

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

RE: Morningside Drive Extension
Declaratory Ruling #367

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I. INTRODUCTION

In this decision, the Environmental Board ("Board") concludes that, based upon the evidence presented by the parties, there is jurisdiction over Morningside Drive Extension pursuant to 10 V.S.A. §§6001-6092 ("Act 250").

II. BACKGROUND

On June 24, 1998, the District #7 Environmental Coordinator issued Jurisdictional Opinion #7-193 in which he determined that the construction of certain improvements to Morningside Drive Extension in the Town of Newport, Vermont, did not constitute development subject to Act 250 jurisdiction.

On July 20, 1998, William Halloran ("Petitioner") appealed the Jurisdictional Opinion by filing a petition for a declaratory ruling with the Board.

On August 5, 1998, this matter was noticed for a prehearing conference to be held on August 24, 1998. On August 14, 1998, the Petitioner sent the requested certificate of service and filed a letter seeking postponement of the prehearing conference in order that he might obtain counsel. He also asked for review of the fee determination.¹

In response to the Petitioner's request, on August 20, 1998, this matter was rescheduled and renoticed for a prehearing conference to be held on October 8, 1998.

On August 24, 1998, the Board received an entry of appearance from Robert B. Chimileski, Esq., counsel for Albert Diem. On August 25, 1998, the Board received a letter from Gordon Amidon, *pro se*.

On October 8, 1998, Board Chair Marcy Harding convened a prehearing conference in this matter.

Also on October 8, 1998, Gordon Amidon filed a Petition for Party Status.

¹ Various Orders were issued by Board Chair Marcy Harding and the Board concerning the Petitioner's claim that he should not be required to pay the full filing fee or the costs of publication of notices in this matter. Those Orders are a part of the Record in this case but are not repeated here.

On October 16, 1998, Chair Harding issued a Prehearing Conference Report and Order ("Prehearing Order") which is incorporated herein by reference. The Prehearing Order included a Statement of the Issue to be addressed in this matter and a Scheduling Order, which set forth a schedule for prefiled testimony and exhibits, evidentiary objections, proposed findings of fact and conclusions of law, the second prehearing conference, and the hearing. The Prehearing Order stated that it was binding unless an objection to it was received on or before October 27, 1998. There were no objections to the Prehearing Order.

On October 23, 1998, Albert Diem filed a Petition for Party Status.

On November 13, 1998, Chair Harding issued an Order, granting the Petitioner party status pursuant to Environmental Board Rule ("EBR") 14(A)(5), granting Gordon Amidon party status pursuant to EBR 14(A)(5), and granting Albert Diem party status pursuant to EBR 14(B)(2).

All parties timely filed prehearing testimony, and the Petitioner filed exhibits.

On March 3, 1999, Diem filed evidentiary objections to the prefiled exhibits filed by Petitioner.

On April 12, 1999, Chair Harding convened a second prehearing conference by telephone. Chair Harding ruled on Diem's evidentiary objections to the Petitioner's exhibits at the second prehearing conference?

On April 14, 1999, a Panel of the Board convened a hearing in the City of

² Chair Harding ruled that Petitioner's Exhibit WH-I, a Warranty Deed, dated April 15, 1983 from Albert and Gail Diem to Jean Paul and Germaine Bonneau, if certified in accordance with the Vermont Rules of Evidence, would be admitted as evidence. Chair Harding further ruled that Petitioner's Exhibits WH-2, WH-3 and WH-5 (several maps) would be admitted for the purposes of indicating general representations of the lands crossed or accessed by Morningside Drive Extension but not for specific information (such as the length of roads or the size of lots) which appeared thereon. Finally, Chair Harding ruled that WH-4, which purported to be a letter from New England Telephone to Gordon Amidon, was without a proper foundation and hearsay and would not be admitted.

Chair Harding placed this ruling on the Record at the April 14 hearing; no party raised an objection to this ruling at the hearing.

Newport with the following parties participating: the Petitioner, *pro se*, Gordon Amidon, *pro se*, and Albeit Diem, through Attorney Chimileski. After hearing opening arguments, the Panel conducted a site visit, placed its site visit observations on the Record, and gave the parties an opportunity to supplement those observations. The Panel then heard testimony and arguments from the parties.³

The Panel conducted deliberative sessions on April 14 and May 4, 1999.

On May 6, 1999, the Panel issued Proposed Findings of Fact, Conclusions of Law, and Order in this matter, concluding that, based upon the evidence presented by the parties, there is no jurisdiction over Morningside Drive Extension pursuant to Act 250.

