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

RE: Hiddenwood Subdivision, Fayston, Vermont
Declaratory Ruling #378

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. INTRODUCTION

This Declaratory Ruling petition presents the question of whether a permit amendment is required for the construction of a certain road or driveways at the Hiddenwood Subdivision (the "Project"), a subdivision subject to an Act 250 permit (10 V.S.A. Ch. 151) in Fayston. There are two questions before the Environmental Board ("Board"): (1) whether what has been constructed constitutes a substantial or material change to the Project as it was initially permitted such that a permit amendment is needed for the road/driveways; and (2) whether the road/driveways are a "road" under the Environmental Board's "Road Rule," so that a permit amendment is needed for this construction even if it is not a substantial/material change.

II. BACKGROUND

The Project is a subdivision and an 8700 foot road on a 151-acre tract located off the German Flats Road in Fayston, Vermont. The Project is subject to Land Use Permit #5W0162 (the "Permit"), as amended.

On October 13, 1987, the District #5 Environmental Commission ("Commission") issued Land Use Permit #5W0162-1 (the "Dash 1 Permit") authorizing the permittees to, among other things, modify the road layout within the Project. The Dash 1 Permit allowed the permittees to replace the so-called "Loop Road" within the Project with two spurs off the main subdivision road (now known as "Hiddenwood Drive").

In late 1998 and early 1999, John and Karen Winchell ("Petitioners") filed a series of letters with Ed Stanak, the Coordinator for the Commission, seeking enforcement of the Dash 1 Permit. The Petitioners believe that the Dash 1 Permit requires that particular lots in the Project be specifically designated to be accessed only by Spur #2. Therefore, the Petitioners (whose lot is accessed by Spur #1) believe that the construction off the end of Spur #1 to access other lots of the subdivision constitutes a violation of the Dash 1 Permit.

In response to the Petitioners' letters, Susan Baird, the Assistant Coordinator for the District 7 Environmental Commission,[1] issued Jurisdictional Opinion 5-99-06 ("JO") on February 22, 1999. The JO determined that (a) there was no requirement in the Dash 1 Permit that particular lots in the Project be accessed by Spur #2, and (b) the construction off the end of Spur #1 to access lots 17, 18, 19, 20 and 21 did not constitute a substantial or material change to the Project and thus did not require a permit amendment pursuant to Environmental Board Rules ("EBR") 2(G) and 2(P).

On March 8, 1999, Petitioners filed a request for reconsideration of the JO with District 5 Coordinator Stanak. The request was denied on March 18, 1999.

On March 22, 1999, Petitioners filed a Petition for Declaratory Ruling, alleging that the JO was in error.

During a prehearing conference held by Board Chair Marcy Harding, the Petitioners stated that they believed that the JO issued by Coordinator Baird did not address the question which Petitioners had raised in their initial letters to Coordinator Stanak. Petitioners appeared to contend that the primary question for which they sought a JO was whether the construction which occurred off the end of Spur #1 was a "road," within the definition of EBR 2(A)(6) (the "Road Rule"), thereby triggering jurisdiction as a "development" under 10 V.S.A. § 6001(3). The Chair explained that the Board could not hear this question in the first instance and that Petitioners would need to seek a second Jurisdictional Opinion from the District Coordinator before the Board could address this particular concern.

Petitioners agreed to seek a second Jurisdictional Opinion, and the case was continued until such Jurisdictional Opinion was rendered, as it might render the first Declaratory Ruling petition moot.

On June 24, 1999, Coordinator Baird issued a second Jurisdictional Opinion (JO 5-99-6 (Remand)) (the "Second JO") in response to the Petitioners' second request. The Second JO repeated Baird's determination in her first JO that the construction off the end of Spur #1 was not a substantial or material change to the Project pursuant to EBR 2(G) and 2(P) and therefore did not require a permit amendment. Baird's second JO also determined that the access off Spur #1 was not a "road" within the meaning of the Road Rule.

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[1] Because of the workload in District 5, Baird was requested to draft the opinion.

On July 1, 1999, Petitioners appealed the Second JO to the Board.

On July 22, 1999, the Hiddenwood Homeowner's Association ("HHA") filed a request for party status to this petition.

