

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

*Re: S-S Corporation/  
Rooney Housing Developments*

Declaratory Ruling #421

**Findings of Fact, Conclusions of Law, and Order**

This is a petition for a declaratory ruling filed by S-S Corporation/Rooney Housing Developments (S-S) concerning whether a Land Use Permit pursuant to 10 V.S.A. Ch. 151 (Act 250) is required for the construction of a housing project (Owen House) in Fair Haven, Vermont, coupled with a housing project (Harvey House) in Castleton, Vermont (collectively 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. History**

On December 16, 2002, the Assistant Coordinator (Coordinator) for the District 1 Environmental Commission issued Jurisdictional Opinion 1-357 (JO), in which she concluded that a housing project proposed by The Owen House Ltd. (Owen House) in Fair Haven, Vermont (Owen Project), coupled with a housing project proposed by The Harvey House Ltd. (Harvey House) in Castleton, Vermont (Harvey Project), constitute development and therefore require Act 250 Land Use Permits.

On December 30, 2002, S-S requested the Coordinator to reconsider and reverse her JO, and on January 6, 2003, the Assistant Coordinator issued a Reconsideration of Jurisdictional Opinion 1-357 (Reconsidered JO), ruling that the Project requires an Act 250 permit.

On February 4, 2003, S-S filed a Petition for Declaratory Ruling with the Board seeking review of the Reconsidered JO.

On March 21, 2003, Board Chair Patricia Moulton Powden issued a Prehearing Conference Report and Order. The Prehearing Order identified three Preliminary Issues:

1. Does the Vermont Supreme Court decision in *In re: Vermont Verde International, Inc.*, No. 2001-116 (Sept. 6, 2002), invalidate the Reconsidered JO, because the Reconsidered JO was not the result of a valid request?

2. Is the Reconsidered JO invalid because there was no request that it be a final determination?

3. Is the Reconsidered JO invalid because the Coordinator did not properly serve it?

On May 21, 2003, the Board deliberated on the Preliminary Issues, and on June 12, 2003, the Board issued a Memorandum of Decision in which it answered each of the three Preliminary Issues in the negative.

On September 24, 2003, the Board held a public hearing on this matter. The Board deliberated on this matter following the hearing and again on October 15 and November 12, 2003.

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

## **II. Issues**

1. Is the Owen House (either alone or in conjunction with the Harvey House) subject to Act 250 jurisdiction?
2. Is the Harvey House (either alone or in conjunction with the Owen House) subject to Act 250 jurisdiction?

## **III. Findings of Fact**

### *S-S Corporation*

1. S-S Corporation (S-S) is a Vermont nonprofit corporation, formed in 1977 to provide housing and care for elderly and disabled people on a not-for-profit basis. S-S does not presently provide housing or care.

### *Owen House*

2. The Owen House, Ltd. is a Vermont nonprofit corporation, created by S-S to own and operate a new facility called "The Owen House" to provide care and living quarters on a not-for-profit basis for eight physically and/or mentally disabled residents.

3. The Owen House is a detached, one-story "ranch style" residence located on a 0.35-acre parcel of land in Fair Haven, Vermont. It has seven bedrooms, two

bathrooms, one small office, one kitchen, one dining room, one living room, one half-bath, one laundry room and one screened-in porch.

*Harvey House*

4. The Harvey House, Ltd. is a Vermont nonprofit corporation, created by S-S to own and operate a new facility called "The Harvey House" to provide care and living quarters on a not-for-profit basis for eight physically and/or mentally disabled residents.

5. The Harvey House is a detached, one-story "ranch style" residence located on a 6.78-acre parcel of land in Castleton, Vermont. It has seven bedrooms, two bathrooms, one small office, one kitchen, one dining room, one living room, one half-bath, one laundry room and one screened-in porch.

6. The Harvey and Owen Houses are built to be handicapped-accessible, with wide hallways with railings and bathrooms designed for handicapped use.

*Relation between the Owen House and the Harvey House*

7. The Harvey House is within five miles of the Owen House.

8. Although separate legal entities, Harvey House Ltd. and the Owen House Ltd. have the same officers and board of directors. Catherine Rooney is the manager of both houses, and she is licensed to operate a Level IV Residential Care Home.

