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

Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority Declaratory Ruling #406

Findings of Fact, Conclusions of Law, and Order

This is a petition for a declaratory ruling filed by Green Mountain Habitat for Humanity (Habitat) and the Burlington Housing Authority (BHA) concerning whether a Land Use Permit pursuant to 10 V.S.A. §§ 6001-6092 (Act 250) is required for the construction of an eight-unit affordable housing project with related subdivision, on Venus Avenue in Burlington (Project).

As set forth below, the Board finds that Act 250 jurisdiction attaches to the Project and that an Act 250 permit is therefore required.

I. Procedural Summary

On January 18, 2002, the District 4 Environmental Commission Coordinator (Coordinator), at Habitat's request, issued Jurisdictional Opinion 4-175 (JO) in which he determined that the Project requires an Act 250 Land Use Permit.

On February 28, 2002, the Coordinator issued a Reconsideration of JO 4-175, affirming the JO (Reconsidered JO).

On March 19, 2002, Habitat and BHA filed a Petition for Declaratory Ruling with the Environmental Board (Board), appealing the JO and the Reconsidered JO; they contend that the Project does not require an Act 250 permit.

On April 18, 2002, Board Chair Marcy Harding convened a Prehearing Conference with the following participants:

Habitat and BHA, by Neil Mickenberg, Esq.

John Desautels and Katherine Desautels (formerly Katherine Gluck), by Michael J. Straub, Esq.

June Garen, Beverly Senna, James P. Senna, Janet L. Prince, Robin E. Dayman, Kevin Greenblott, Robert D. Barnes, Christine Barnes, Odell E. Walker, Anthony Tran, Jeffrey L. Landa, Sarah Truax, Margaret Allard, Jay Allard, Harvey Allard, Jr., Kerry B. Davis, Rob Kimball, Peter Murray, Amy Murray, Kathy LaCross, Nancy Dupont, John F. Pruss, Jr., Frank A. Austin, Richard LaPointe, Gerald Boisjoli, Nancy H. Casey, Deborah L. Flynn, David E. Jones, Jed Marcelino, Linda Audette, Earl J.

Babcock, Jr., Carmel A. Babcock, James L. Cheeseman, Carol Cheeseman, Garry Bean, Robby Bean, Brenda Bean, Earl J. Babcock, Patrick J. McHugh, Geraldine M. Seymour, Robert G. Lutz, Jon A. Normandin, Norma C. Brunelle, Edward E. McGrath, Michael Peterson, Lorraine K. Pruss-Gorton, Paul W. Gorton, Mardi Senna, Norman Senna, David Langlois, Jane Langlois, Dwaine Hood, Sr., and Greg Langlois (together with John and Katherine Desautels, Neighbors), by Katherine Desautels.

The City of Burlington and Burlington Planning Commission (City of Burlington), by Kimberlee J. Sturtevant, Esq.

On April 19, 2002, Chair Harding issued a Prehearing Conference Report and Order (PCRO) identifying parties, the issue on appeal, and setting the case for hearing by a Panel of the Board. At the prehearing conference, the parties agreed to work together toward stipulating to the facts of the case, and the prehearing schedule was crafted accordingly. The parties did not file a stipulation of fact.

Also at the prehearing conference, there was some discussion concerning whether Michael Straub would represent the entire group of Neighbors, or only John and Katherine Desautels. On April 25, 2002, Mr. Straub confirmed that he represents John and Katherine Desautels and that Ms. Desautels represents the Neighbors.

On August 27, 2002, the parties filed a joint request to continue the hearing from September 4, 2002 to October 30, 2002.

Also on August 27, 2002, Chair Harding issued a Continuance Order granting the parties' joint request.

In accordance with the Continuance Order, a hearing panel of the Board convened a public hearing in this matter on October 30, 2002, took evidence from the parties. The Panel commenced deliberations immediately after the hearing and also on November 15, 2002.

Based upon a thorough review of the record and related argument, the Panel issued a proposed decision on November 20, 2002, which was sent to the parties. The parties were allowed to file written objections and request oral argument before the Board on or before December 6, 2002. On December 6, 2002, Habitat and BHA filed an objection to the proposed decision and requested oral argument.

On December 18, 2002, the Board heard oral argument and convened a deliberation concerning this 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.

II. Issue

Whether the Project constitutes a development and requires a land use permit pursuant to Act 250.

III. Findings of Fact

To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. *See Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

Topic headings are for organizational purposes only.

A. The Project

1. Habitat and BHA propose to build and sell four single-family residences and two duplex units (a total of eight units) at 140 Venus Avenue in Burlington.

2. No construction has taken place at the Venus Avenue Project site, and no site work has taken place.

3. The Project is located on a 2.3 - acre parcel.

4. BHA owns the 2.3 - acre parcel on which the Project will be located; Habitat owns none of the Project land.

5. The Project is legally structured as a condominium, and all of the unit owners will have an undivided interest in the common areas, including the land, a portion of which will be subject to a conservation easement to the Burlington Department of Parks and Recreation.