On July 29, 1999, the Petitioners filed an objection to HHA's request for party status.

The Second Prehearing Conference was held on July 29, 1999.

On July 30, 1999, Chair Harding sent to the Service List a Memorandum suggesting that the relevant issues be framed in a certain manner.

On August 2, 1999, the Petitioners replied to the Chair's Memorandum, filed a petition for party status under EBR 14(A), and notified the Board that both Karen and John Winchell intend to participate as parties.

On August 6, 1999, Chair Harding issued the Second Prehearing Conference Report and Order.

On August 17, 1999, Petitioners filed an objection to certain rulings which appear in the Second Prehearing Order. Petitioners objected to the manner by which the Chair had framed the issues in the Second Prehearing Order, to the Chair's decision granting them party status under EBR 14(A)(5) but not under EBR 14(A)(1) or (2), and to the Chair's grant of EBR 14(B)(2) party status to HHA.

Also on August 17, 1999, HHA filed an objection to the filing and hearing dates in the Second Prehearing Order.

The Board deliberated on these objections on September 15, 1999, and on September 17, 1999 issued a Memorandum of Decision and Order upholding the Chair's framing of the issues. The Board noted also that the Petitioners had standing to petition for this Declaratory Ruling and therefore did not address their party status arguments. The Board further affirmed the Chair's grant of party status to HHA.

On November 15, 1999 Chair Harding convened a site visit and hearing before a Panel of the Board in Fayston, Vermont with the following entities participating:

Petitioners John and Karen Winchell
HHA by Bill Mlacak

On November 15, 1999 and December 15, 1999, the Panel deliberated on this matter.

Based upon a thorough review of the record, related argument, and the proposed findings of fact and conclusions of law, the Panel issued a proposed decision on December 16, 1999 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 3, 2000.

On January 3, 2000 the Petitioners filed a response to the proposed decision, requesting that certain changes be made to the proposed findings of fact. Neither party requested oral argument.

The Board deliberated on January 12, 2000. Following a thorough review of the proposed decision and the record, the Board declared the record complete and adjourned. This matter is now ready for final decision.

III. ISSUES

As determined by the Board in its September 17, 1999 Memorandum of Decision and Order, the issues in this case are:

1. Whether (a) Land Use Permit 5W0162-1 specifically designates that particular lots in the Project are to be accessed by only one of the Project subdivision's two spur roads (either Spur #1 or Spur #2), and (b) if yes, whether the access off Spur #1 to access lots 17, 18, 19, 20 and 21 constitutes a substantial and/or material change to a permitted project and thus requires a permit amendment pursuant to Environmental Board Rules ("EBRs") 2(G) and 2(P).

2. Whether the access off Spur #1 constitutes a road under the Road Rule, EBR 2(A)(6), thereby subjecting it to Act 250 jurisdiction.

IV. FINDINGS OF FACT

To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. *See Secretary, Agency of Natural Resources v.*

Upper Valley Regional Landfill Corporation, 167 Vt. 228, 241-42 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

1. On November 16, 1972, Land Use Permit #5W0162 was issued to Hiddenwood Associates for the Project. As initially permitted, the Project was to be a 55-lot subdivision and an 8700 foot road on a 151-acre tract located off the German Flats Road in Fayston, Vermont. However, only 28 lots have thus far been created.

2. A March 10, 1974 plot plan for the Project shows a series of roads, including a main road (Hiddenwood Drive) with driveways off of it and the so-called Loop Road, on a 50 foot wide right-of-way ("ROW") which was to commence where lots 8 and 22 front Hiddenwood Drive and thence run westerly in a clockwise direction between lots 8, 15, 13, 17, 18, 21, and 25 (along its outer edge) and lots 22, 23, 19, 20 and 24 (along its inner edge). The Loop Road was mowed, maintained and occasionally graded, but never topped with gravel.

3. Petitioners own lot 19 in the Project; the southern and western boundaries of lot 19 border on the former Loop Road.

4. Petitioners' deed grants them "an easement for ingress and egress in common with grantors and others over the private roads of the Subdivision...."

