1987

h. Land Use Permit #4C0676R-2/4C0736 dated October 8, 1987

i. Land Use Permit #4C0676-R-3 and supporting Findings of Fact, Conclusions of Law, and Order, both dated August 18, 1988.

j. Land Use Permit #4C0676-R-3A dated October 31, 1988

k. Land Use Permit #4C0676-R-3B dated September 27, 1990

l. Land Use Permit #4C0676R-3C dated September 12, 1991

m. Land Use Permit #4C0676R-4 dated February 15, 1991.

n. Land Use Permit #4C0676R-4A dated January 10, 1991.

o. Land Use Permit #4C0676R-5 dated November 9, 1989.

p. Land Use Permit #4C0676-R-6 and supporting Findings of Fact, Conclusions of Law, and Order, both dated April 11, 1990.

q. Land Use Permit #4C0676-R-8 dated February 15, 1991

r. Land Use Permit #4C0676-R-8A dated November 20, 1992

s. Land Use Permit #4C0676-R9 dated October 18, 1995

t. Land Use Permit #4C0676-R10 and supporting Findings of Fact.

Conclusions of Law. and Order, both dated October 20, 1997.

u. Land Use Permit #4C0676-R11 and supporting Findings of Fact.  
Conclusions of Law, and Order. both dated October 20, 1997.

v. Special Warranty Deed dated September 8, 1992 of Mountaha Handy  
transferring legal interest in South Park Drive to the Town.

w. Special Warranty Deed dated November 13, 1992 of San Remo Realty  
Company transferring legal interest in South Park Drive to the Town of Colchester.

x. The PRS

y. The cover sheet to the application for an amendment to the Permit filed  
with the District #4 Environmental Commission by RNV on January 21, 1998.

z. The Town of Colchester is a "ten acre town," so-called, for purposes of  
determining Act 250 jurisdiction.

aa. RNV and B & S are entities that construct and operate Burger King  
restaurants in Vermont.

### III. ISSUE ON APPEAL

Whether there is jurisdiction over the Project pursuant to 10 V.S.A. §§ 6001-  
6092.

### IV. FINDINGS OF FACT

1. The District #4 Environmental Commission issued the Permit to Petitioner's  
predecessors in interest and Mountaha Handy on May 26, 1987.
2. The Permit authorized the construction of Phase I of a business park and 2.710  
feet of roadway (now known as South Park Drive) located off Routes 2 and 7 in  
Colchester, Vermont (previously defined as the "Permit Site").
3. The business park is located on the south side of South Park Drive.
4. On September 8, 1993, legal interest in and to South Park Drive transferred to the  
Town of Colchester.

5. RNV plans to build a Burger King restaurant on the north side of South Park Drive ("Project Site").
6. The Project Site is not part of the involved land that was the subject of the Permit.
7. The Project Site is 2 acres +/- in size.
8. Colchester is a "10 acre town" for purposes of Act 250 jurisdiction.
9. RNV does not plan to build a road in connection with the Project.
10. The PRS recites that construction of the Project necessitates an amendment to the Permit.
11. On January 21, 1998, RNV filed an application with the District #4 Environmental Commission to amend the Permit. The application recites that the purpose of the application is to update the traffic analysis for South Park Drive to include the Burger King restaurant.
12. The Project Site is owned by Norma Bernadini pursuant to the Warranty Deed of Maria Bemadini dated June 3, 1968 and recorded on July 5, 1968 in the Town of Colchester Land Records.

V. LEGAL ANALYSIS and CONCLUSIONS

A. Scope of Review and Burden of Proof

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. 10 V.S.A. §6007(c) and Environmental Board Rule ("EBR") 3(D). Although the petition may come to the Board as an appeal of a jurisdictional opinion or project review sheet, the issue in a declaratory ruling proceeding is not whether the opinion, or any part thereof, is correct. Thus, facts stated or conclusions drawn in the jurisdictional opinion are not considered by the Board. Provided a petition is timely filed, the only issue is the applicability of any statutory provision or of any rule or order of the Board over the project described in the jurisdictional opinion.

The burden of proof to demonstrate an exemption from Act 250 jurisdiction is on the person claiming the exemption -- RNV in this proceeding. 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 both the burdens of production and persuasion. Re: Pratt's Propane, #3R0486-EB, Findings of Fact, Conclusions of Law, and Order at 4-6 (Jan. 27, 1987). [EB #311M]

B. Act 250 Jurisdiction

Act 250 provides that “[n]o person shall commence construction on a subdivision or development, or commence development without a permit.” 10 V.S.A. § 6081(a). Therefore, Act 250 regulates two types of projects: development and subdivisions, “Development” is defined, in pertinent part, as the “construction of improvements” for commercial purposes on a tract that exceeds a specified acreage. 10 V.S.A. § 6001(3); Environmental Board Rule (“EBR”) 2(A)(2). In Colchester, a so-called “ten acre town,” the construction of improvements must be on a tract that is 10 acres or larger.