B. Green Mountain Habitat for Humanity

6. Habitat is a tax-exempt, Vermont non-profit corporation which is dedicated to the construction of affordable homes through the use of volunteers.

7. Habitat has one staff member and is governed by a volunteer Board of Directors.

8. Habitat receives grants from the Vermont Housing Conservation Board (VHCB), the Burlington Housing Trust Fund, and from foundations such as the Ronald McDonald foundation.

C. Other housing units constructed by Habitat

9. Habitat has built six housing units and is currently constructing a seventh housing unit within a five-mile radius of the Project within the past five years:

a. a duplex at 660 North Avenue, sold by Habitat and recorded December 20, 2000;

b. one single-family residence at 23 Allen Street, sold by Habitat on August 31, 2001 and recorded November 5, 2001;

c. one single-family residence at 48 Batchelder Street, sold by Habitat on December 3, 1998 and recorded January 27, 1999;

d. one single-family residence at 52 Batchelder Street sold, by Habitat on November 25, 1998 and recorded January 27, 1999

e. one single-family house at 176 South Champlain Street, sold by Habitat on June 4, 2002 and recorded June 17, 2002

f. one single-family unit, presently under construction on an existing lot on Sims Street, which Habitat plans to sell in late 2002 or early 2003

10. None of the seven other houses built by Habitat are contiguous to the Venus Avenue Project.

11. All of the seven other houses built by Habitat were built on existing lots; Habitat did not subdivide any lots in the course of building the other houses.

12. Each of the other houses built by Habitat , except the Sims Street house, was sold to a family as a private residence following construction.

13. Habitat has received zoning approval and other required city permits for the other seven houses it constructed, or is constructing.

14. Habitat has no single, overall "development plan" for the houses it constructs; rather, Habitat acts in an *ad hoc* mode -- if a lot becomes available and it is affordable, Habitat tries to acquire it to use as a building lot.

D. Funding for the Project and Habitat's other housing units

15. Part of the funding for the Project comes from a grant received by Habitat from VHCB, part comes from charitable donations, and part comes from mortgage payments to Habitat, which holds mortgages on housing units it constructs and sells.

16. The other seven housing units noted above were also partially funded by VHCB grants, charitable donations, and mortgage payments to Habitat, which holds the mortgages for these housing units.

17. In the construction of its houses, Habitat relies on volunteer work and occasionally contracts for certain work, such as electrical work.

E. Burlington Housing Authority

18. BHA is a Vermont municipal housing authority within the city of Burlington which constructs affordable housing and assists low-income individuals and families in finding affordable housing.

F. Other housing units constructed by BHA

19 During the past five years BHA has not subdivided any land for resale.

20. BHA constructed only one unit within the past five years, an apartment at the Franklin Square Apartment complex.

21. BHA did not participate in the development or construction of any of the other houses noted above which Habitat built.

G. Burlington Development Review Board approval of the Project

22. The Burlington Development Review Board (DRB) conditioned its approval of the Project on several things, including a condition requiring that:

> Habitat and the Burlington Housing authority shall remain responsible as the original developer and applicant for this eight (8) unit PRD for any maintenance or permitting issue(s) for a period not to exceed three (3) years beyond the date of issuance of the final certificate of occupancy for the development.

23. The DRB acknowledged both Habitat and BHA as the original developer in its conditions of approval.

24. The DRB approved the Project on February 20, 2001.

H. Other city and state permits for the Project

25. BHA and Habitat applied jointly for city permits, including the zoning permit, for the Project.

26. The Public Water System Permit identifies BHA as the permittee; the record does not indicate the identity of the applicant.

27. The Project received subdivision approval from the City of Burlington on February 20, 2001, and was reviewed and approved under Burlington's subdivision ordinance; the subdivision permit identifies BHA as the landowner; the record does not indicate the identity of the applicant.

28. The state Water Supply and Wastewater Disposal Permit identifies BHA as the landowner; the record does not indicate the identity of the applicant.

I. Relationship between Habitat and BHA relative to the Project

29. Habitat and BHA have entered into an Agreement which requires each organization to construct four of the eight units involved in the Project.

30. Under the Agreement, after Habitat constructs a unit, BHA will convey its interest in the unit and an undivided one-eighth interest in the common areas to Habitat.

31. Immediately following the conveyance from BHA, Habitat will convey the same property to a private homeowner.

32. Habitat will never own more than four of the units and will never own more than an undivided interest in one-half the common areas.

33. There is no present agreement between BHA and Habitat concerning which organization is responsible for building which unit.

34. Habitat is solely responsible for all costs associated with building its four units.

35. BHA will hire laborers to build its four units.

36. There will be no shared purchase of materials by BHA and Habitat in the construction of their units.

37. The BHA units will be sold to homeowners along with an undivided one-eighth interest in the common areas for each unit.