5. On September 3, 1987, the Dash 1 Permit amendment application was submitted to the Commission. The application is date stamped "REC'D DIST #5 COMM SEP 03 '87." The application requested, *inter alia*, a "change in road layout." The project narrative accompanying the application stated, "The proposed changes would remove the loop shown to the west of the main access road and substitute 2 spurs with driveways as shown."

6. Accompanying the amendment application was a plot plan, which is also date stamped "REC'D DIST #5 COMM SEP 03 '87" (the "September 1987 Plot Plan").

7. The September 1987 Plot Plan shows the two spurs. The spur denominated as "Spur #1" leads south off Hiddenwood Drive between lots 8 and 22. According to the September 1987 Plot Plan, Spur #1 terminates west of the common corner of the boundaries of lots 19, 22 and 23. However, when the Petitioners purchased their lot, the construction of Spur #1 actually terminated east of this common corner.

8. The spur denominated as "Spur #2" on the September 1987 Plot Plan leads south off Hiddenwood Drive between lots 24 and 25; the plot plan indicates that Spur #2 terminates west of the boundary between lots 20 and 24.

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9. There is a boulder on Spur #2 which prohibits vehicle use beyond the short access it provides to lots 24 and 25.

10. The September 1987 Plot Plan shows the 50-foot ROW that had appeared on the March 10, 1974 plot plan.

11. The September 1987 Plot Plan does not depict any lines for driveways leading to any of the lots served by either of the two spurs.

12. On October 13, 1987, the Commission issued the Dash 1 Permit, authorizing, among other things, a modification of the road layout within the Project. The Dash 1 Permit replaced the Loop Road with the two spurs, Spur #1 and Spur #2. Condition 1 of the Dash 1 Permit states, in pertinent part, that "The project shall be completed in accordance with the plans and exhibits on file with the District Environmental Commission...."

13. The September 1987 Plot Plan was the only plot plan in the Commission's files at the time that it issued the Dash 1 Permit.

14. There have been further amendments to the Permit; none of these amendments, however, have any bearing on the issues presented by this Declaratory Ruling.

15. A plot plan which is date stamped "REC'D DIST #5 COMM AUG 01 '89" appears in the Commission files; this plot plan was not in the Commission's files when the Dash 1 Permit was issued. This plot plan includes dotted lines leading off the two spurs, apparently depicting the location of the driveways to access lots 13, 17, 18, 19, 20, and 21.

16. A driveway leads north off the construction added to Spur #1 to provide access to the Petitioners' home.

17. At the intersection of Spur #1 and the access to the Petitioners' home, the traveled way is approximately 15 feet wide; east of this intersection Spur #1 appears to be as wide as 20 feet.

18. West of the intersection of Spur #1 and the access to the Petitioners' home, the traveled way continues in a westerly direction until it forks; the north fork leads to the home on lot 20 owed by the Reed-Rhoades, the west fork leads to the home on lot 21 owned by the Oblers.

19. There is no evidence in the Record which indicates who presently owns the other lots in the Project.

20. All of the lots which are presently accessed by Spur #1 are smaller than ten acres in size.

21. There is some evidence in the Record as to lengths between the boundaries of lots 17, 18, 19 and 20; however, there is no clear or definitive evidence as to the length of the traveled way beyond the point where Spur #1 ends.

22. The Dash 1 Permit permitted the entire lengths of Spur #1 and Spur #2 as they were proposed.

23. The Town of Fayston has both permanent zoning and subdivision bylaws.

V. CONCLUSIONS OF LAW

A. Scope of Review

A hearing on 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, the issue in a declaratory ruling proceeding is not whether a jurisdictional 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 any rule or order of the Board over the project described in the opinion.

B. Burden of Proof

The party seeking to change the "present state of affairs" generally has the burden of proof. *See Re: W. Joseph Gagnon*, Declaratory Ruling #173, Memorandum of Decision at 5 (July 3, 1986), *citing* McCormick, *Evidence* 949.

The burden of proof consists of the burdens of production and persuasion. *Applewood Corporation Dummerston Management*, Declaratory Ruling #325, Findings of Fact, Conclusions of Law, and Order at 8-9 (Sept. 25, 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, Findings of Fact, Conclusions of Law, and Order at 8 (Sept. 25, 1987), *aff'd In re L.W. Haynes*, 150 Vt. 572 (1988).

