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

Re: *S-S Corporation /* Declaratory Ruling #421
Rooney Housing Developments

Memorandum of Decision

This proceeding involves a Petition for Declaratory Ruling to the Environmental Board (Board) filed by S-S Corporation / Rooney Housing Developments (Rooney) from a jurisdictional opinion which concludes that two housing projects require permits pursuant to 10 V.S.A. Ch. 151 (Act 250).

I. History

On December 16, 2002, Carmelita Brown, 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) in Fair Haven, Vermont (Owen Project), and a housing project proposed by The Harvey House Ltd. (Harvey) in Castleton, Vermont (Harvey Project), constitute development and therefore require Act 250 Land Use Permits. Both Owen and Harvey are owned by Rooney.

On December 30, 2002, Rooney requested the Coordinator to reconsider and reverse her JO, and on January 6, 2003, the Coordinator issued a Reconsideration of Jurisdictional Opinion 1-357 (Reconsidered JO).

On February 4, 2003, Rooney filed a Petition For Declaratory Ruling with the Board seeking review of the Reconsidered JO.

On April 23, 2003, Rooney and the Agency of Natural Resources (ANR) filed initial memoranda on the three Preliminary Issues identified in Chair Patricia Moulton Powden's March 21, 2003 Prehearing Conference Report and Order.

On May 7, 2003, ANR filed a reply memorandum.

The Board deliberated on the Preliminary Issues on May 21, 2003.

II. The Preliminary Issues

Pending before the Board are the following 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?

III. Discussion

A. Findings relevant to the Preliminary Issues

Based on the record before the Board, the following findings are not in dispute:

1. Rick Oberkirch, an ANR Permit Specialist, requested the jurisdictional opinion from the Coordinator concerning whether the Harvey Project and the Owen Project constituted a "development."

2. There is no evidence that Oberkirch requested that the jurisdictional opinion be a final opinion.

3. There is no evidence that Oberkirch requested that the jurisdictional opinion be served on anyone.

4. There is no evidence that Oberkirch filed an Act 250 Disclosure Statement with this request for the jurisdictional opinion.

B. Discussion

1. Preliminary Issue 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?

Rooney argues that only a person who has an interest affected by a subdivision or a development can request a jurisdictional opinion. It contends that while the statute says "any person" may request a jurisdictional opinion, legislative history from the Senate Natural Resources Committee indicates that only persons with an interest in the subdivision or development could make the request. Allowing a State employee to initiate the jurisdictional opinion process, Rooney argues, removes the issue from the enforcement process and converts the Environmental Board from a prosecutor into an adjudicator, a transformation disapproved by the Court in *In re Vermont Verde Antique International, Inc.,* 13 Vt.L.W. 231 (2002).

The pertinent parts of the relevant statute, 10 V.S.A. §6007(c), state:

> c) With respect to the partition or division of land, or with respect to an activity which might or might not constitute development, any person may submit to the district coordinator an Act 250 Disclosure Statement and other information required by the board, and may request a jurisdictional opinion from the district coordinator concerning the applicability of this chapter. If a requestor wishes a final determination to be rendered on the question, the district coordinator, at the expense of the requestor and in accordance with rules of the board, shall serve the opinion on individuals or entities who may be affected by the outcome of the opinion, and on parties that would be entitled to notice under section 6084, if jurisdiction were determined to exist. A jurisdictional opinion of a district coordinator shall be subject to a request for reconsideration and may be appealed to the board by the applicant, by individuals or entities who may be affected by the outcome of the opinion, or by parties that would be entitled to notice under section 6084, if jurisdiction were determined to exist. An appeal from a jurisdictional opinion must be filed within 30 days of the mailing of the opinion to the person appealing. Failure to appeal within the prescribed period shall render the jurisdictional opinion the final determination with respect to jurisdiction under this chapter unless the opinion has not been properly served on parties that would be entitled to notice under section 6084, if jurisdiction were determined to exist, and on persons and entities which may be affected by the outcome of the decision, according to rules of the board… .

General rules of statutory construction give the Board some guidelines in its analysis of Preliminary Issue 1.