9. Construction on both the Harvey House and the Owen House commenced in late 2002 and is now completed.

*Payment of rent or fees*

10. The residents pay rents or fees to live at the Harvey House and the Owen House.

*Residents at the Harvey House and Owen House*

11. At both the Harvey House and the Owen House, most residents will have his or her own bedroom and will share the other rooms of the house, housekeeping facilities, and chores in common with one another.

12. While some residents may live in the Harvey House or Owen House for a long time, some may leave to enter a hospital or nursing home; of these people, some will return and some will not. Further, some residents have alternative residences that they will live in, whereas others do not.

13. The average length of stay of residents in The Washington Street Home, an S-S facility in Fair Haven similar to the Harvey House and Owen House, is more than 20 years. Some residents lived in The Washington Street Home for more than 30 years.

14. No staff or owners live at the Harvey House or Owen House.

*Care provided at the Harvey House and Owen House*

15. The eleven staff at the Harvey and Owen Houses are on duty 24 hours a day, seven days a week in three shifts. The staff prepares meals for the residents and assists the residents with dressing, toiletry and other personal care.

16. A Level IV facility does not provide skilled nursing care, and there is no registered nurse on the staff at the Harvey or Owen Houses. Nursing care is provided to the residents at the Harvey House and Owen House through the Visiting Nurses Association.

17. Catherine Rooney is licensed to dispense medications to the residents.

#### **IV. Conclusions of Law**

The issue is whether the Owen House and the Harvey House are subject to Act 250 jurisdiction.

##### **A. Applicable Statute and Environmental Board Rules (EBR)**

Act 250 defines "development" as:

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.

10 V.S.A. §6001(3)(A)(iv).

Environmental Board Rules define "development" as:

The construction of a housing project or projects such as cooperatives, apartments, condominiums, detached residences, construction or creation of mobile home parks or trailer parks, or commercial dwellings with ten 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 within any continuous period of five years.

EBR 2(A)(1)(c).

Board Rules define "commercial dwelling" as:

any building or structure or part thereof, including but not limited to hotels, motels, rooming houses, nursing homes, dormitories and other places for the accommodation of people, that is intended to be used and occupied for human habitation on a temporary or intermittent basis, in exchange for payment of a fee, contribution, donation or other object having value. The term does not include conventional residences, such as single - family homes, duplexes, apartments, condominiums or vacation homes, occupied on a permanent or seasonal basis.

EBR 2(M).<sup>1</sup>

## **B. Analysis**

### *1 Commercial Dwelling*

The first question is whether the Harvey and Owen Houses (collectively the Project) are "commercial dwellings" within the meaning of EBR 2(M).

*a. any building or structure or part thereof, including but not limited to hotels, motels, rooming houses, nursing homes, dormitories and other places for the accommodation of people;*

The Harvey and Owen Houses are buildings or structures that are for the accommodation of people.

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<sup>1</sup> EBR 2(M) was in effect in 1985, when the Legislature, "in unambiguous terms," ratified all Board rules relating to administration of Act 250, *In re Barlow*, 160 Vt. 513, 520 (1993); *In re Spencer*, 152 Vt. 330, 336 (1989); see 1985, No. 52, § , and see *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 285 (1995); *In re Gerald Costello Garage*, 158 Vt. 655 (1992), thereby giving the rule "the same effect as ... any law passed by the Legislature in the first instance." *In re Spencer*, 152 Vt. at 336.

b. *that is intended to be used and occupied for human habitation on a temporary or intermittent basis;*

S-S notes that many of their residents have been in their care for years, and it therefore claims that it is not the intent for either the Harvey House or the Owen House to be occupied on a temporary or intermittent basis. However, some residents occupy the Houses temporarily, leaving and returning intermittently, as their needs require.

The Board notes that EBR 2(M) explicitly lists nursing homes and rooming houses as examples of "commercial dwellings;" the inference is that these types of housing are temporary or intermittent. While the Owen and Harvey Houses may be called "residential care homes" or "group homes," and such facilities are not specifically listed in the definition, the definition refers to "other places for the accommodation of people," and it employs the prefatory phrase "included but not limited to." Further, in their physical appearance and utilization, the Houses have similarities to nursing homes in all respects important for Act 250 review; indeed, it appears that the only differences between the Harvey and Owen Houses and nursing homes are licensing requirements and level of care.<sup>2</sup>

c. *in exchange for payment of a fee, contribution, donation or other object having value;*

The residents of the Harvey and Owen Houses are required to pay rents or fees in order to live in these residential care homes. See, *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 285 (1995) ("Commercial purpose" is defined as "the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object having value.") This element of Rule 2(M) is therefore met.

