

On February 28, 2002, Hack filed a Petition for Declaratory Ruling with the Board, appealing JO2. Hack contends that the Hack Project is not subject to Act 250 jurisdiction.

On February 28, 2002, the Fullers and Hack (Petitioners) filed their joint Motion to Consolidate the two Petitions for Declaratory Ruling as the facts in the two proceedings are substantially similar and the conclusions in JO1 and JO2 are the same.

Chair Harding convened a joint prehearing conference on Friday, March 15, 2002. The following individuals or entities appeared at the prehearing conference and were granted party status as noted.

The Fullers, Environmental Board Rule (EBR)14(A)(2) and
Mr. Hack, EBR 14(A)(2).

Also attending the prehearing conference were Barbara Greenwald and Linda Devlin, both appearing *pro se*. Ms. Greenwald and Ms. Devlin live in the vicinity of the Hack Project. Ms. Devlin indicated her intention to observe the proceeding only. Ms. Greenwald initially indicated her intention to seek party status in the Hack proceeding. Prior to the conclusion of the prehearing conference, however, Ms. Greenwald indicated that she would not seek party status.

In advance of the prehearing conference, the Fullers and Hack waived their rights to an evidentiary hearing. At the prehearing conference the parties waived their rights to oral argument and stipulated to the Findings of Fact set forth below.

Following the conclusion of the prehearing conference, the matter was recessed.

The Board deliberated on March 20, 2002. Based upon a thorough review of the record and filings, including the stipulated Findings of Fact, the Board declared the record complete and adjourned. The matter is now ready for final decision.

II. ISSUE

Whether the Fuller or Hack Projects require permits pursuant to Act 250 by virtue of the construction of a common road to access subdivided lots within each of the projects.

III. FINDINGS OF FACT

Based on the Parties' stipulation, the Board makes the following findings of fact.

D.R. #403

1. The Fullers own a 65 acre tract of land located off Gregg Hill Road in the Town of Waterbury.
2. The Fullers propose to divide the tract into three lots being 10.1, 10.1 and 45 acres in area respectively.
3. Access to all three lots will be by means of a common road.
4. The purpose of the subdivision is the sale of two residential lots on the open market with the third lot to be retained by the Fullers.
5. The Town of Waterbury has adopted permanent zoning bylaws but has not adopted permanent subdivision bylaws.

D.R. #404

6. Peter Hack owns a 15 acre tract of land located off Crossett Hill Road in the Town of Duxbury.
7. Peter Hack proposes to divide the tract into five lots of less than 10 acres each.
8. Access to lots numbered 3, 4 and 5 will be by means of a common road.
9. The purpose of the subdivision is the sale of residential lots on the open market.
10. The Town of Duxbury has adopted permanent zoning bylaws but has not adopted permanent subdivision bylaws.

IV. CONCLUSIONS OF LAW

Land use activities trigger Act 250 jurisdiction in one of two distinct and separate ways. The activity is either a “development” or a “subdivision.” See 10 V.S.A. Section 6081(a). Under 10 V.S.A. § 6001(3), “development” is defined, *inter alia*, as the construction of improvements on a tract or tracts of land owned or controlled by a person involving more than one acre of land within municipalities, like Waterbury and Duxbury, which have not adopted both permanent zoning and subdivision bylaws. Under Section 6001(19), “subdivision” is defined, *inter alia*, as a tract or tracts of land, owned or controlled by a person, which the person has partitioned or divided into six or more lots for the purpose of resale, within a continuous period of five years, in municipalities like Waterbury and Duxbury which have not adopted both permanent zoning and subdivision bylaws.

Neither project involves six or more lots, and, therefore, jurisdiction is not triggered under the subdivision provisions. The District #5 Coordinator has found that the planned construction of the common roadways accessing lots in each project triggers Act 250 jurisdiction under the statutory definition of “development.” Accordingly, when considering whether or not these or similar projects trigger jurisdiction, it must be determined which statutory provision controls the jurisdictional trigger.