First, 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); *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority,* Declaratory Ruling #406, Findings of Fact, Conclusions of Law, and Order at 10 n2 (Dec. 31 2002); *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc*., #2W0813-3 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 12 (Apr. 19, 2001). "[I]n 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); *see also, Re: Green Mountain Habitat for Humanity, Inc., supra,* at 10 n.2 and 16 – 17.

A common meaning of "any" is: "one or another without restriction or exception." *American Heritage Dictionary,* 2d College Ed., (1982)

Second, when the meaning of a statute is plain and unambiguous on its face, it must be enforced according to its express terms. *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 286 (1995), *citing, In re Burlington Housing Authority*, 143 Vt. 80, 83 (1983). *And see*, *In re Spencer*, 152 Vt. 330, 336 (1989) (where the language of the statute is clear, the Legislature's intent must be ascertained from the words of the statute itself); *Re: Green Mountain Habitat for Humanity, Inc., supra,* at 16-17; *Re: Vermont Egg Farms, Inc.,* Declaratory Ruling #317, Findings of Fact, Conclusions of Law, and Order at 8 (Jun. 6, 1996), *citing, Burlington Electric Dept. v. Vermont Dept. of Taxes*, 154 Vt. 332, 335-36 (1990). [1]

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[1] Rooney argues that legislative history should be reviewed; ANR argues that there is no need to look beyond the face of the statute.

When the language of the statute is clear and straightforward, resort to legislative history is neither necessary nor appropriate. *In re Margaret Susan P.*, 169 Vt. 252, 263 (1999) (only where statutory language is "unclear and ambiguous" may legislative history be used to determine legislative intent); *Hitchcock Clinic, Inc. v. Mackie*, 160 Vt. 610, 611 (1993);*Catamount Slate, Inc. et al.,* Declaratory Ruling #389, Memorandum of Decision at 3 (Sept. 20, 2001), *app. dcktd.*, No. 2002-142 (Vt. Sup. Ct.) Because the words "any person" are clear the Board need not look to the legislative history in order to discern their meaning.

Further, even if the Board were to look at legislative history, the Board would find that the isolated portions of that history that have been provided by Rooney are insufficient.

Vermont has limited legislative history. Unlike the federal Congress, Vermont has no committee reports that explain the thoughts behind the laws that come out of the various House or Senate Committees. There are transcripts of committee hearings, and one such transcript from the Senate Natural Resources Committee is what Rooney has ostensibly provided as an attachment to its memorandum. The Board does not know, however, whether this interpretation of the words "any person" is the interpretation given by the House Natural Resources Committee; we do not know if the Conference Committee on the bill agreed with (or even considered) this interpretation. Thus, one must tread carefully when determining whether the legislative history that has been provided is complete and, if complete, controlling. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1978) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.") And see, *United States v. O'Brien,* 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statue is not necessarily what motivates scores of others to enact it.") See also *State of Vermont v. Brinegar*, 379 F. Supp. 606, 611 (D. Vt. 1974), cited in *Catamount Slate, Inc. et al.,* Declaratory Ruling #389, Memorandum of Decision at 9 (Jul. 27, 2001), *app. dcktd.*, No. 2002-142 (Vt. Sup. Ct.).

Even reading the words "any person" within the framework established by the *Vermont Verde* decision leads to the conclusion that *Vermont Verde's* holding is narrow: a Coordinator cannot issue a *sua sponte* jurisdictional opinion. This holding is based on two points made by the *Vermont Verde* Court: first, that the statutory language that says "*from* the district coordinator" means that the request has to come *from* someone other than the Coordinator herself. That the *Vermont Verde* Court understood that "any person" refers to anyone other than the Coordinator, is apparent from the language of the Court's decision itself:

> Here, the statute provides that "any person" may request a jurisdictional opinion "from the district coordinator." 10 V.S.A. § 6007(c) (emphasis added). Read in context, this suggests that "any person" refers broadly to third parties *exclusive of the coordinator*, who is authorized to rule on such requests, but not to make them.

Vermont Verde, 13 Vt.L.W. at 232 (emphasis added).