The Project, a proposal to build a Burger King restaurant, involves the construction of improvements for commercial purposes pursuant to 10 V.S.A. § 6001(3) and EBR 2(A)(2). The Project is on a 2.0 acre parcel of land in Colchester. Colchester is a “ten acre town.” Therefore, Act 250 does not have jurisdiction over the Project by virtue of the acreage of involved land. No other basis for asserting independent jurisdiction over the Project exists.

The PRS states that the Project necessitates an amendment to the Permit. An amendment is required for any “substantial” change in a Permitted project. EBR 34(A). “Substantial change” is defined as “any change in a *development* which may result in significant impact with respect to any of the criteria specified in” Act 250. EBR 2(G) (emphasis supplied). An amendment must also be obtained for any “material” change in a permitted project. EBR 34(A). “Material change” is defined as “any alteration *to the project* which has a significant impact on any *finding*, conclusion, term or condition of the project’s permit and which affects one or more values sought to be protected by the Act.” EBR 2(P) (emphasis supplied). The theory underlying the PRS is that traffic generated by the Project will cause a substantial or material change to the authorized traffic flow on South Park Drive, which is itself subject to the Permit.

The Project is on a parcel of land that is separate and distinct from the Permit Site, including South Park Drive. Norma Bemadini, the current landowner, has held legal title to the Project Site since 1968. Access to the Project is attained via South Park Drive, which is now a public road. Therefore, RNV will not need to obtain a right-of-way or hold any other interest in the road in order to use it. Construction and operation of a Burger King on the Project Site may well impact the traffic on South Park Drive.

Jurisdiction does not attach to the Project (and the Project Site does not become involved land of the permitted development) solely because the Project may create an effect on the Permit Site. Under the facts of this matter, an adjoining property owner cannot be required to seek an amendment to a neighbor's permit by virtue of construction on the adjoiner's, non-permitted, property.

Therefore, the Chair concludes that there is no Act 250 jurisdiction over the Project and the PRS is superseded by this Ruling.\*

#### VI. PARTY STATUS

In light of the Chair's decision to vacate the PRS, she does not address the party status requests of W2L2 and Starbuck.

#### VII. ORDER

1. Official notice is hereby taken of the facts and documents set forth in II. above
2. Act 250 jurisdiction does not attach to the Project.
3. RNV is not required to obtain an amendment to the Permit.
4. The PRS is superseded by this Ruling and this declaratory ruling request is dismissed with prejudice.
5. Pursuant to EBR 16, this Preliminary Ruling is binding on all interested parties unless a written objection to the Preliminary Ruling, in whole or in part, is filed on or before Friday, June **12, 1998** ("Objection"). The Objection may be accompanied by or incorporate a memorandum of law addressing the issues to which the party is objecting.

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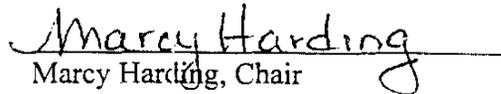
The Chair notes, however, that because South Park Drive is subject to the Permit, it may be necessary for the *Permit holder(s)*, Petitioner and/or the Town, to seek an amendment to the Permit (e.g. for increase in authorized traffic, additional curb cuts, etc.).

But see footnote 2 above.

6. In the event an Objection is filed pursuant to **paragraph #5** above, this matter shall proceed as follows:
  - a. The full Board will deliberate the issues raised by the Objection at its regularly scheduled deliberative session on **Wednesday, June 24, 1998**
  - b. Any party wishing to present oral **argument** concerning the Objection must so notify the Board in writing on or **before Tuesday, June 16, 1998**. If such written request is received, **argument** will be scheduled for **Wednesday, June 24, 1998 at 9:00 a.m. at the offices of the Environmental Board, National Life Records Center Building, Conference Room R2C, Montpelier, VT**. Each party will be given 10 minutes for argument unless otherwise authorized by the Board.
7. If no Objection is filed, this Chair's Preliminary Ruling shall be final
8. Parties shall file an **original** and ten collated **copies** of legal memoranda and any other documents filed with the Board **and mail one copy to each of the parties** listed on the attached certificate of service. Pursuant to EBR 12(D), memoranda shall be no more than twenty-five pages.

Dated at Montpelier, Vermont this 8th day of June, 1998

ENVIRON MENTAL BOARD

  
Marcy Harding, Chair