38. Habitat and BHA are jointly responsible for obtaining grants to cover infrastructure associated with the Project; such grants will be made to Habitat and BHA jointly.

39. BHA and Habitat hold no joint escrow accounts or financial paper.

40. Habitat paid for the engineering studies and plans for all of the eight units at the Project.

41. Plans and studies submitted by Lamoureux and Dickinson, the engineering firm, include plans for all eight units in the Project. The plans are entitled "Habitat for Humanity – 8 Unit PRD."

42. All housing units at the Project are of a common design.

43. This Project is the only project in which BHA has worked directly with Habitat.

44. When the Project concludes, BHA and Habitat will have no ownership interest in the land.

45. Upon their construction, a condominium association will be formed for the eight units; the association will hold the common land at the Project.

46. The Burlington Parks and Recreation Department will control the conservation land at the Project site.

IV. Conclusions Of Law

The issue is whether the Project is a "development." Act 250 defines "development" to include:

> the construction of housing projects such as cooperatives, condominiums, or dwellings, or construction or maintenance of mobile homes or trailer parks, with 10 or more units, constructed or maintained on a tract or tracts of land, owned or controlled by a person, within a radius of five miles of any point on any involved land, and within a continuous period of five years.

10 V.S.A. §6001(3)(A)(iv); *see also*, EBR 2(A)(3)(defining "development").

To determine whether the Project is a development, it is helpful to break the definition of "development," as it pertains to housing units, into its constituent elements.

A. "the construction of housing projects"

The Project is the construction of a housing project of eight units, although BHA and Habitat argue that only four units are attributable to each of them.

B. "with ten or more units"

Even if only four of the units at the Project are attributable to Habitat, those four units, added to the six units already constructed by Habitat, and the seventh unit under construction, put Habitat's portion of the Project over the ten unit threshold.

C. "constructed or maintained on a tract or tracts of land"

The Project is located on a 2.3 - acre parcel.

D. "owned or controlled"

BHA owns the 2.3-acre parcel where the Project is located; by virtue of its Agreement with BHA, Habitat exercises control over the parcel. *See, In re Eastland, Inc.*, 151 Vt. 497 (1989); *In re Lou R. Vitale*, 151 Vt. 580 (1989).

E. "by a person"

EBR 2(H) defines "person" by reference to 10 V.S.A. § 6001(14)(A) and (B). The statute, in turn, defines "person" to include " . . . an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership…." 10 V.S.A. § 6001(14)(A)(i).

A joint venture is a relationship between parties "to engage in and carry out a single business venture for joint profit without any actual partnership or corporate designation." *Vermont Environmental Board v. Chickering*, 155 Vt. 308, 317 (1990)(citations omitted).

While, arguably, Habitat and BHA will each build, own, and sell their four units, a number of factors lead to the conclusion that the Project is a single business venture consisting of eight units.

BHA and Habitat applied jointly for city permits for the Project. The Burlington DRB's approval, which acknowledges both Habitat and BHA as the Project's original developer, includes a condition which requires that Habitat and BHA "remain responsible as the original developer and applicant for this eight (8) unit PRD for any

maintenance or permitting issue(s) for a period not to exceed three (3) years beyond the date of issuance of the final certificate of occupancy for the development."

Habitat and BHA have entered into an Agreement concerning the construction of the eight units involved in the Project. While Habitat will never own more than four of the units and will never own more than an undivided interest in one-half the common areas, and both Habitat and BHA are responsible for the financing for and construction of their discrete four units, the Agreement acknowledges that BHA has an interest in each of Habitat's four units, as it includes an understanding that, after Habitat constructs a unit, BHA will convey its interest in the unit to Habitat.

Other factors indicate the closeness of the Habitat and BHA relationship as it concerns the Project. While BHA and Habitat hold no joint financial papers, they are jointly responsible for getting grants to cover infrastructure associated with the Project. Habitat paid for the engineering studies and plans for all of the eight units at the Project; plans submitted by the engineering firm include plans for all 8 units in the Project. Additionally, all housing units at the Project are of a common design.

As it is clear that BHA and Habitat are acting in concert with respect to this Project, the Board concludes that it is a "single business venture." [1]

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[1] Habitat takes issue with adding the seven other houses that Habitat built (see Findings of Fact, §C) to the Project's eight units in order to reach the 10 unit threshold under §6001(3)(A)(4). It argues that "the BHA/Habitat joint venture which constitutes the "person" under 10 V.S.A. §6001(3) is a different entity than Habitat, which alone built the seven Other Houses over the last five years."

To agree with Habitat's first argument – that a joint venture is a " 'legal or commercial entity,' distinct from the individual acts of its separate members" - would ignore the concept of "person," under Act 250. It would allow an entity (like Habitat) to build nine houses and then, by creating a joint venture (Habitat/BHA) by joining itself to another organization (BHA), to build nine more houses within five miles and five years with no Act 250 jurisdiction attaching to the second project. This is exactly the sort of activity disapproved of in the *Chickering* case.

