

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

Re: Swedish Ski Club of Vermont Land Trust

Declaratory Ruling #411

Findings of Fact, Conclusions of Law, and Order

This proceeding involves a Petition (Petition) for a Declaratory Ruling (DR) filed with the Environmental Board (Board) by Swedish Ski Club of Vermont Land Trust (SSCVLT) from a Jurisdictional Opinion asserting jurisdiction pursuant to 10 V.S.A. Ch. 151 (Act 250) over a tract of land in the Town of Wilmington, Vermont.

I. Procedural History

On June 3, 2002, the Acting District #2 Environmental Commission Coordinator (Acting Coordinator) issued Jurisdictional Opinion (JO) #2-139-1 in which he determined that Act 250 jurisdiction exists over a 205 acre tract of land in Wilmington owned by SSCVLT (Project) by virtue of its status as a “subdivision.”

On July 9, 2002, the Acting Coordinator issued JO #2-139-1 (Reconsideration) which restated and confirmed Act 250 jurisdiction over the said land.

On July 30, 2002, pursuant to Environmental Board Rule (EBR) 3(D), SSCVLT filed the Petition with the Board, seeking review of JO #2-139-1 (Reconsideration).

On August 30, 2002, Board Chair Marcy Harding convened a Prehearing Conference with SSCVLT by James P.W. Goss, Esq. (by telephone) as the sole participants.

At the Prehearing Conference the Chair noted that the Board had recently proposed amendments to EBR 2(B)(3), and that, if ultimately adopted, such amendments might address and resolve the Issue in this matter. She invited SSCVLT to consider whether it would like to continue this matter pending the possible promulgation of such amendments.

By letter filed September 10, 2002, the attorney for SSCVLT stated that SSCVLT agreed to such continuance.

On September 11, 2002, Chair Harding issued a Prehearing Conference Report and Order, continuing this matter pending the pending the outcome of the promulgation of the Board’s proposed rules.

Also on September 11, 2002, the Chair issued a Notice To Statutory Parties who had been served with JO #2-139-1 (Reconsideration), requesting that such parties inform the Board by September 25, 2002 if they wished to remain listed as parties on the Board's Certificate of Service. No statutory party notified the Board of its desire to remain as a party, and on October 15, 2002, the Chair issued an Order Concerning changes to the Certificate of Service List. At present, SSCVLT is the only person listed as a party to this case.

On January 3, 2003, in anticipation of the adoption of the amendments to EBR 2(B)(3), SSCVLT filed Proposed Findings of Fact and Conclusions of Law.

The Board deliberated on this matter on January 15, 2003. This matter is now ready for decision.

III. Issue

The issue in this matter is:

Whether the Project is subject to the jurisdiction of 10 V.S.A. Ch. 151 (Act 250).

III. Findings of Fact ¹

1. SSCVLT is a trust formed by several families for the sole purpose of holding title to the land (Property) which is the subject of the Project. The Property was acquired by SSCVLT for investment purposes in 1977, and there has been no construction of improvements or physical change of any kind to the Property since that time.

¹ Except as slightly modified herein, and with the caveat that "[an Act 250 jurisdictional determination] is only as good as the facts upon which it is based," *Re: Dexter and Susan Merritt*, Declaratory Ruling #407, Memorandum of Decision at 6 (Jun. 20, 2002), *appeal dkt.* No. 2002-306 (Vt. S. Ct.), quoting *Catamount Slate, Inc. et al.*, Declaratory Ruling #389, Memorandum of Decision at 11 (Jun. 29, 2001), *app. dkt.*, No. 2002-142. (Vt. Sup. Ct.); and see *Re: GHL Construction, Inc. PAK Construction, Inc.*, #2S1124-EB and DR #396, Findings of Fact, Conclusions of Law, and Order at 14 (Dec. 27, 2001), the Board adopts SSCVLT's Proposed Findings of Fact, which are supported by an affidavit of Adolph Jocknick, a SSCVLT Trustee.

2. In early 1984, SSCVLT became aware that the Vermont Legislature was about to close the “ten acre loop hole” of Act 250 through passage of Act 114 (1983 adj. session). Accordingly, prior to the effective date of Act 114, SSCVLT prepared and filed a plot plan on town land records showing the Property divided into 10 lots, each of which was more than 10 acres in size (the First Plot Plan). SSCVLT believed this action would vest its rights to sell and subdivide the Property in this configuration without Act 250 jurisdiction attaching.

3. SSCVLT was not aware of Section 6 of Act 114, which required 10+ acre lots to be conveyed in an arm’s length transaction prior to July 1, 1984 in order not to be counted as “lots” for jurisdictional purposes.²

4. No sales or offers of sale occurred with respect to the Property for approximately the next 17 years.

5. In early 2000, the Trustees of SSCVLT approached Vermont counsel about the potential sale of the Property to realize a return on the investment of the member families. At that time, Vermont counsel informed SSCVLT that filing of the First Plot Plan in town land records (without at least one lot being sold prior to July 1, 1984) triggered Act 250 jurisdiction over the Property.