Recently, responding to arguments nearly identical to those raised here, the Board stated:

> Moreover, the Petitioner's argument is contrary to 10 V.S.A. §6007(c) which allows "any person" to request a jurisdictional opinion, not any "interested person" or any person with party status. This non-interest based standard is contrasted with other provisions of 10 V.S.A. §6007(c) which only allow appeals of jurisdictional opinions to the Board by "the applicant, by individuals or entities who may be affected by the outcome of the opinion, or by parties that would be entitled to notice under section 6084, if jurisdiction were determined to exist." The legislature clearly created a different threshold for requesting a jurisdictional opinion ("any person") and appealing a jurisdictional opinion (only certain interested parties). The Petitioner's argument ignores that difference. Thus, Petitioner's argument is based on an ambiguous phrase in *Vermont Verde*, outdated rules, and is contrary to the express language of the statute and the rule.

Re: Alpine Pipeline Co., Declaratory Ruling #415, Memorandum of Decision at 7 (Jan. 3, 2003); *and see*, *Catamount Slate, Inc. et al.,* Declaratory Ruling #389, Memorandum of Decision at 11 (Jun. 29, 2001), *app. dcktd.*, No. 2002-142 (Vt. Sup. Ct.)

The second rationale advanced in the *Vermont Verde* decision is that the statutory scheme, which vests the Board with both adjudicatory and enforcement roles, should be read in a way that keeps those roles separate and distinct, something which cannot be accomplished if *sua sponte* jurisdictional opinions are allowed.

A request by the Permit Specialist does not raise the same prosecutorial vs. adjudicative concerns that were raised by the *sua sponte* actions of the *Vermont Verde* Coordinator. ANR appears as a party to Board proceedings, and "there is a distinct difference between the Environmental Board and [ANR], of which the Board is only a part. … ANR has no adjudicatory powers under Act 250…." *In re Wildlife Wonderland, Inc*., 133 Vt. 507, 517 (1975).

Again, this point was addressed in the *Alpine Pipeline* decision

> The Board concludes that the Court in using the phrase "interested third party" was distinguishing the "third party" from "an official of the Board itself." Given the context of the opinion, the Supreme Court's concern was district coordinators' issuance of *sua sponte* jurisdictional opinions which the Court believed was contrary to the adjudicatory role of a jurisdictional opinion. There is no compromise of the adjudicatory process if the request for a jurisdictional opinion comes from anyone other than the district coordinator. Thus, under *Vermont Verde* while a district coordinator cannot request a jurisdictional opinion from him or herself, any other person can. To the extent the Supreme Court one time referred to "interested third party" as compared to "third party," that reference can be interpreted to mean a person who is interested enough to request a jurisdictional opinion.

Alpine Pipeline Co., *supra,* at 7.[2]

Lastly, as ANR notes, requests from Permit Specialists for jurisdictional opinions serve both the interests of developers (who may not know that an Act 250 permit is necessary) and the State (which wants to facilitate and ensure compliance with the law). Restricting a Permit Specialist's ability to seek jurisdictional opinions would frustrate both of these valid goals.

The Board concludes that the phrase "any person," as interpreted by the *Vermont Verde* decision, may include ANR employees.

2. Preliminary Issues 2 and 3

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

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[2] ANR is a *statutory* party to Board proceedings, 10 V.S.A. §6084. ANR is, therefore, *as a matter of law,* an "interested" party. Thus, even if Rooney is correct that only "interested" parties can request jurisdictional opinions, ANR fits that definition.

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

Rooney argues that the threshold requirements for a final jurisdictional opinion were not satisfied in this case. See Rooney's Brief of Petitioners at 5 –6. [3] The Board addresses each of Rooney's arguments in turn:

(1) that Oberkirch did not file an Act 250 Disclosure Statement

Rooney presents in one line in its memorandum a claim that a failure to file an Act 250 Disclosure Statement along with a request for a jurisdictional opinion is a fatal flaw. But Rooney's argument fails for a number of reasons.

The first sentence of 10 V.S.A. §6007(c) reads:

> With respect to the partition or division of land, *or with respect to an activity which might or might not constitute development*, any person *may* submit to the district coordinator an Act 250 Disclosure Statement and other information required by the board, and may request a jurisdictional opinion from the district coordinator concerning the applicability of this chapter.