Habitat argues next that the seven other houses cannot be attributed to the Project, since they were built only by Habitat. This argument would again separate out Habitat's individual acts from the Habitat/BHA joint venture. Again, this is contrary to the concept of "person" under the Act. It is Habitat's activities as a "person" that trigger jurisdiction over the Project; and Habitat must bring to the Project all of its prior acts, including the construction of the seven other houses. *See, In re Spencer,* 152 Vt. 330, 337 – 339 (1989) ("Spencer and wife" do not comprise a separate "person" from "Spencer and Vargas" or Spencer, himself); *Re: John W. Stevens and Bruce Gyles,* Declaratory Ruling #240, Findings of Fact, Conclusions of Law, and Order at 11 (May 8,

While Habitat is a nonprofit corporation and BHA is a Vermont municipal housing authority, the Board also finds that the single business venture in which they are engaged is "for joint profit." There is nothing in the word "profit" that expressly limits its application to financial gain from sales alone.[2] "Profit" can be found in avoided costs; here, Habitat profited by its association with BHA because Habitat did not need to spend funds to purchase the land for its four units, and BHA profited because Habitat paid for the engineering studies and plans for all of the eight units at the Project, including those to be built by BHA.

The Board therefore concludes that BHA and Habitat are engaged in a joint venture in the development of the eight units on Venus Avenue and thus, for purposes of this Project, are the same "person" under Act 250 and the Board's Rules.

F. "within a radius of five miles"

The seven housing units constructed by Habitat are all within five miles of the Project.

G. "of any point on any involved land"

Habitat argues that the use of the term "involved land" connotes that there must be a relationship between the Project and the other housing units constructed by Habitat. The Neighbors reply that the term merely means that if a house sits on a

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1992); *Re: Marcel and Stella Roberts,* Declaratory Ruling #265, Findings of Fact, Conclusions of Law, and Order at 10 (May 11, 1993); *Re: Marcel Roberts and Noel Lussier*, Declaratory Ruling #239, Findings of Fact, Conclusions of Law, and Order at 5-6 (May 11, 1993).

[2] In determining the meaning of terms used in a statute, one looks first to the statutory definitions; when, however, such terms are not defined, they "are to be given their plain and commonly accepted meaning," *Vincent v. State Retirement Board*, 148 Vt. 531, 535 -36 (1987), as "in the absence of compelling reasons to hold otherwise, it is assumed that the plain and ordinary meaning of statutory language was intended by the legislature." *State v. Young*, 143 Vt. 413, 415 (1983). There is no definition of the word "profit" either in 10 V.S.A. Ch. 151 (Act 250), or in the statutory definitions found in 1 V.S.A. Ch. 3, subch. 2; thus, one may turn to the dictionary for assistance in defining the term. While the definition of "profit" most commonly is "the gross proceeds of a business transaction less the costs of the transaction, i.e. net proceeds," it also includes the "accession of good, valuable results [and] useful consequences…." *Black's Law Dictionary,* (6th Ed., 1990).

portion of a lot, the five mile measurement is not made from the location of the house but from any point on the lot on which the house is located.

The Neighbors have the more persuasive argument. In its decision in *Re: Burlington Housing Authority*, Declaratory Ruling #124, Findings of Fact, Conclusions of Law, and Order (May 20, 1981), *aff'd, In re Burlington Housing Authority*, 143 Vt. 80, 83 (1983), the Board expressly rejected the application of the "involved land" [3] language which pertains to commercial or industrial construction "involving" more than ten acres, 10 V.S.A. §6001(3)(A)(i), to the definition of "development" which pertains to housing units. 10 V.S.A. §6001(3)(A)(iv):

> We also reject petitioner's argument that the Supreme Court's decision in *Committee to Save the Bishop's House v. Medical Center Hospital,* 137 Vt. 142 (1979) exempts scattered housing projects from Act 250 jurisdiction unless a functional relationship exists among the sites that effect a significant impact under the environmental criteria of the Act. … However, it is clear from the *Bishop's House* decision that parcels which are actually built upon are "involved" in the development, whatever the interrelationship among such parcels might be. See *Bishop's House*, 137 Vt. at 150. In the case of housing projects, this analysis makes a great deal of sense, since the legislature expressed its concern over the cumulative environmental and fiscal impacts of 10 or more new housing units in a certain area – e.g., effects on school enrollment, public utilities and services, water supplies and prime agricultural soils. These effects exist cumulatively with the development of the housing units, whether on one site or on many, totally apart from the interactive effects of one site on another. …

Burlington Housing Authority at 3. [4]

Habitat argues that the Board has adopted a rule which defines "involved land," EBR 2(F)(1), and that this definition must apply to the definition of development which

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[3] *See* EBR 2(F)(1).

