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

Re: Bennington School, Inc. Declaratory Ruling #434

Memorandum of Decision

This proceeding involves a Petition (Petition) for a Declaratory Ruling (DR) to the Environmental Board (Board) filed by Bennington School, Inc (BSI) from a series of jurisdictional opinions which assert jurisdiction pursuant to 10 V.S.A. Ch. 151 (Act 250) over several parcels of land and buildings owned by BSI in the Towns of Bennington and North Bennington, Vermont.

I. History

On March 11, 2004, the Town of Bennington's Permitting Director requested a jurisdictional opinion from the Coordinator (Coordinator) for the District 8 Environmental Commission concerning BSI's group homes located at 972 Vail Road, 575 Mattison Road, 662 Mattison Road, and 968 Route 7, all in the Town of Bennington, Vermont.

On March 17, 2004, Dwight Lorenz requested a jurisdictional opinion from the Coordinator concerning BSI's group home at 488 College Road in the Village of North Bennington, Vermont.

On March 22, 2004, the Coordinator issued a series of jurisdictional opinions. These included:

A. Jurisdictional Opinion #8-235: 972 Vail Road, Bennington (Vail House)

B. Jurisdictional Opinion #8-236: 488 College Road, North Bennington (Frost House)

C. Jurisdictional Opinion #8-237: 575 Mattison Road, Bennington

D. Jurisdictional Opinion #8-238: 662 Mattison Road, Bennington

E. Jurisdictional Opinion #8-239: 968 Route 7, Bennington (Manning House)

On March 30, 2004, BSI requested that the Coordinator reconsider all of these Jurisdictional Opinions.

On April 7, 2004, the Coordinator issued a Reconsideration letter in which he reaffirmed his findings and conclusions in the Jurisdictional Opinions.

On April 28, 2004, BSI filed a Petition for Declaratory Ruling with the Environmental Board, seeking review and reversal of the Jurisdictional Opinions.

On June 1, 2004, Board Chair Patricia Moulton Powden convened a Prehearing Conference with the following participants:

BSI by Kenneth Margolin, Esq.
Town of Bennington and Bennington Planning Commission (Town) by Daniel Monks

The Chair's June 4, 2004 Prehearing Conference Report and Order noted that BSI, the Town, and the Bennington Regional Planning Commission are all parties entitled by statute, 10 V.S.A. §6084(a), and Environmental Board Rule 14(A) to participate in the Petition.

In a July 23, 2004 Memorandum of Decision, the Board held that (1) the Village of North Bennington is a statutory party pursuant to 10 V.S.A. §6084(a) and Environmental Board Rule (EBR) 14(A)(3) and that (2) Dwight Lorenz may participate as a party in this matter as it relates to BSI's operations at 488 College Road in North Bennington.

In the late summer and early autumn of 2004, BSI and the Town filed prefiled testimony. On October 14, 2004, BSI filed a motion for summary decision pursuant to EBR 23, to which the Town replied on November 22, 2004.

The Board held oral argument on December 15, 2004, and BSI and the Town filed supplemental memoranda in January 2005.

The Board deliberated on this matter on December 15, 2005[1] and February 23, 2005.[2] This matter is now ready for decision.

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[1] Board Members Pembroke and Rainville did not participate in this deliberation.

[2] Board Members Paul and Richardson did not participate in this deliberation, but they have read and concur with the final decision.

II. Issues

At the Prehearing Conference, BSI withdrew its Petition for a Declaratory Ruling from Jurisdictional Opinion #8-237 (575 Mattison Road, Bennington) and Jurisdictional Opinion #8-238 (662 Mattison Road, Bennington). Therefore, the remaining issues in this Petition are:

1. Whether the property owned by BSI at 972 Vail Road in the Town of Bennington, Vermont, which is the property at issue in Jurisdictional Opinion #8-235, is subject to the jurisdiction of 10 V.S.A. Ch. 151 (Act 250).

2. Whether the property owned by BSI at 488 College Road in the Village of North Bennington, Vermont, which is the property at issue in Jurisdictional Opinion #8-236, is subject to the jurisdiction of 10 V.S.A. Ch. 151 (Act 250).