In this proceeding, the Petitioners have raised the question of jurisdiction over the construction which occurred beyond the end of Spur #1. Accordingly, the Petitioners have the burden of proof in this matter.

C. 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 hearing, the Chair stated that the Panel would take official notice of the files maintained by the Commission in this matter, in particular, the Permit; the Dash 1 Permit, which authorized the two spur roads; documents and exhibits which were filed concerning the application for and the issuance of the Dash 1 Permit; the two Jurisdictional Opinions issued by Coordinator Baird; a March 18, 1999 letter from Baird to Petitioner Karen Winchell; and that the Town of Fayston is a "ten-acre" town.

D. Discussion

1. Issue 1: Substantial or Material Change

The Board Rules relevant to the first Issue are the rules that define when a permit amendment is required (EBR 34), and the definitions of "substantial change" (EBR 2(G)) and "material change" (EBR 2(P)). Rule 34 states, "An amendment shall be required for any material or substantial change in a permitted project....."

a. Substantial Change

" 'Substantial change' means any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10)." EBR 2(G).

Finding substantial change involves a two step process. First, there must be a "cognizable" (i.e. physical) change to the permitted project. *See, e.g., Sugarbush Resort Holdings, Inc.*, Declaratory Ruling #328, Findings of Fact, Conclusions of Law, and Order (Feb. 27, 1997); *Re: David Enman (St. George Property),* Declaratory Ruling #326, Findings of Fact, Conclusions of Law, and Order (Dec. 23, 1996); *Re: Village of Ludlow*, Declaratory Ruling #212, Findings of Fact, Conclusions of Law, and Order (Dec. 29, 1989). Second, the change must have the potential to impact significantly on one or more of the ten Act 250 criteria. *Id.*; EBR 2(G). In considering the issue of substantial change, the Board has stated:

> In deciding whether Act 250 jurisdiction applies . . . , the appropriate consideration is whether the potential for significant impact is raised. This consideration does not require an in-depth review of possible impacts, but simply a determination that significant impacts may occur.

Village of Ludlow, supra, at 9 (*quoting Re: City of Montpelier*, Declaratory Ruling #190, Findings of Fact, Conclusions of Law, and Order at 7 (Sept. 6, 1988)). *See also In re Barlow*, 160 Vt. 513, 521-22 (1993) (upholding validity of EBR 2(G) by finding that an impact can be potential as long as it may be significant and affirming Board determination that an increase in the extraction rate and frequency of use of a gravel pit was a substantial change); *Re: Taft Corners Associates, Inc.*, #4C0696-11-EB (Remand), Findings of Fact, Conclusions of Law, and Order (Revised) (May 5, 1995) (substantial change found where increase in size of project involving retail and warehouse buildings would, without certain improvements to existing roads, have a potential for significant impact on Criterion 10 (town / regional plan)); *Re: Village of Ludlow, supra* (substantial change to an existing sewage treatment plant found where new parts were added and others were replaced with parts that were physically different because additional traffic and noise impacted Criteria 1(air), 5(traffic), and 8(aesthetics)).

b. Material Change

"'Material change' means any alteration to a 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).

A determination of whether an activity is a "material change" involves a two step analysis. First, the Board must decide whether a physical change or a change in use has occurred or will occur. *Vermont Institute of Natural Science,* Declaratory Ruling #352, Findings of Fact, Conclusions of Law, and Order at 26 (Feb. 11, 1999)*; Sugarbush Resort Holdings, Inc., supra; Re: David Enman (St. George Property), supra; Re: Mount Mansfield Co., Inc.,* Declaratory Ruling #296, Findings of Fact, Conclusions of Law, and Order (July 22, 1992). Second, if there is a change, the Board must determine whether the alteration has a significant impact on any finding, conclusion, term, or condition of the Permit and whether the alteration affects one or more of the values protected by Act 250. *Id.;* EBR 2(P); *and see In re Greg Gallagher*, 150 Vt. 50, 51 (1998).

c. Analysis

Since an analysis under both "substantial change" and "material change" rules requires a determination as to whether there has been a cognizable or physical change, this is the first question that should be addressed, as if such change is not present, the second, or "impacts," analysis is not necessary.