[4] Habitat also cites the Supreme Court case of *In re Stokes Communications Corp.,* 164 Vt. 30, 36 (1995), in support of its "involved land" argument. Again, however, *Stokes* was a matter in which the definition of "development" now found in 10 V.S.A. §6003(A)(i) was at issue, not the definition pertaining to housing units in subsection (A)(iv).

pertains to "housing units." Habitat asserts that a failure to do so violates the Administrative Procedures Act, 3 V.S.A. Ch. 25 (APA). [5]

Habitat's claim ignores the rationale of the earlier *Burlington Housing Authority* case. As is clear from the *Burlington Housing Authority* decision, the Board has earlier specifically rejected the arguments now raised by Habitat, finding that there need not be conclusion that "a functional relationship exists among the sites that effect a significant impact under the environmental criteria of the Act." *Id.* The Board also notes *Burlington Housing Authority's* emphasis on the cumulative impacts caused by housing construction, which exists even if there is no functional relationship between the different housing sites.

The term "involved land" has been used by the Board solely in terms of computing relevant acreage when determining whether a project "involves" more than one or ten acres of land. There is a distinction between the way the term "involved land" is used for commercial or industrial development and the way it is used for housing projects. Section 6001(3)(A)(i) states that "development" means:

> i) The construction of improvements on a tract or tracts of land, owned or controlled by a person, *involving more than 10 acres of land within a radius of five miles of any point on any involved land*, for commercial or industrial purposes in a municipality that has adopted permanent zoning and subdivision bylaws.

As is apparent from the language of the statute, to be subject to Act 250, development for commercial or industrial purposes in a "ten-acre" town must *involve* more than 10 acres of land; the focus under the statute is the *size* of the parcel or parcels of land, as, if less than 10 acres are "involved," there is no Act 250 jurisdiction.

By contrast, §6001(3)(A)(iv) states that "development" means

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[5] To agree with Habitat's apparent claim of error regarding the APA - that the Panel's decision writes a new rule which has not gone through the APA process - would mean that the Board could never, in a decision, establish a definition for a term. This makes little sense, as it would mean that the Board could never make a decision as to the meaning of a word or a term in Act 250, if the word had not already been defined by a rule. While, in light of this case and Habitat's argument, it might be advisable for the Board to consider writing such a rule to apply to housing projects, the present nonexistence of such a rule does not render the Board's actions illegal.

The Board notes further that the definition of "involved land" that Habitat promotes – one which integrate the "common-sense criteria" – was also not adopted through the APA process.

> (iv) The construction of housing projects such as cooperatives, condominiums, or dwellings, or construction or maintenance of mobile homes or trailer parks, with 10 or more units, *constructed or maintained on a tract or tracts of land, owned or controlled by a person, within a radius of five miles of any point on any involved land,* and within any continuous period of five years.

The requirement that the development must *involve* parcels which comprise more than 10 acres of land does not exist for jurisdiction over housing projects; rather, the *number of units* is the primary concern, not the acreage on which they sit, either collectively or individually. *Burlington Housing Authority* tells us that every house sits on its own parcel or parcels of "involved land," and the only question is whether any point on such a parcel is within five miles of other parcels. [6]

Lastly, the specific language of the definition of "involved land" in EBR 2(F)(1) makes it clear that it cannot apply to housing unit development:

> (1) The entire tract or tracts of land, within a radius of five miles, upon which *the construction of improvements for commercial or industrial purposes will occur*, and any other tract, within a radius of five miles, to be used as part of the project or where there is a relationship to the tract or tracts upon which the construction of improvements will occur such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship. In the event that a commercial or industrial project is to be completed in stages according to a plan, or is part of a larger undertaking,

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[6] Despite Habitat's claim that the Board's decision today ignores the existence of the words "involved land" in the statute, the concepts embodied in the EBR 2(F)(1) definition of "involved land" *are* applicable to housing unit development and can be used when considering jurisdiction. The "involved land" analysis in Rule 2(F)(1) may encompass a situation in which a house is built on Lot A, but has its primary or secondary leachfield located on Lot B, a separate lot. Lot B may not be contiguous to Lot A; Lot B may not even be owned by the owner of Lot A; it need only be controlled by such owner. In such an example, Lot B would be considered to be "involved land" with Lot A, and if Lot B is within five miles of other housing unit lots, then the house on Lot A house will be counted as a housing unit under §6001(3)(A)(iv), even if Lot A itself is not within the five-mile radius.

Thus, while Habitat argues that our decision strikes the term "involved land" from the statute, we do not ignore the existence of those words. We merely interpret them differently than what Habitat would prefer.

> all land involved in the entire project shall be included for the purpose of determining jurisdiction.

EBR 2(F)(1) (emphasis added). The particular reference in Rule 2(F)(1) to "the construction of improvements for commercial or industrial purposes" indicates the types of development - those referenced in 10 V.S.A. §6001(3)(A)(i), (ii) and (iii) – to which the Rule applies. Since housing unit development is a different animal, one which is not included within the legislature's "commercial or industrial purposes" category, the definition in Rule 2(F)(1) is inapposite.