3. Whether the property owned by BSI at 968 Route 7 in the Town of Bennington, Vermont, which is the property at issue in Jurisdictional Opinion #8-239, is subject to the jurisdiction of 10 V.S.A. Ch. 151 (Act 250).

III. Findings of Fact [3]

A. The Towns

1. The Town of Bennington has permanent subdivision and zoning regulations; it is a so-called "ten-acre town."

2. The Village of North Bennington has permanent zoning regulations but does not have permanent subdivision regulations; it is a so-called "one-acre town."

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[3] The Findings are drawn solely from BSI's summary judgment memoranda and affidavits, BSI's supplemental filings, and statements made by BSI's attorney at oral argument. The Findings are made solely for the purpose of the Board's decision on the pending summary decision motions.

B. Bennington School, Inc. (BSI)

3. BSI is a for-profit corporation, organized under the laws of Vermont, with its principal place of business at 192 Fairview Street in Bennington, Vermont.

4. BSI is licensed by the State of Vermont as a school to provide special educational services and to provide residential services to adolescent students between the ages of nine and eighteen.

5. BSI receives payment for each of its students' education and housing. Payments are typically made by the state or the local school system that refers the student to Bennington School.

6. BSI's students have certain emotional and learning needs. They can live in group homes, but often cannot live in their own family homes.

C. The Campuses

7. BSI owns two campuses -- the Mattison campus for girls and the Fairview campus for boys.

8. The Fairview campus is approximately 31 acres. There are five buildings on campus: an adventure building, maintenance workshop, two dormitories and an educational building.

9. The Mattison campus is approximately 6 acres. There are five buildings on campus -- three dormitories and two educational buildings.

10. The Mattison and Fairview campuses are 2½ miles distant from each other at the closest point.

11. While their populations fluctuate, 34 girls usually live on the Mattison campus, and 58 boys usually live on the Fairview campus

D. The BSI Group Homes

12. In addition to its two campuses, BSI owns and operates four group homes for adolescents. Three of these group homes (Vail House, Frost House and Manning House) are the subject of the Jurisdictional Opinions at issue in this appeal.

13. Vail House, Frost House and Manning House are connected to, and a part of, BSI, which is a campus school with group homes.

14. The Houses are not corporations separate from BSI.

15. All of BSI's group homes are part of its overall operations. BSI runs all of the Houses; the Houses are part of the services that BSI provides.

16. BSI purchases all necessary items for all of the Houses.

17. It is an essential part of the philosophy and programmatic design of each of BSI's group homes that they be as home-like and family-like as possible. Food is brought in from the main (Fairview) campus. Meals are eaten family-style.

Vail House

18. The property owned by BSI at 972 Vail Road in the Town of Bennington (Vail House) is a single story house. On the main level there are eight single bedrooms, a living room, dining room, two bathrooms, and a kitchen. In the basement, there is educational space consisting of two classrooms, a recreation room, and a bathroom. Vail House has approximately 1720 square feet of living space. It sits on a lot which is greater than 10 acres in size.

19. Eight students live in Vail House.

20. BSI did not build Vail House. BSI purchased Vail House in 1990. At the time of BSI's purchase, Vail House was being used as a single family home.

21. BSI has made the following changes and improvements at Vail House since its purchase:

1991: added a smoke and heat detector system
1997: converted a 2 car garage into 4 bedrooms
1998: divided the basement into classroom and recreation space
2003: installed a sprinkler system

The above improvements to Vail House were internal.

22. When BSI purchased Vail House, the septic system was "on its last legs." The system that existed when BSI purchased Vail House suffered from poor

soil conditions as well as high groundwater. Work is currently being done on a new septic system on the Vail House site.

23. In 2003, BSI applied to the Vermont Waste Water Management Division for approval of its plans for a new septic system, as the system was inadequate for continued use. The application is still pending.

24. Vail House is two miles from the Mattison campus; one mile from the Fairview campus; three miles from Frost House, and four miles from Manning House. All these distances are approximate.

25. Vail House is exclusively for the use of the students who live there. Only Vail House residents sleep at the home; only Vail House residents receive psychological counseling services at Vail House. Except for occasional guests, only Vail House students and staff eat at the home.