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<sup>2</sup> While S-S's record of providing quality care may be inferred from the length of time that residents lived in The Washington Street Home, the Board's jurisdictional determination in this case cannot depend on the personal level of satisfaction of the residents in the care that they receive. Rather, the Board must look to the aspects of the Harvey House and the Owen House that are relevant to Act 250 and ask whether the type of construction and occupation at issue in this matter is typical of the sorts of housing described in Rule 2(M). Thus, the Board must look to the physical structures and general usage of the Harvey House and the Owen House, not to the subjective particulars that may result from their operation.

d. *The term does not include conventional residences, such as single - family homes, duplexes, apartments, condominiums or vacation homes, occupied on a permanent or seasonal basis.*

S-S asserts that the residents are "like family" and the Houses are "single family residences" in terms of their design, the effects of their construction, and their possible ultimate use, should S-S cease to operate them as group homes. However, the Board finds this argument unpersuasive.

Clearly, the definition of a "commercial dwelling" is not intended to cover a home occupied by a single family, nuclear or extended. But, again, it is the *commercial* aspects of the present situation that make it different. A family does not charge its children (at least not its minor children) a "fee, contribution, donation or other object having value" for the privilege of living at home. Members of a family live together in a home. Here, only the residents live in the Harvey and Owen Houses while the owner/manager does not live in either house.

Further, while admirable, Ms. Rooney's feelings towards those living under her care has no bearing on the environmental impacts of the Project, nor can jurisdiction over a project hinge on such a subjective test.

The Board finds further guidance for its determination by reference to Vermont's zoning statutes:

A state licensed or registered residential care home or group home, serving *not more than six persons* who are developmentally disabled or physically handicapped, shall be considered by right to constitute a permitted single-family residential use of property, except that no such home shall be so considered if it locates within 1,000 feet of another such home.

24 V.S.A. §4409(d) (emphasis added). The Owen and Harvey Houses will each provide housing for eight persons.<sup>3</sup>

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<sup>3</sup> S-S cites to the federal Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. §8013, for the proposition that, as "group homes" defined under §8013(k)(1) of that Act, the Harvey House and Owen House are "single family residences" and thus not "commercial dwellings." The Board declines to adopt the federal definition, as it is in direct conflict with the plain language of 24 V.S.A. §4409(d) and EBR 2(M). *In re Woodford Packers, Inc.*, \_\_\_ Vt. \_\_\_, 2003 VT 60 ¶14 (2003) (absent compelling indication of error, court will defer to and sustain Board's interpretation of its rules). The Board further notes that Cranston-Gonzalez addresses federal funding and rental support for

Accordingly, the Board finds that the Owen and Harvey Houses are not "conventional residences," as that term is used in EBR 2(M), but, rather, as previously noted, "commercial dwellings."

## 2. *Housing Projects*

Because the Harvey House and the Owen House are "commercial dwellings," the Board must determine whether they fit the elements of the Board's rule on "housing projects." EBR 2(A)(1)(c).

Neither the Harvey House nor the Owen House alone has ten or more units, thus, standing alone, neither would constitute a "housing project" subject to Act 250 jurisdiction. When considered together as a single project, however, the Houses do trigger the requirements of the Act. *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority, Declaratory Ruling #406, Findings of Fact, Conclusions of Law, and Order at 7 - 20 (Dec. 31, 2002).*

### *a. The construction of a housing project or projects such as ... commercial dwellings with ten or more units;*

S-S argues that Act 250 does not apply because the Project does not constitute a housing project with ten or more units within the meaning of 10 V.S.A. §6001(3)(A)(iv) or EBR 2(A)(1)(c). It contends that the term "unit" does not mean the number of bedrooms or rooms of a project.

S-S cites federal provisions which define "dwelling units" in support of its claim that, because each room within the Harvey House and the Owen House is not a separate, self-contained living area (with its own living, sleeping, cooking and bathroom facilities) each house is itself only one "unit." The references cited by S-S, however, are within the context of the federal Internal Revenue Code and federal Treasury regulations. These laws and regulations focus on federal taxation concerns and do not consider the same environmental impacts of projects as does this Board.