This is not the first time that Act 250 program has been confronted with this issue relating to which statutory provision controls the triggering of jurisdiction when subdivisions and access roadway construction is involved in a project. In a 1973 declaratory ruling, the Board held that the construction of a roadway to provide access to two or more parcels constituted “development” under 10 V.S.A. §6001(3), and, therefore, was subject to Act 250 jurisdiction. *Re: Breakwater Associates*, Declaratory Ruling #29 (Sep. 26, 1973). *Breakwater Associates* effectively ignored the ten-lot (now six-lot) minimum and other jurisdictional tests created by statute and submitted all projects to Act 250 review except those few which involved only the sale of raw, unimproved lots with no infrastructure or those which could create access for each individual lot from a public way. To correct this unintended result, in 1975, the Board adopted EBR 2(A)(6) (the Road Rule) which overturned *Breakwater Associates* and made it clear that the term “development” did not include the construction of a road unless the road either provided access to more than five lots within a project, or was at least 800 feet in length.

More recently, during its 2001 session, the Vermont Legislature reduced the subdivision jurisdictional threshold from ten to six lots in certain municipalities. More on point to this proceeding, the Legislature repealed the Road Rule thereby eliminating jurisdiction over roadways providing access to lots. See Public Act No. 40 (H.475)(Act 40), July 1, 2001. Accordingly, by repealing the Road Rule, the

Legislature clearly intended that the construction of a road in and of itself is not “development” sufficient to trigger Act 250 review, where the road is for the purpose of accessing two or more lots in a “subdivision.”¹

This limitation on road construction activities being considered as “development” is also supported by established statutory construction rules. That being, “[w]hen two statutory provisions deal with the same subject matter, and one is general and the other more specific, the more specific provision 'must be given effect according to its terms.'" *State v. Jarvis* , 146 Vt. 636, 638 (1986), *quoting State v. Teachout* , 142 Vt. 69, 73 (1982); *see also, Looker v. City of Rutland* , 144 Vt. 344 (1984); *Petition of Town of Springfield* , 143 Vt. 483 (1983); *Lomberg v. Crowley* , 138 Vt. 420, 423 (1980); *Appelget & Elliott v. Baird* , 126 Vt. 503, 507 (1967) ((W)here two statutes may apply to a single circumstance, with conflicting consequences, the general statute must yield to the special.).

With this principle of construction in mind, the Board concludes that the provisions applicable to subdivisions are more specific and control when activities potentially fall under either the “development” or “subdivision” triggering definitions.

In each of these proceedings, while construction of the common roadways accessing lots is planned by the Petitioners, the activities of partitioning or dividing the tracts for the purpose of resale will control when deciding when and under what circumstances jurisdiction is triggered.

The Board concludes, therefore, that Act 250 jurisdiction does not attach to the Fuller or Hack Projects as neither involves the partitioning or dividing of the tracts for the purpose of resale into six or more lots under the definition of “subdivision.”²

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This intent is further evident by reviewing Sections 1 and 14 of Act 40. These sections were the result of a compromise reducing the jurisdictional threshold from ten to six lots in those towns without both permanent zoning and subdivision bylaws in exchange for elimination of the Road Rule. See, e.g. Testimony of Marcy Harding to House Natural Resources and Energy Committee (Jan. 17, 2002, Vt. Bien. Sess.).

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Thus, a road or other infrastructure that is constructed to serve residential lots will not, by and of itself, trigger jurisdiction under the statutory definition of "development." This decision, however, should not be read to exempt from the definition "development" roads or infrastructure that are constructed to serve a

V. ORDER

1. Declaratory Ruling Requests #403 and #404 are hereby processed as joint proceedings.
2. Act 250 jurisdiction does not attach to the Fuller or Hack Projects.
3. The January 16, 2002 JO #5-02-1 and the January 29, 2002 JO #5-02-2 are vacated.

Dated at Montpelier, Vermont on the 21st day of March, 2002.

ENVIRONMENTAL BOARD

 /s/Marcy Harding
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commercial or industrial subdivision, or, indeed, any commercial construction that occurs on a subdivided lot.