26. The boys who live at Vail House receive their classroom education at Vail House.

Frost House

27. The property owned by BSI at 488 College Road in the Village of North Bennington (Frost House) is a single story house, with six bedrooms, a living room, three bathrooms, a kitchen, dining room, and a recreation area. The House has approximately 3059 square feet of living space and sits on a four-acre lot.

28. Six students live in Frost House.

29. BSI did not build Frost House. BSI purchased the Frost House property in 1997. At the time of BSI's purchase of Frost House, it was being used as a single family home.

30. BSI has made the following changes and improvements at Frost House since its purchase:

1997: installed a fire alarm system
1999: converted the garage into recreational space and 2 study rooms
2000: installed a mound septic system

The above improvements to Frost House - except for the septic system - were internal.

31. Frost House is 0.5 miles from the Mattison campus; three miles from Fairview campus; six miles from Manning House; 2.8 miles from Stoddard House (another BSI group home); and three miles from Vail House. All distances are approximate.

32. Frost House is exclusively for the use of the students who live there. Only Frost House residents sleep at the home; only Frost House residents receive psychological counseling services at Frost House. Except for occasional guests, only Frost House students and staff eat at the home.

33. The girls who live at Frost House receive their classroom education at the Mattison campus.

Manning House

34. The property owned by BSI at 968 Route 7 in the Town of Bennington (Manning House) is a single story house, with three bedrooms, two living rooms, two bathrooms, a kitchen, and a dining room. The House is approximately 2196 square feet of living space and sits on a lot which is 7.5 acres.

35. Six students live at Manning House.

36. BSI did not build Manning House. BSI purchased the Manning House property in 2002. At the time of BSI's purchase of Manning House, it was being used as a single family home.

37. BSI has made the following changes and improvements at Manning House since its purchase:

2002: installed a sprinkler system
2002: installed an alarm and heat system

The above improvements to Manning House were internal.

38. Manning House is 5.5 miles from the Mattison campus; three miles from Fairview campus; six miles from Frost House; and 4.4 miles from Vail House. All distances are approximate.

39. Manning House is exclusively for the use of the students who live there. Only Manning House residents sleep at the home; only Manning House residents receive psychological counseling services at Manning House. Except for occasional guests, only Manning House students and staff eat at the home.

40. The boys who live at Manning House receive their classroom education at an educational facility in Sunderland, Vermont.

E. The BSI students

41. During the week, the girls at Frost House are transported to their classrooms at the Mattison campus, and the boys at Manning House are transported to their classrooms in Sunderland.

42. All BSI students who live in BSI group homes live in the homes because (1) their educational and emotional status, and/or their family home situations make it inappropriate during that time of their lives to live in their family homes; and (2) as a result of their educational and emotional status, they need, and can benefit from, the education and programs BSI has to offer.

43. Students typically live in BSI group homes for 12 - 18 months. The length of stay for any student will be dictated by his or her individual needs. The BSI group home is each student's home for the time that he or she attends BSI and lives in the home.

44. The Vail, Manning and Frost Houses enable adolescents with special learning and emotional needs, who cannot live in their family homes, to live in family-like homes in the community, while learning daily living and other skills necessary to their adult lives when they graduate from BSI.

45. For adolescents with serious emotional and learning needs, who can benefit from community living, but who cannot live in their own family homes, group homes staffed by trained teachers, counselors, and child care workers, are the only means for them to live in the community.

46. The services provided to BSI's students in its group homes, including Vail, Frost, and Manning Houses, are required because of the students' needs. If they did not have significant needs, then they would not require staffed group homes in order to live in the community in family-like homes.

IV. Conclusions of Law

A. "Construction of improvements for commercial purposes:" 10 V.S.A. §6001(3)(A)(i) and (ii)

1. definition of "development"

Act 250 jurisdiction extends to those land uses which constitute "development," which is defined, in pertinent part, as:

> (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.

10 V.S.A. §6001(3)(A)(i).

> (ii) The construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality that has not adopted permanent zoning and subdivision bylaws.