On May 24, 1999, the Petitioner filed a timely objection to the Proposed Decision and requested oral argument. Amidon also filed a timely objection on May 24.

Oral argument on the objections was heard by the full Board on June 16, 1999. Petitioner, *pro se*, and Robert Chimileski, Esq. representing Albert Diem, participated by phone, Amidon appeared in person, *pro se*. Mrs. Halloran was included in the telephone conference but did not participate. Following argument, the Board deliberated on the arguments presented by the parties.

On July 1, 1999, the Board issued a Memorandum of Decision and Order ("MOD"). The Board found that, because of the way the issue was framed in the Prehearing Order, it was possible that the Petitioner and Amidon were misled as to the evidence which they were required to present in order to satisfy their burden of proof. The Board therefore reframed the issue in this case as follows:

Whether there has been construction of a road (the so-called Morningside Drive Extension) which is subject to the jurisdiction of IO V.S.A. Ch. 151 ("Act 250"), pursuant to Environmental Board Rule 2(A)(6) (the "Road Rule").

³ Albert Diem did not appear at the hearing, and therefore his prefiled testimony was not admitted into evidence. Likewise, the prefiled testimony of William Madigan, submitted by Diem, was not admitted into evidence, as Madigan was not present at the hearing.

The Board remanded the matter back to the Panel for further hearing on the issue as reframed.⁴

The MOD set dates for filing prefiled testimony and exhibits. On July 12, 1999, the Petitioner filed a motion for an extension of three months for such filings, which the Chair granted in an August 4, 1999 Memorandum of Decision and Order.

Diem filed further testimony on October 13, 1999, and Petitioner filed further exhibits on October 14, 1999.

On November 8, 1999, Diem filed an objection to one of Petitioner's exhibits (#H-2-4, a letter from New England Telephone to Amidon). In the Third Prehearing Conference on December 6, 1999, the Chair ruled that Exhibit #H-2-4 would be admitted for the sole purpose of proving that Amidon received the letter.⁵

On December 8, 1999, the Panel held a second hearing in this matter in Newport with the following parties participating: the Petitioner, *pro se*, Gordon Amidon, *pro se*, and Albert Diem, through Attorney Chimileski. After hearing opening arguments the Panel heard testimony and arguments from the parties.⁶ Although requested by Petitioner, the Panel declined to take another site visit.

The Panel conducted deliberative sessions on December 8, 1999 and January 5, 2000.

Based upon a thorough review of the Record and related argument, the Panel issued a proposed decision on January 6, 2000 which was sent to the parties. The parties were allowed to file written objections and request oral argument before the Board on or before January 25, 2000. No party filed written objections or requested oral argument.

On February 16, 2000, the Board convened a deliberation concerning this

⁴ The Board served its decision on persons on the initial certificate of service list who did not seek party status in the initial proceeding in order to give them the opportunity to participate.

⁵ Chair Harding placed this ruling on the Record at the December 8 hearing; no party raised an objection to this ruling at the hearing.

⁶ Again, neither Diem nor Madigan appeared, and their testimony was therefore not admitted.

matter. Following a review of the proposed decision and the evidence and arguments presented, the Board declared the Record complete and adjourned. This matter is now ready for final decision.

III. ISSUE

Whether there has been construction of a road (the so-called Morningside Drive Extension) which is subject to the jurisdiction of 10 V.S.A. Ch. 151 ("Act 250"), pursuant to Environmental Board Rule 2(A)(6) (the "Road Rule").

IV. OFFICIAL NOTICE

Under 3 V.S.A. § 810(4), notice may be taken of judicially cognizable facts in contested cases. In addition, and with limited exceptions, "[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).

Pursuant to 3 V.S.A. § 810(4), at the December 8, 1999 hearing, the Chair stated that the Panel would take official notice of the fact that the Town of Newport does not have permanent subdivision and zoning bylaws, and is therefore a "one-acre" town. No party at the hearing objected to the Panel taking this notice.