Habitat raises a stronger claim with its "single project" argument, one which is based both on the *Burlington Housing Authority* case, as affirmed, and the later decision in *Re: Trono Construction Co., Inc.,* Declaratory Ruling 149, Findings of Fact, Conclusions of Law, and Order (May 23, 1984), *aff'd, In re Trono Construction Co.,* 146 Vt. 591 (1986). In these cases, the Board and Vermont Supreme Court looked to whether housing projects on separate tracts "are so closely related as to constitute a single 'development' for purposes of Act 250." *In re Trono Construction Co.,* 146 Vt. at 592.

Trono involved two housing projects on separate parcels of land in Burlington. The developer obtained an Act 250 permit for one project (twelve units on College Street), completed construction and began selling units, and then commenced construction on a nine-unit housing project on North Union Street, within 5 miles of the first project. The Court affirmed the Board's decision that "the mixture of the timing of the projects and common ownership brought [the] second development project within the strictures of Act 250." *Id.* The Court noted that the Board had considered "common sense criteria" to determine whether different housing projects constitute a single development, such as common ownership or management, common funding, shared facilities, and contiguity in time of development. [7]

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[7] Because *Trono* cites the "criteria" approvingly, Habitat argues that the Panel is therefore "overturning" the Court's *Trono* decision. The Board disagrees.

The Supreme Court's *Trono* decision did not *establish* a test that must be followed in all subsequent cases. Rather, the court simply affirmed the test that the Board decided to apply. This does not mean that if the Board chooses to apply a different test, the Court would disallow it because it was not the same test as had been applied in *Trono.* Indeed, as more fully discussed below, in 1990, the legislature amended the definition of housing unit to add the "five year" requirement, something that did not exist at the time of the Court's 1986 *Trono* decision. Certainly, this amendment allows the Board to undertake a new analysis of §6001(3)(A)(iv), free from the language of the Court's decision. The Board is therefore not "overturning" the *Trono* decision; it is merely interpreting the meaning of the law in light of the legislative change.

Trono, both at the Board and in the Supreme Court, was based on the Board's earlier, May 1981 *Burlington Housing Authority* decision, which, for the first time, introduced the "common sense criteria" test to the housing unit definition in response to an argument that had been presented to the Board:

> Petitioner argues that our finding that a housing project may exist on scattered sites will subject to Act 250 jurisdiction any developer who builds more than 10 units of any type *at any time* within a five mile radius…..
>
> a. We do not hold that any builder who has constructed 10 or more units will automatically trigger Act 250 jurisdiction with each new unit to be constructed within the necessary geographical radius. A developer may, over time, build and sell a number of different housing projects in scattered locations. Several common-sense criteria *may* be used to determine whether any of these scattered developments would comprise a related housing project. Such indications would include: retained common ownership or management, common funding, shared facilities, and contiguity in time of development. …

Burlington Housing Authority, at 2 (emphasis added). [8] It is apparent from the above language from *Burlington Housing Authority* that the principal concern of the petitioner in that matter was the "ultimate scenario" claim that housing units built 20 or 30 years apart could be added together to trigger jurisdiction. [9] The Board's measured reply – and its decision to link scattered housing projects together through an initiative based on "common-sense criteria" – can be seen as a rational response to that concern.

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[8] Subsequent reference to these criteria, within a ten-acre "involved land" analysis and not an analysis of "development" pertaining to housing projects, appears in *Re: Town of Wilmington*, Declaratory Ruling #258, Findings of Fact, Conclusions of Law, and Order at 10 (Jun. 30, 1992). *And, see, Re*: *Lake Realty*, #9A0175-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Oct. 20, 1989). These criteria were also noted in *William Dibbern*, #5R0194-1-EB, Findings of Fact, Conclusions of Law, and Order at 5 (July 16, 1981).

[9] The petitioner also expressed a concern that jurisdiction would attach to "any person who merely owned 10 or more units within a five mile radius," but the Board quickly dismissed that fear, noting that "mere ownership does not constitute a 'development' under §6001(3)." *Burlington Housing Authority* at 2 – 3.

The question is whether these "common-sense criteria" remain as critical a component to determining jurisdiction over housing projects today as they were in the early 1980s. Several considerations provide an answer.