10 V.S.A. §6001(3)(A)(ii); *and see* EBR 2(A)(1)(b).

a. construction of improvements

EBR 2(D) defines "construction of improvements" as:

> any physical action on a project site which initiates development for any purpose enumerated in Rule 2(A). Activity which is principally for preparation of plans and specifications that may be required and necessary for making application for a permit, such as test wells and pits (not including exploratory oil and gas wells), percolation tests, and line-of-sight clearing for surveys may be undertaken without a permit, provided that no permanent improvements to the land will be constructed and no substantial impact on any of the 10 criteria will result. A district commission or the board may approve more extensive exploratory work prior to issuance of a permit after complying with the notice and hearing requirements of Rule 51 herein for minor applications.

b. "commercial purpose"

EBR 2(L)[4] defines "commercial purpose" 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.

2. application of 10 V.S.A. §6001(3)(A)(i) and (ii) to the Houses

a. 972 Vail Road, Bennington (Vail House): 10 V.S.A. §6001(3)(A)(i)

i. construction of improvements

While arguably minor in nature, the construction that occurred at Vail House, which transformed the existing single-family home into a building that would be suitable and meet requirements for a school dormitory, constitutes construction of improvements. "Under Act 250 and environmental board rules, any construction activity, no matter how minute, triggers Act 250 jurisdiction. " *In re Audet*, __ Vt. ___, 2004 VT 30, ¶11 (Apr. 1, 2004), citing, *In re Rusin*, 162 Vt. 185, 191 (1994) ("10 V.S.A. §6081(a) mandates a land-use permit before commencement of any construction on a development."); EBR 2(D).

> *ii. on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land … in a municipality that has adopted permanent zoning and subdivision bylaws.*

Because the Town of Bennington has zoning and subdivision regulations, the definition of "development" under the provisions of 10 V.S.A. §6001(3)(A)(i) applies,

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[4] Board Rules 2(A)(1)(b), 2(D), and 2(L) were in effect in 1985, when the Legislature, "in unambiguous terms," ratified all Board rules relating to administration of Act 250, 1985 Vt. Laws No. 52, §5; *In re Barlow*, 160 Vt. 513, 520 (1993); *In re Spencer*, 152 Vt. 330, 336 (1989); 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.

such that commercial construction at Vail House is subject to Act 250 jurisdiction if it involves more than ten acres.

BSI owns Vail House, which is on a parcel of land that is greater than 10 acres in size.

iii. for "commercial purposes"

BSI is a for-profit corporation which receives payment for each of its students' education and housing. BSI's operations at Vail House are thus for "commercial purposes." *See, In re Spring Brook Farm Foundation, Inc., supra,* at 286 – 87 ("commercial purpose" exists, even if the recipients of the services that are provided do not pay for them); *and see, In re Baptist Fellowship of Randolph*, 144 Vt. 636, 639 (1984).

iv. jurisdiction over Vail House

Pursuant to 10 V.S.A. §6001(3)(A)(i), the construction at Vail House requires an Act 250 permit unless the imposition of such jurisdiction is prohibited under some other provision of law.[5]

b. 488 College Road, North Bennington (Frost House): 10 V.S.A. §6001(3)(A)(ii)

i. construction of improvements

While arguably minor in nature, the construction that occurred at Frost House, which transformed the existing single-family home into a building that would be suitable and meet requirements for a school dormitory, constitutes construction of improvements. *In re Audet*, *supra*.

ii. for "commercial purposes"

For the same reasons applicable to Vail House, BSI's operations at Frost House are also for "commercial purposes." *In re Spring Brook Farm Foundation, Inc., supra; In re Baptist Fellowship of Randolph*, *supra.*

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[5] At oral argument, the attorney for BSI conceded that Vail House meets the definition of "development' for purposes of determining jurisdiction under 10 V.S.A. Ch. 151.

iii. on more than one acre of land within a municipality that has not adopted permanent zoning and subdivision bylaws

Because North Bennington has no subdivision regulations, construction within North Bennington is governed by the provisions of 10 V.S.A. §6001(3)(A)(ii), such that commercial construction at Frost House is subject to Act 250 jurisdiction if it is on more than one acre of land.