V. FINDINGS OF FACT

1. Morningside Drive is a road in the Town of Newport. It runs in a generally northerly direction from Vance Hill Road for a distance of approximately 846 feet, more or less.
 2. **Gordon Amidon owns property on Morningside Drive; he has owned this property since 1975.**
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Morningside Drive Extension
Declaratory Ruling #367
Findings of Fact, Conclusions of Law, and Order
Pane 6

3. In 1973, Petitioner, William Halloran, purchased land to the north of Amidon's property. Halloran later sold the southern portion of this land to Marion Peduzzi.
 4. As it existed prior to 1983, Morningside Drive was an improved road to a point twenty feet north of the driveway to the barn now owned by Amidon (near the Avery's driveway).
 5. North of the point where Morningside Drive ended in 1983, an old farm road or track (the "Old Farm Road") in poor, but passable, condition ran in a northerly direction to the south boundary line of land then owned by Petitioner (and now owned by Peduzzi); the Old Farm Road then ran northerly onto the Petitioner's land.
 6. The distance from the point where Morningside Drive ended in 1983 to the south boundary line of Peduzzi's land (the land formerly owned by the Petitioner) is about 100 yards.
 7. Prior to 1983, the Old Farm Road was the only road leading north from the terminus of Morningside Drive.
 8. Near Peduzzi's south boundary line, the present road forks. The left (west) fork is the Old Farm Road. This road runs on Peduzzi's and the Petitioner's land in a very wooded area for a distance of approximately 825 feet to its end at a dirt berm in the northeast corner of the Petitioner's property. It is difficult to discern the Old Farm Road, as the land is very wooded. The right (east) fork runs in a northerly direction on property to the east of the land formerly and presently owned by the Petitioner, parallel to the Old Farm Road, to and beyond the dirt berm.
 9. On August 18, 1982, Hazel Stearns sold to Jean Paul and Germaine Bonneau approximately 50 – 60 acres of land (the "former Stearns Farm"). The former Stearns Farm lies to the north of the terminus of Morningside Drive, to the north of property formerly owned by Diem, and to the northeast of Petitioner's property.
 10. Prior to 1983, the former Stearns Farm had no road access from Morningside Drive.
 11. A Warranty Deed, dated April 15, 1983 from Albert and Gail Diem to Jean Paul and Germaine Bonneau, recorded in the Land Records of the Town of
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Newport, conveys a right-of-way across the Diems' land to lands owned by the Bonneaus. The deed reads, in pertinent part:

It being a certain right-of-way from Vance Hill Road, so-called to certain lands and premises presently owned by the Grantees lying northerly of said road having a uniform width of fifty (50') feet and more particularly described as follows:

Beginning at the intersection of Vance Hill Road and Morningside [sic] Drive and running along said Morningside Drive adjacent to the westerly boundary of lands of the Grantors on a bearing N 26° E a distance of 846 feet, more or less, to the approximate terminus of Morningside Drive; thence proceeding along the westerly boundary of the former Kesl lot on a bearing N 26° 00' E a distance of 250 feet, more or less, to the northwest corner of said lot; thence running along the westerly boundary of the former Conly lot on a bearing N 06° 55' E a distance of 828.08 feet, more or less, to the lands of the Grantees.

It is a condition of this deed that the Grantees herein shall, within a period of one years [sic] from the date hereof construct at Grantees' expense a road on the within granted right-of-way. Said road shall be constructed to such specifications as are acceptable to the Town of Newport for Town Roads. In addition, the Grantees shall also extend electric power along said right-of-way at their expense.

12. The Deed from the Diems to the Bonneaus provided a right-of-way to the former Stearns Farm, north from the end of Morningside Drive, across the Diems' property, to the south boundary line of the former Stearns Farm.
13. In the summer and fall of 1983, Contractor Real Desrochers used heavy trucks and bulldozers in the course of substantial road construction north of the end of Morningside Drive.
14. The road construction improved the existing Old Farm Road, north from the 1983 end of Morningside Drive to the fork near the south boundary line of the Petitioner's former property (the land now owned by Peduzzi). At the fork, a new road was constructed which veered to the east, and then ran north to the south boundary line of the former Stearns Farm, parallel to the Petitioner's eastern boundary line, on the right-of-way which the Diems had

granted to the Bonneaus. The road then continued north into **the former** Stearns Farm. All of this construction, including the improvements to the Old Farm Road and the new construction, constitutes "Morningside Drive Extension."

15. In the course of constructing Morningside Drive Extension, trees were cleared, new material (gravel) was added, and culverts and utility boxes were installed.
16. There is evidence of the existence of underground utilities (phone and electric lines, but not water or sewer lines) running along Morningside Drive Extension from the fork in the road to the terminus of Morningside Drive Extension.
17. In 1963, Morningside Drive Extension was constructed to a condition similar to its present condition.
18. A house (the so-called "Ghelli home") has been built to the east of Morningside Drive Extension. North of the driveway to this home, the condition of Morningside Drive Extension deteriorates.
19. Land at the end of Morningside Drive Extension has been cleared; this clearing is approximately three to five acres.
20. In 1963, at the time Morningside Drive Extension was constructed, Diem, Bonneau, and perhaps Amidon,⁷ owned the land on which the road was built.
21. Construction on Morningside Drive Extension was completed by December 1983.
22. The length of Morningside Drive Extension from the fork in the road to its end is approximately 1500 feet.
23. The total length of Morningside Drive Extension, including the improvements to the Old Farm Road and the new construction from the fork into the former

⁷ That Morningside Drive Extension may be on Amidon's property for its first **several hundred feet is not significant** to this decision. The Board is not authorized to make determinations as to property rights. Equinox Resort Associates, L.P., Memorandum of Decision and Continuance Order at 3 (Sept. 24, 1997).