The Board's decision *Developer's Diversified Realty Corporation,* Declaratory Rulings #364, #371, and #375 (Consolidated), Findings of Fact, Conclusions of Law, and Order at 23 (March 25, 1999), guides our analysis of the first question in this case. There, the question presented was whether the addition of a Mezzanine within a previously permitted building constituted a "substantial" or "material change." The Board found that the plans which were part of the original permit application were vague: "The plans associated with the Permit are conceptual and show no detail of the interior of Department Store A." As a result of this vagueness, there was no specific benchmark from which to judge whether a change had occurred. Without this benchmark, the Board could not conclude that the Mezzanine constituted a cognizable change from what was approved in the initial permit.

Applying the *Developer's Diversified* analysis, the Board must first determine whether the Dash 1 Permit is specific enough in its language (or in the exhibits that accompanied it) such that it requires that certain specific lots in the Project could only be accessed by Spur #2. If such specificity can be found, then access to those lots by Spur #1 would be a cognizable or physical change which would satisfy the first step of the substantial/material change analysis.

The Dash 1 Permit itself is not specific. It authorizes the permittees to "modify the road layout." The only reference to the modifications that are approved appears in the standard language in Condition 1 of the Dash 1 Permit: "The project shall be completed in accordance with the plans and exhibits on file with the District Environmental Commission...."

In terms of exhibits, the only map in the Commission file at the time the Dash 1 Permit was issued was the September 1987 Plot Plan, which shows no specific driveways leading to specific lots. While there is another plot plan which shows driveways leading from each spur to specific lots, this map has a Commission date stamp reading "AUG 01 '89," a date long after the spurs were approved in October 1987.

Therefore, the question as to whether the use of Spur #1 to access lots which are closer to Spur #2 constitutes a cognizable change from what was permitted at the time of the 1987 Dash 1 Permit must be answered in the negative. The map in the Commission's file at the time the Dash 1 Permit was issued did not specify which lots were to be accessed by which spur. The Dash 1 Permit was therefore likewise vague, and it is thus impossible to establish any benchmark from which a cognizable change can be determined. *Developer's Diversified, supra.* Without this first element – cognizable/physical change - no substantial or material change can be found, and thus no permit amendment is necessary.

2. Issue 2: the Road Rule

The Board has jurisdiction over "developments" and "subdivisions," as those terms are defined in the statute, 10 V.S.A. §6001(3) and (19) and the Board's Rules, EBR 2(A) and (B). Act 250 permits are required only for such developments and subdivisions. 10 V.S.A. §6081.

The Board has stated in its rules that certain roads will constitute "developments" for purposes of establishing Act 250 jurisdiction over such roads and the lands which they access. Under the Road Rule,

> 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

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> continuous period of ten years commencing after the effective date of this rule shall be included.

EBR (2)(A)(6). Because the Town of Fayston has both permanent zoning and subdivision bylaws, it is a so-called "ten-acre" town, *see* 10 V.S.A. §6001(3), and thus jurisdiction under the Road Rule applies only if the tract (or tracts) of involved land is more than ten acres.

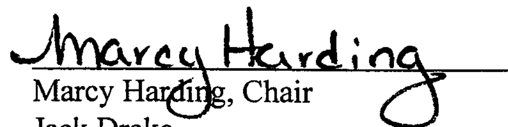
The purpose of the Road Rule is to determine whether Act 250 jurisdiction exists over the subject road and the lands which it serves. *See, In re R.. Brownson Spencer II,* 152 Vt. 330 (1989) (where elements of Road Rule are met, jurisdiction exists). Here, by virtue of the fact that the Project is a "subdivision," 10 V.S.A. §6001(19), and that the Project tract is already subject to an Act 250 permit, *Act 250 jurisdiction already exists over the entire Project tract*, including all lots and roads therein. Therefore, determining whether the construction at issue here falls within the ambit of the Road Rule serves no purpose. Since relevant jurisdiction is already established, such a determination would be merely an academic exercise, one which the Board declines to conduct.

VI. ORDER

The construction to access lots off Spur #1 does not require an amendment to the Permit.

Dated at Montpelier, Vermont this 12th day of January 2000.

ENVIRONMENTAL BOARD



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