6. Subsequent to this initial meeting, the Trustees of SSCVLT, with advice of their Vermont counsel, attempted to structure an arrangement whereby Act 250 jurisdiction over the Property could be divested.

7. On October 23, 2000, SSCVLT's counsel requested a Jurisdictional Opinion, holding that, if a new and revised plot plan of the Property was prepared depicting only 9 lots (i.e.: combining two of the lots depicted on the First Plot Plan), and if sales of lots occurred only pursuant to that revised plot plan, Act 250 jurisdiction would be divested.

8. On November 30, 2000, the District 2 Environmental Commission Coordinator (District 2 Coordinator) issued a Jurisdictional Opinion holding that Act 250 jurisdiction had been triggered over the Property and could not be divested.

9. On December 5, 2000, SSCVLT’s counsel requested reconsideration of the November 30, 2000 Jurisdictional Opinion. In that request, SSCVLT’s counsel noted that, unlike prior Board cases finding that subdivision jurisdiction could not be

² Similar language was contained in Act 64 (1987 Adj. Sess.) which also significantly changed the definition of “subdivision” under Act 250.

divested once triggered, no “sales, offers of sales, earth disturbance or construction of improvements of any kind have occurred on or with respect to ...” the Property.

10. On March 16, 2001, the District 2 Coordinator issued the decision on the reconsideration request. This decision held that, if the Property plat was revised as noted above to depict only 9 lots and if conveyances were made only pursuant to that plat, Act 250 jurisdiction would be deemed divested. A key factor in this determination was that no offers of sales of the configured lots or construction of improvements had occurred at the Property. The Reconsideration Decision was not appealed by any party or person.

11. SSCVLT then requested that its surveyor prepare the new plat and file the same on Town Land Records as called for in the District 2 Coordinator's March 16, 2001 decision. However, shortly after this time, SSCVLT's surveyor experienced serious health problems which delayed preparation and filing of the revised plat.

12. On July 1, 2001, the Vermont Legislature again amended the jurisdictional provisions regarding Act 250 subdivisions. Act 40 (2001) amended the definition of "subdivision" in 10 V.S.A. §6001(19) to add the following language: " 'Subdivision' shall also mean 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 six or more lots, within a continuous period of five years, in a municipality which does not have duly adopted permanent zoning and subdivision bylaws." Unlike prior amendments to the Act 250 definition of “subdivision” Act 40 contained no provisions stating that a previously exempt subdivision would lose that status if a sufficient number of lots were not conveyed prior to the law's effective date.

13. The Town of Wilmington does not have both permanent zoning and subdivision bylaws.

14. On December 28, 2001, SSCVLT's surveyor completed a subdivision plan depicting a nine-lot subdivision at the Property (Revised Plat) and filed the same in the Wilmington Land Records.

15. Subsequent to filing of the Revised Plat on Wilmington Land Records, SSCVLT entered into a Purchase and Sale Agreement with respect to the Property. The Purchase and Sale Agreement offered the entire Property for sale and did not offer lots for sale.

16. After entry into the Purchase and Sale Agreement, counsel for the Purchaser discovered the 9 lot plan for the Property in the course of his title search and raised the issue of potential Act 250 jurisdiction with SSCVLT.

17. SSCVLT then reapproached its counsel for advice regarding the situation. On May 30, 2002, SSCVLT's counsel requested another Jurisdictional Opinion, essentially holding that, if a new plat was prepared and filed in the Wilmington Town records depicting the property as a 5 lot subdivision, Act 250 jurisdiction would again be divested. In the alternative, SSCVLT's counsel sought a finding that, due to the absence of language in Act 40 requiring the conveyance of lots prior to its effective date, and due to the fact that the Reconsideration Decision contained no time deadline by which the nine-lot plan had to be filed, SSCVLT's rights to convey the property as a nine-lot subdivision pursuant to the Revised Plat were fully vested and were not divested by the subsequent legislation.

18. On June 3, 2002, the Acting Coordinator issued a Jurisdictional Opinion, holding that Act 250 jurisdiction over the Property had been triggered by the passage of Act 40 prior to the filing of the Revised Plat and could not be divested.

19. On June 24, 2002, SSCVLT's counsel requested reconsideration of the June 3, 2002 Jurisdictional Opinion.

20. On July 9, 2002, the Acting Coordinator issued a decision on SSCVLT's reconsideration request, again holding that Act 250 jurisdiction over the Property could not be divested.

21. Subsequently, the Prospective Purchaser of the Property terminated the Purchase and Sale Agreement. At the present time, there is no outstanding contract for sale of the Property.

22. In December 2002, SSCVLT prepared a new plat of the Property depicting a five-lot subdivision of the Property. The new subdivision plat contains the following legend: "This plat supersedes all prior subdivision plats of the subject Property and is intended to constitute a retraction and rescission of all prior subdivision plans of the Property."

23. On December 24, 2002 the new subdivision plat was recorded in the Wilmington Land Records at slide No. 123.

24. None of the member families of SSCVLT or any related "persons" within the meaning of 10 V.S.A. Section 6001(14)(A) have subdivided other lands in Vermont.