Further, to adopt the federal definitions into the Act 250 context would be contrary to EBR 2(M)'s reference to "hotels, motels, rooming houses, nursing homes, [and] dormitories," as these buildings often do not include self-contained living areas (which include kitchens or other cooking facilities). Indeed, if S-S's definition were to prevail then a 100-room hotel would be only one "housing unit," and a person could build nine such hotels in some towns and yet not fall within the jurisdiction of the Act.

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housing for low-income and disabled persons, not the environmental concerns that are at the heart of Act 250.



The Board finds this result would render 10 V.S.A. §6001(3)(A)(iv) and EBR 2(A)(1)(c) absurd and be wholly beyond what the Legislature could have possibly contemplated the statute. *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 287 (1995); *In re McShinsky*, 153 Vt. 586, 591 (1990) (statutes should be construed to avoid absurd or irrational results).

The Harvey House and the Owen House will each have seven bedrooms, for a total of 14 bedrooms (i.e. 14 units), for 16 people. Although the Board has not dealt with group homes or nursing homes in this exact context, the Board has held that the proposed construction of college dormitories constitutes a development because it provides more than ten dwelling units. *Re: Marlboro College*, Declaratory Ruling #24 (Jul. 26, 1973); *Burke Mountain Academy*, Declaratory Ruling #6 (Apr. 18, 1973). The Board has also held that a motor lodge with ten or more units constitutes a housing project. *Re: Brattleboro Chalet Motor Lodge, Inc.*, #4C04821-2-EB, Findings of Fact, Conclusions of Law, and Order at 3 (Oct. 17, 1984). S-S provides no reason or argument for the Board to depart from this precedent.

Therefore, the Harvey House and the Owen House, when considered together, have more than ten units.

*b. constructed or maintained on a tract or tracts of land owned or controlled by a person;*

Each of the corporations in this matter, created to own and operate the homes, Harvey House Ltd. and Owen House Ltd., has the same Board of Directors. The Board concludes that the same person owns or controls the two tracts of land involved in the Project.

*c. within a radius of five miles of any point on any involved land;*

Because the Owen House and the Harvey House are approximately 3 ½ miles apart in a straight-line distance, the five-mile element of the statute and rule is met.

*d. and within any continuous period of five years.*

Construction on both the Harvey and Owen Houses began in late 2002, and is completed as of the present date; they were thus constructed within the requisite five-year period.

### **C. Conclusion**

The Project, consisting of two commercial dwellings, EBR 2(M), is a "development," as defined in 10 V.S.A. §6001(3)(A)(iv) and EBR 2(A)(1)(c).

**V. Order**

The Project is subject to Act 250 jurisdiction. Considered as a single project, the Harvey and Owen Houses trigger the requirements of Act 250 and thus require a Land Use Permit.

Dated at Montpelier, Vermont this 25<sup>th</sup> day of November 2003.

ENVIRONMENTAL BOARD

*/s/Patricia Moulton Powden* \_\_\_\_\_

\* Patricia Moulton Powden, Chair

George Holland

Samuel Lloyd

Don Marsh

\* W. William Martinez

\* Patricia Nowak

Jean Richardson

Alice Olenick

\* Chair Moulton Powden, concurring:

I have argued that the Harvey and Owen Houses do not easily fit into the definition of "commercial dwellings" as outlined in EBR (2)(M). These Houses (and other homes developed for this population) are not intended to be occupied on a "temporary or intermittent" basis. I have also argued that these Houses' environmental impacts are consistent with "single family homes, duplexes, apartments," which are specifically exempted from EBR (2)(M), and therefore should not be considered "commercial dwellings," except that these Houses are not "conventional residences." Thus, in my belief, the Houses could fit in either element of EBR (2)(M) as "commercial dwellings," or as single family homes specifically exempted from the Rule and therefore Act 250.

I am, however, persuaded by the definition in Title 24, V.S.A, §4409(d), referenced in this decision. In the interests of consistent application of law and regulations, I therefore reluctantly concur with the decision to find jurisdiction

I am authorized to state that Board Members Martinez and Nowak join in this concurrence.