First, the use of the word "may" in the Board's *Burlington Housing Authority* decision indicates that, in the absence of other factors, the "common sense criteria" provide guidance to the Board's jurisdictional determination. Although Habitat dismisses it as immaterial to the "single project" question raised herein, it is nonetheless significant to note that Act 250 was amended in 1990 (*after* all the decisions in *Burlington Housing Authority* and *Trono*) to add the words "and within any continuous period of five years" to the definition of housing unit "development." Act No. 234, §3 (1989 Adj. Sess., eff. June 4, 1990). Thus, as one of the "common-sense criteria" specifically noted in the *Burlington Housing Authority* decision - contiguity in time of development – was specifically addressed and limited by the Legislature, the single, principal fear presented by the *Burlington Housing Authority* petitioner no longer exists, and the Board need no longer rely on such criteria as a protection against an unwarranted extension or overreaching of Act 250's housing project jurisdiction. [10]

Second, the Board presumes that the legislature intended the plain meaning of the statutory language. *Re: Vermont Egg Farms, Inc.,* Declaratory Ruling #317, Findings of Fact, Conclusions of Law, and Order at 8 (Jun. 14, 1996), *citing Bisson v. Ward*, 160 Vt. 343, 348 (1993). Therefore, if the meaning of the statute is plain on its face, the Board enforces the statute according to its express terms. *Vermont Egg Farms, Inc.,* at 8, *citing Burlington Electric Dept. v. Vermont Dept. of Taxes*, 154 Vt. 332, 335-36 (1990). The plain language of the statute, 10 V.S.A. §6001(3)(A)(iv), contains no requirement that housing units on different parcels must be linked together as a single project before jurisdiction will be triggered. To the contrary, the statute sets up only certain factors that must be present to create jurisdiction: the construction of ten or

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[10] It is interesting to note that the 1990 amendment which added the five-year requirement may also have been in response to the Board's decision in *Re: Harold Jacobs,* Declaratory Ruling #210, Findings of Fact, Conclusions of Law, and Order at 2 (Sept. 28, 1989), in which the Board held that there were no time frame limits within the definition of "development" pertaining to housing units.

Additionally, the *Harold Jacobs* decision makes no mention of the "common-sense criteria" established by *Burlington Housing Authority.* Two other related Board decisions, one issued before and one issued after the 1990 amendment, also ignore those criteria. *Re: Bradford Moore / S.D.L. Enterprises, Inc.*, Declaratory Ruling #205, Findings of Fact, Conclusions of Law, and Order (Apr. 24, 1990); *Re: Richard Farnham*, Declaratory Ruling #250, Findings of Fact, Conclusions of Law, and Order (July 17, 1992). The Board's application of the "common sense criteria," therefore, has not been consistent.

more housing units, on land owned or controlled by a person, within five miles and five years of each other. Those factors are all present in the instant case. [11]

Third, the elements which appear in §6001(3)(A)(iv) are virtually identical to those which appear in the definition of "subdivision," 10 V.S.A. §6001(19): "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, … within any continuous period of five years." When determining whether the partitioning of lots on separate tracts constitutes a "subdivision," the Board does not require that any common elements (ownership, funding, etc.) exist between those separate tracts; the Board only looks to elements of statute and not to whether there is some sort of relationship between the lots.

The Board also notes that the recent amendment to the definition of "development," relating to the construction of housing units in designated downtowns, likewise simply counts units constructed by a person within five years and five miles. *See*, 10 V.S.A. §6001(C). [12] Again, the legislature has not required that there be *any*

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[11] Habitat contends that our decision violates the limitations on Board jurisdiction imposed by the Supreme Court's *Bishop's House* decision - - that Act 250 jurisdiction attaches "only where activity on a very major scale is planned." 137 Vt. at 151. But it is the legislature which decides the "scale" of developments which will be subject to Act 250 jurisdiction; here, §6001(3)(A)(iv) contains certain elements, such as ownership, distance and time, and as long as a project meets the language of that section, the law applies.

[12] Section 6001(C) reads:

> (C) For the purposes of determining jurisdiction under subdivisions (3)(A) and (3)(B) of this section:
>
> (i) Housing units constructed by a person partially or completely outside a designated downtown development district shall not be counted to determine jurisdiction over housing units constructed by a person entirely within a designated downtown development district.
>
> (ii) Within any continuous period of five years, housing units constructed by a person entirely within a designated downtown district shall be counted together with housing units constructed by a person partially or completely outside a designated downtown development district to determine jurisdiction over the housing units constructed by a person partially or completely outside the designated downtown development district and within a five-mile radius.

relationship between the housing units that are considered for purposes of determining jurisdiction. [13]

The Vermont Supreme Court has held that "when the same words are used in different sections of the same statute they will bear the same meaning throughout, unless it is apparent that another meaning was intended…." *Billings v. Billings*, 114 Vt. 512, 517 (1946); *accord, State v. Welch*, 135 Vt. 316, 321 (1977). The Board believes that the fact that the legislature requires no linkage between lots counted for purposes of determining the existence of a "subdivision" or units counted for purposes of determining jurisdiction for downtown housing, no linkage is required under a straight reading of 10 V.S.A. §6001(3)(A)(iv).

Fourth, in terms of their environmental impact on the criteria listed in 10 V.S.A. §6086(a), under some circumstances there may be no difference between a residential subdivision and an equal number of single family housing units on tracts of common land. Whether or not they are related by "common sense criteria," housing units on common land may have the same environmental impacts as houses which are each on their own separate lots. [14] Because the environmental impacts can be identical, there is

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> (iii) All housing units constructed by a person within a designated downtown development district within any continuous period of five years, commencing on or after the effective date of this subdivision, shall be counted together.