(Emphasis added)

To read §6007(c) to state that a Disclosure Statement *must* accompany a request for a jurisdictional opinion would be contrary to the use of the word "may" in the statute. "The plain, ordinary meaning of the word 'may' indicates that a statute is permissive, not mandatory." *Town of Calais v. County Road Commissioners*, 173 Vt. 620, ___ (2002), 795 A.2d 1267, 1768 (2002), *citing, In re D.L.,* 164 Vt. 223, 234 (1995); *Dover Town Sch. Dist. v. Simon*, 162 Vt. 630, 631 (1994) (mem.) *And see, Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, Declaratory Ruling #406, Findings of Fact, Conclusions of Law, and Order at 16 (Dec. 31, 2002) (use of the word "may" implies guidance not mandate).

Moreover, the Board must read the statutory provisions relating to jurisdictional opinions and to Disclosure Statements not in isolation but as parts of the same law, Vermont *Verde,* 13 Vt.L.W. at 232. Disclosure Statements are required *only* from people who are *subdividing or partitioning land.* 10 V.S.A. §6007(a).[4] They are

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[3] ANR does not address either Preliminary Issue 2 or 3.

[4] Section 6007(a) reads, in pertinent part:

> (a) *Prior to the division or partition of land*, the seller or other person *dividing or partitioning* the land shall prepare an Act 250 Disclosure

intended both to put the subdivider on notice that he may need to get an Act 250 permit and to protect buyers from unknowingly buying land that is subject to Act 250 ("Failure to provide the statement as required shall, at the buyer's option, render the purchase and sales agreement unenforceable." *Id.)* Disclosure Statements are not required from anyone else; people who are proposing possible "developments" do not file Disclosure Statements. 10 V.S.A. §6007(a). Were the Board to read §6007(c) as Rooney advocates, then *no* person, *including the landowner*, could request a jurisdictional opinion concerning a possible "development," because such a request would never be accompanied by a Disclosure Statement. Such an interpretation of §6007(c) would lead to an absurd and irrational result, something which the Vermont Supreme Court does not countenance. *In re Spring Brook Farm Foundation, Inc.,* 164 Vt. 282, 287 (1995); *In re McShinsky*, 153 Vt. 586, 591 (1990); *In re Southview Assocs*., 153 Vt. 171, 175 (1989).

(2) that there is no indication in the record that Oberkirch wished that there be "a final determination to be rendered on the question"

(3) that neither Oberkirch nor ANR paid to have the jurisdictional opinion served on others

(5) that neither the Harvey House which held title to the Fair Haven property, nor the Owen House, which held title to the Castleton property were served with the initial jurisdictional opinion issued on December 16, 2002.

These claims are without merit. A request for a jurisdictional opinion will, as here, generate a jurisdictional opinion. If the person who requests the jurisdictional opinion wants it to be final and binding on other people, then he must take steps to have it served on those people. Service is effectuated by the mailing of a Jurisdictional Opinion to a person. *See* 10 V.S.A. §6007(c) (appeal to the Board from a Jurisdictional Opinion must be taken within 30 days of "the mailing of the opinion"); EBR 3(C)(3) and 12(J). *Catamount Slate, Inc. et al.,* Declaratory Ruling #389, Memorandum of Decision at 6- 7 (Jun. 29, 2001), *app. dcktd.*, No. 2002-142 (Vt. Sup. Ct.).

> Statement. A person *who is dividing or partitioning land*, but is not selling it, shall file a copy of the statement with the town clerk, who shall record it in the land records. The seller *who is dividing or partitioning* land as part of the sale shall provide the buyer with the statement within 10 days of entering into a purchase and sale agreement for the sale or exchange of land, or at the time of transfer of title, if no purchase and sale agreement was executed, and shall file a copy of the statement with the town clerk, who shall record it in the land records.

(Emphasis added)

While a requestor's failure to have a jurisdictional opinion served may affect its impact in terms of its finality, it does not call into question the opinion's validity.

(4) that the jurisdictional opinion was not served on the Fair Haven administrative officer

The lack of service of the jurisdictional opinion on the Fair Haven administrative officer means only that the jurisdictional opinion is not final and binding as to that person, nothing more. 10 V.S.A. §6007(c). Nothing in the statute or the Board Rules says that a jurisdictional opinion is not valid if it is not served on *everyone* who might be interested in it.

IV. Order

1. All three of the Preliminary Issues are answered in the negative.

2. The Chair shall issue a Scheduling Order relative to the merits of this matter.

Dated at Montpelier, Vermont this 12th day of June 2003.

ENVIRONMENTAL BOARD

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