Stearns Farm, is approximately 1800 feet.

24. The Bonneaus had six lots for sale in the former Stearns Farm at the time Morningside Drive Extension was constructed in 1983.
 25. On September 28, 1993, the Bonneaus sold to David P. Ghelli by Warranty Deed, "lot #1 in the sub-division of the former Stearns Farm." The Deed notes that this lot "contains 10.33 acres." The Deed also conveys "a right-of-way 50.0 feet in width over a newly constructed roadway leading in a northerly extension of Morningside Drive along the westerly boundary of the parcel herein conveyed."
 26. Also on September 28, 1993, the Bonneaus sold to Daniel A. and Irene B. Dagesse by Warranty Deed, "lot #3 in the sub-division of the former Stearns Farm." The Deed notes that this lot "contains 10.33 acres." The Deed also conveys "a right-of-way 50.0 feet in width over a newly constructed roadway leading in a northerly extension of Morningside Drive along the westerly boundary of the parcel herein conveyed."
 27. Morningside Drive Extension is the "newly constructed roadway" referenced in both the Ghelli and Dagesse Deeds.
 28. The construction of Morningside Drive Extension occurred at the time the Bonneaus sold the first lots at the former Stearns Farm.
 29. The Bonneaus have sold other lots at the former Stearns Farm to Souci, Spink and Lalime.
 30. As constructed, Morningside Drive Extension provided and presently provides the only road access to 'all of the lots sold by the Bonneaus in the former Stearns Farm.
 31. Morningside Drive Extension was constructed to provide access to the former Stearns Farm; this was the only reason it was constructed.
 32. While there is no evidence presented that Diem commissioned or constructed Morningside Drive Extension, it does provide the only road access to two lots sold by the Diems in 1987.
 33. Petitioner does not have access to his land from Morningside Drive Extension. He does, however, have access to his land from the
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southwestern corner of his land. He also has a right-of-way to his land across the land which he sold to Marion Peduzzi.

34. The Town of Newport does not have permanent subdivision and zoning bylaws.
35. Neither the Petitioner nor any other witness alleged or provided any evidence that the construction of the road had caused any environmental harm or otherwise resulted in significant impact with respect to any of the criteria specified in 10 V.S.A. §6086(a)(1) – (10).

VI. CONCLUSIONS OF LAW

A. Scope of Review

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 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, rule or order of the Board to Morningside Drive Extension.

B. Burden of Proof

The burden of proof consists of the burdens of production and persuasion. *Applewood Corporation Dummerston Management*, Declaratory Ruling #325 (September 28, 1996). As to the specific question of burden of proof in Declaratory Ruling petitions, the Board has written:

The person who raises the question of jurisdiction has the burden of production; that is, he must provide sufficient evidence to the Board for the Board to be able to find that the particular activity in question meets the definition of “development” or “subdivision” under 10 V.S.A. §6001 so that it requires an Act 250 permit under 10 V.S.A. § 6081(a).

L. W. Haynes, Inc., Declaratory Ruling #192 (Sept. 25, 1987), *aff'd in re L. W. Haynes*, 150 Vt. 572 (1988).

The evidence by which a party can meet its burden of proof does not need to

come from that party, however.

The fact that a party has the burden of proof does not mean that he must necessarily shoulder it alone; it simply means that he, and not the other party, bears the risk of nonpersuasion. "The burdens of proof, i.e., the risk of non-persuasion, never shifts from the party on whom it is placed,... But it should be observed that the burden of proof is satisfied by the actual proof of facts which need to be proved, regardless of *which party introduces the evidence.* "

In re Quechee Lakes Corp., 154 Vt. 543, 553 (1990), quoting *Parish v. Maryland & Virginia Milk Producers Association*, 261 Md. 618, 692, 277 A.2d 19, 53-54, cert. denied, 404 U.S. 940 (1971) (emphasis in original).