25. On January 15, 2003, amendments to EBR 2(B)(3) became effective.

IV. Conclusions of Law

Act 250 jurisdiction is triggered upon occurrence of any event constituting "subdivision" within the meaning of present statutory section 10 V.S.A. §6001(19). Pursuant to EBR 2(B)(2), as amended, and as relevant to this matter, a "subdivision shall be deemed to have been created with the first of any of the following events:"

(b) The filing of a plot plan on town records; or the filing of a complete application for a municipal subdivision or zoning permit; or filing of a complete application for a state subdivision permit or a potable water supply and wastewater system permit.

Thus, with the filing of the First Plot Plan, SSCVLT created a "subdivision," thereby triggering Act 250 jurisdiction over the Property and Project. The question presented in this Declaratory Ruling, is whether subsequent actions taken by SSCVLT can result in a lifting of that jurisdiction.

The recent amendments to EBR 2(B), effective on January 15, 2003, added subsection (3), which now provides that, in certain circumstances, jurisdiction which has attached to a subdivision will cease to exist. The new Rule recognizes that the policies to be protected by Act 250 continue to be sustained upon proper reconfiguration of subdivisions to divest jurisdiction prior to construction of permanent improvements on the land. EBR 2(B)(3) states, in pertinent part, that a "subdivision"

(3) shall cease to exist if it is found, in a final jurisdictional determination issued pursuant to Rule 3(C) or 3(D), to have been retracted or revised below jurisdictional levels at any time prior to the construction of improvements on the subdivision. Examples of activities or events that may justify a determination that a retraction or revision of a subdivision below jurisdictional levels has occurred may include, but are not limited to the following:

(c) the filing of a plot plan in town land records showing the revision or retraction of a subdivision following a rescission of conveyed lots.

In this case, no improvements have been constructed on the Property during the period of SSCVLT's ownership and the only offer for the sale of the Property has been terminated. In addition, SSCVLT has now filed on Wilmington Land Records a revised plot plan which reconfigures the subdivision at the Property to contain only five lots,

which "supersedes all prior subdivision plats of the subject Property," and which is specifically "intended to constitute a retraction and rescission of all prior subdivision plans of the Property." As a result, if the new Rule 2(B)(3) now applies, SSCVLT has taken the requisite steps to divest Act 250 jurisdiction from the Property.

Generally, the law which is in effect on the date a proceeding before the Board is commenced is the law of the case for purposes of Act 250 proceedings. *Barre City School District, #5W1160-Reconsideration-EB*, Findings of Fact, Conclusions of Law, and Order at 14 (Jan. 30, 1995); *Waterbury Shopping Village, #5W1068-EB*, Memorandum of Decision at 2 (June 26, 1990); *Raymond and Lois Ross, #2W0716-EB*, Memorandum of Decision and Order at 2 - 3 (Nov. 2, 1987), *aff'd, In re Ross*, 151 Vt. 54 (1989); *see also Re: Crushed Rock, Inc. and Pike Industries, Inc., #1R0489-4-EB*, Findings of Fact, Conclusions of Law, and Order at 37 - 39 (Feb. 18, 1994) (disapproving *Re: J.P. Carrara & Sons, Inc., #1R0589-EB*, Memorandum of Decision at 1-2 (Sept. 28, 1987)). However, the Board has in the past applied changes in the law which occur during pendency of a case where the change benefits the applicant or has the effect of making the application of Act 250 to a particular applicant or project less onerous or restrictive. *Re: Juster Development Company, #1R0048-8-EB*, Findings of Fact, Conclusions of Law, and Order at 27 (Dec. 19, 1988) ("Town plan amendments made after the date of an Act 250 application, and which benefit an applicant, are properly included as part of the town plan for Act 250 purposes"); and *see, by analogy, 1 V.S.A. §214(c)* (allowing imposition of a reduced penalty or punishment in an amended statute).

Because there are no apparent adverse impacts from the application of the amended Rule in this case and because such application does not violate the values protected by Act 250, the Board elects to apply EBR 2(B) as recently amended to the Project.³ The Board therefore holds that, with the December 24, 2002 recording of the new five-lot subdivision plat in the Wilmington Land Records, the subdivision plans, which previously existed with respect to the Property, have been formally revised and retracted. As the present five-lot subdivision does not itself independently trigger Act 250 jurisdiction, Act 250 jurisdiction no longer attaches to the Property.

³ The alternative would be to remand this matter to the District 2 Coordinator for an initial application of the amended EBR 2(B)(3) to the present subdivision consistent with this opinion, an exercise which the Board finds, in this case, to be inefficient.

V. Order

The Project is not subject to the jurisdiction of 10 V.S.A. Ch. 151.

Dated at Montpelier, Vermont this 16th day of January 2003.

ENVIRONMENTAL BOARD

_____/s/Marcy Harding_____
Marcy Harding, Chair
Bernie Henault
George Holland
Samuel Lloyd
W. William Martinez
Alice Olenick
Jean Richardson
Donald Sargent