BSI owns Frost House, which is on a four-acre parcel.

iv jurisdiction over Frost House

Pursuant to 10 V.S.A. §6001(3)(A)(ii), the construction at Frost House requires an Act 250 permit, unless the imposition of such jurisdiction is prohibited under some other provision of law.[6]

c. 968 Route 7, Bennington (Manning House): 10 V.S.A. §6001(3)(A)(i)

i. construction of improvements

While arguably minor in nature, the construction that occurred at Manning House, which transformed the existing single-family home into a building that would be suitable and meet requirements for a school dormitory, constitutes construction of improvements. *In re Audet*, *supra*.

ii. for "commercial purposes"

BSI's operations at Manning House are also for "commercial purposes." *In re Spring Brook Farm Foundation, Inc., supra; In re Baptist Fellowship of Randolph*, *supra.*

[6] At oral argument, the attorney for BSI conceded that Frost House meets the definition of "development' for purposes of determining jurisdiction under 10 V.S.A. Ch. 151.

> *iii. 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.*

Because it is on a parcel of less than ten acres (7.5 acres), and Bennington is a "ten-acre" town, Manning House does not, taken in isolation, meet the acreage threshold for jurisdiction under 10 V.S.A. §6001(3)(A)(i). However, Manning House is within five miles of both the Fairview campus and Vail House, each of which is on more than 10 acres. Finding of Fact 38. The question is whether the Board can consider the Manning House tract along with the Fairview campus or Vail House tracts to be tracts of "involved land," such that Manning House would be considered as one with the Fairview campus or Vail House for purposes of meeting the ten-acre threshold for jurisdiction under §6001(3)(A)(i).[7] *See*, *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.,* Declaratory Ruling #409, Findings of Fact, Conclusions of Law, and Order (Dec. 5, 2002), *aff'd, In re Real J. Audet*, *supra.*

a. "involved land"

EBR 2(A)(1)(b) defines "development," in parts pertinent to the question raised herein, as:

> The construction of improvements for any commercial … purpose …, which is located on a tract or tracts of land of more than … ten acres . . . . *In determining the amount of land, the area of the entire tract or tracts of involved land owned or controlled by a person will be used*.

(Emphasis added)

"Involved land" includes, in pertinent part:

> 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

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[7] BSI contends that other BSI properties are not "involved land" for purposes of the assertion of 10 V.S.A. §6001(3)(A)(i) jurisdiction over Manning House. Memorandum at 11.

> 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.

EBR 2(F)(1).

Breaking the definition of "involved land" into its constituent elements, our analysis proceeds as follows:

> *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*

Pursuant to EBR 2(U), "tract" is defined as "one or more physically contiguous parcels of land owned or controlled by the same person or persons."

As concluded above, there has been construction of improvements for commercial purposes on the Manning House tract.

> *2. and any other tract,*

The Fairview campus tract and the Vail House tract also fall within the definition of "tract" in EBR 2(U), as they are both owned by BSI, the same "person" for purposes of Act 250 jurisdiction. EBR 2(C)(1).

> *3. within a radius of five miles*

The Manning House tract is located within a radius of five miles of the Fairview campus tract and the Vail House tract.

> *4. 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.*

Manning House, Vail House and the Fairview campus are all integral parts of the BSI's overall operation of its school. See Findings of Fact 12 - 17. Manning House is "involved land," with the Fairview campus tract and the Vail House tract.

iv jurisdiction over Manning House

Pursuant to 10 V.S.A. §6001(3)(A)(i), the construction at Manning House requires an Act 250 permit unless the imposition of such jurisdiction is prohibited under some other provision of law.[8]

C. BSI's federal claims under the FHA and the ADA

1. *BSI's claims*

BSI contends that the State cannot assert Act 250 jurisdiction over Vail, Frost or Manning Houses, as to do so would violate the anti-discrimination provisions of the federal Fair Housing Act (FHA), 42 U.S.C. §3601, *et seq.,* and the Americans with Disabilities Act (ADA), 42 U.S.C. §12101, *et seq.* BSI argues:

a. BSI's students are "handicapped" under the FHA; BSI has jurisdiction to assert the rights of its students, as well as its own rights under the law.