C. Relevant Environmental Board Rule

The Environmental Board Rule ("EBR") which is relevant to this matter is the so-called "Road Rule," which states:

2(A) A project is a "development" if it satisfies any of the following definitions:

(6) The construction of improvements for a road or roads, incidental to the sale or lease of **land**, to provide access to or within a tract of land of more than one acre owned or controlled by a person. In municipalities with both permanent zoning and subdivision bylaws, this jurisdiction shall apply only if the tract or tracts of involved land is more than ten acres. For the purpose of determining jurisdiction, any parcel of land which will be provided access by the road is land involved in the construction of the road. This jurisdiction shall not apply unless the road is to provide access to more than five parcels or is to be more than 800 feet in length. For the purpose of determining the length of a road, the length of all other roads within the tract of **land** constructed within any continuous period of ten years commencing after the effective date of this rule shall be included; (Amended, effective March 11, 1982.)

D. Discussion

The question raised in this matter is whether there is Act 250 jurisdiction over Morningside Drive Extension. For such jurisdiction to exist, the facts must demonstrate that Morningside Drive Extension fits within the definition set forth in

the Road Rule. Having examined the Road Rule's constituent elements, the Board holds that there is sufficient evidence in the Record to support a conclusion that there is jurisdiction over Morningside Drive Extension.

1 . *Was there the construction of improvements for a road or roads ?*

The first element of the Road Rule requires that there has been the construction of improvements for a road or roads. *Re: Atlantic Cellular Co. L.P. and Rinkers, Inc.* Declaratory Ruling #340, Findings of Fact, Conclusions of Law, and Order at 11 (July 11, 1997). The findings establish that road construction on Morningside Drive Extension occurred in 1983. This construction consisted of improvements to a part of the Old Farm Road and new construction to the east and northeast of the Old Farm Road leading into the former Stearns Farm.

2. *Does the road provide access to or within a tract of land of more than one acre owned or controlled by a person?*

The Town of Newport does not have permanent subdivision and zoning bylaws, and, therefore, the Road Rule triggers jurisdiction if the road provides access to more than one acre. At the time Morningside Drive Extension was constructed in 1983, it provided access to the former Stearns Farm, a 50 – 60 acre tract of land owned by the Bonneaus. Further, the Board observed at its site visit that the road provides access to a tract of cleared land of approximately three to five acres. Finally, both the Ghelli and Dagesse properties, which are provided access by Morningside Drive Extension, are described in their deeds as being 10.33 acres each.

3. *Was the construction of improvements for a road "incidental to the sale or lease of land?"*

A road will trigger jurisdiction under EBR 2(A)(6) if a connection between its construction and the sale or lease of land can be demonstrated.

Here, the sale of two lots by the Bonneaus to Ghelli and to the Dagesse occurred during the time that Morningside Drive Extension was under construction. Further, Morningside Drive Extension provides the only road access to the lots which the Bonneaus sold to Ghelli, the Dagesse, and others. These facts are sufficient to establish the "incidental to sale" element of the Road Rule. *R. Brownson Spencer II, #1R0576-EB*, Findings of Fact, Conclusions of Law, and Order at 4 (March 10, 1987), *aff'd, In re R. Brownson Spencer II*, 152 Vt. 330

(1989); *Elizabeth Aaronsohn, et al.*, #8B0291 -I-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Jan. 26, 1983).

4. *If there was construction,*

(a) *does it 'provide access to more than five parcels?'*

Morningside Drive Extension provides access to the six-lot subdivision at the former Stearns Farm.

or

(b) *is the road more than 800 feet in length?*

Morningside Drive Extension is longer than 800 feet.

Based upon the evidence in the Record, the Board concludes that the Petitioner has met his burden of producing sufficient evidence on which the Board can conclude that Morningside Drive Extension is subject to Act 250 jurisdiction.

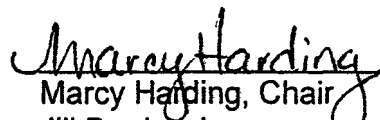
Because the elements of the Road Rule have been satisfied, a permit is required for Morningside Drive Extension and for the lands which it accesses. *R. Brownson Spencer II, supra*, at 5.

VII. ORDER

1. The Board takes **official** notice of the fact that the Town of Newport does not have permanent subdivision and zoning bylaws.
2. Morningside Drive Extension and the lands which it accesses are subject to Act 250 jurisdiction and require a land use permit.

Dated at Montpelier, Vermont this 17th day of February 2000.

ENVIRONMENTAL BOARD



Marcy Harding, Chair
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John Drake
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Samuel Lloyd
W. William Martinez
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