[13] Habitat argues that the legislative history of the 1990 amendment reveals that its purpose was to protect developers from Act 250 jurisdiction in relation to housing that was constructed over an extended period, and that the Panel's use of the amendment to expand jurisdiction turns this purpose on its head.

The Board disagrees. The decision today recognizes that the 1990 amendment *is* a protection for developers. The decision is a statement that the "five year" test replaces the "common-sense criteria" that had earlier been established in the *Burlington Housing Authority* decision as an attempt to address a complaint that there was no time limitation in the law as it previously existed. To adopt Habitat's claim would mean that not only does the "five year" requirement exist, but also all of the "criteria" would still apply, even though two of the "criteria" (common ownership or management and contiguity in time of development) specifically relate to time sensitive issues.

[14] Habitat asserts that these "cumulative effect" considerations can apply equally to commercial or industrial developments which together exceed 10 acres, but the Supreme Court's *Bishop's House* decision rejects this approach.

It was within the context of determining acreage involved in a project that the *Bishop's House* case was decided. The case did not concern the question of how to

no reason to treat subdivisions and housing unit developments differently for jurisdictional purposes. [15]

Lastly, the ramifications of requiring a "common sense criteria" relationship between housing units could allow a person to build nine housing units, sell the last unit, commence construction on the next nine units, *ad infinitum*, as long as he was careful to obtain funding from different banks. The five-year test would thus be rendered surplusage, contrary to general rules of statutory construction. "In construing a statute, every part of the statute must be considered, and every word, clause, and sentence given effect if possible." *State v. Stevens*, 137 Vt. 473, 481 (1979); *Slocum et al. v. Department of Social Welfare*, 154 Vt. 474 (1990); *State v. Tierney*, 138 Vt. 163, 165 (1980); *State v. Racine*, 133 Vt. 111, 114 (1974) (court "must presume that all language is inserted in a statute advisedly").

The Board therefore concludes that the plain language of the 1990 amendment supercedes the "common-sense criteria" originally enumerated in the 1981 *Burlington Housing Authority* decision. [16]

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measure the distances between housing units, which is what the "involved land" language in §6001(3)(A)(iv) addresses.

The Board also notes that the "cumulative effect" argument appears in the earlier *Burlington Housing Authority* decision; the Board did not create it for this decision.

[15] Habitat contends that housing projects should not be equated with subdivisions because the definition of "subdivision" does not include a reference to "involved land." While this is true, if one considers that the use of the word "involved land" in the definition of housing projects relates to distances between the parcels on which the individual houses sit, and not the size of those parcels, then the fact that the definition of "subdivision" does not include a reference to "involved land" is not material to our decision. Further, by its very nature, all of the land in a subdivision is "involved land;" there is simply no need or reason to refer to the concept of "involved land" within the definition of "subdivision."

[16] Habitat claims that, even if *Trono's* "contiguity in time of development" criterion is addressed by the 1990 amendment, the other "criteria" required by *Trono* still exist. Again, however, as noted above, the *Trono* decision does not establish any requirements that the Board must follow; it merely reaffirms those that the Board chose to apply back in the mid-1980s. Nothing prohibits the Board from finding that the 1990 amendment supercedes earlier requirements in their entirety. Further, Habitat ignores all of the other reasons as to why the "common-sense criteria" should be abandoned.

Nor can the Board agree with Habitat's contention that its citation to *Trono* in the Board's later *Town of Wilmington* decision, *supra,* note 8, means that the Board was

H. "and within a continuous period of five years."

Habitat's seven other houses were all built within the past five years.

Conclusion

The Project meets the definition of a housing unit "development." [17]

V. Order

The Project constitutes a development, jurisdiction is triggered, and an Act 250 Land Use Permit is required.

Dated at Montpelier, Vermont this 31st day of December 2002.

ENVIRONMENTAL BOARD

_/s/Marcy Harding_____
Marcy Harding, Chair
John Drake
* Bernie Henault
Samuel Lloyd
* W. William Martinez
Alice Olenick
Jean Richardson
Donald Sargent

* Members Henault and Martinez dissent from this decision.

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citing *Trono* with approval, even after the 1990 amendments. The *Town of Wilmington* case merely mentions (within the context of a 10-acre "involved land" analysis) the "'criteria" noted in *Trono*. This mention is hardly of any note.

[17] Habitat notes that the biggest obstacle to building affordable housing in Vermont is the objection of neighbors. While the Board recognizes and lauds Habitat's goals and purposes and realizes that its decision today may make those goals more difficult to achieve, the section of the law at issue here, 10 V.S.A. §6001(3)(A)(iv), makes no distinction between affordable housing and market rate housing. The only provision of Act 250 that provides special dispensation for the construction of affordable housing appears in 10 V.S.A. §6001(3)(B), and, if further exceptions to the law for the benefit of affordable housing projects are to be made, they must also be legislative in origin.