b. As to all three of BSI's group homes involved in this appeal, the Board must interpret its rules so as to treat group homes for people with disabilities the same as single family homes. Failure to do so would violate the federal FHA and ADA, and Vermont's public accommodation equivalent statute, 9 V.S.A. § 4501, et seq.

c. The Board must consider and apply the FHA and ADA.

d. If BSI's students lived with their families in single-family homes, there would be no Act 250 jurisdiction over their living situation. But people with disabilities, including the BSI students, must live in group homes. Group homes may, as here, fall within the definition of "development," be subject to Act 250 jurisdiction, and therefore require Land Use Permits for their construction. Thus, people with disabilities are subject to requirements that people without disabilities need not endure.

e. The mere fact that an Act 250 application for the Houses must be filed is discriminatory.

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[8] Because the Board concludes that jurisdiction attaches to Manning House under 10 V.S.A. §6001(3)(A)(i), it does not reach the question of whether jurisdiction might also attach under 10 V.S.A. §6001(3)(A)(iv).

f. Under the FHA, the Board must reasonably accommodate the needs of handicapped individuals. Denial of a reasonable accommodation request violates the FHA.

g. The only accommodation that is reasonable is that the Board must conclude that the BSI group homes are the same as "conventional dwellings" and hold that it has no jurisdiction.

h. The Vermont Legislature has consistently expanded the rights of citizens with disabilities to live in the community, as part of a state-wide national policy of normalization. To interpret Act 250 and the Board Rules as subjecting all group homes for handicapped people to the law, while exempting single-family homes, is inconsistent with that policy and contrary to the intent of the Legislature.

2. Bennington's reply

The Town of Bennington disagrees; it argues:

a. The FHA, the ADA, and Vermont's public accommodation statute may require in particular cases that state administrative bodies make reasonable accommodations for protected individuals.

b. The record at this stage in the proceeding does not support a conclusion that BSI's clients are handicapped within the meaning of the anti-discrimination statutes.

c. Even if the clients were entitled to protection under the anti-discrimination statutes, these laws do not strip the Board of jurisdiction over "development" that is otherwise subject to Act 250. Handicapped individuals who seek reasonable accommodations must first apply for a regulatory permit, and then make a fact-specific showing in that proceeding as to what accommodations are both necessary and reasonable.

d. Act 250 does not on its face discriminate against the handicapped. The Board is not the proper forum for adjudicating a claim that the assertion of jurisdiction based on facially neutral criteria creates an unlawful discriminatory impact. Even if the board could adjudicate such a claim, the record here does not support it.

3. Discussion

There is no dispute that the FHA and ADA apply to Act 250. *Howlett v. Rose*, 496 U.S. 356 (1990); *Tsombanidis v. West Haven Fire Dept.*, 352 F.3d. 565 (2nd Cir., 2003). The FHA and ADA require state and local governments to enforce housing policies in a manner that does not discriminate against individuals with disabilities. *Tsombanidis* at 573.[9]

BSI's argument is founded on the proposition that a finding that any of its Houses are subject to Act 250 jurisdiction is the equivalent of a violation of the FHA and the ADA. This is because (a) BSI students must live in group homes; (b) group homes are subject to Act 250 jurisdiction and single-family residences are not; and (c) merely having to go through the Act 250 application process places an undue burden under federal law and constitutes a failure to make reasonable accommodation to the needs of handicapped individuals.

The Board has difficulty accepting certain of these claims. First, not all group homes are subject to Act 250 jurisdiction; a nine-bedroom group home which sits on a lot smaller than one acre would not necessarily be subject to the jurisdiction of the Act. It is the fact that BSI's Houses, for different reasons, fall within the definition of "development"[10] that causes Act 250 jurisdiction to attach.

Second, the Commissions and Board judge projects objectively in terms of their impacts on the criteria listed in 10 V.S.A. §6086(a); who inhabits such projects is not a relevant consideration. *In re Spring Brook Farm Foundation, Inc*., *supra*, 164 Vt. at 287 (Act 250 requires a focus on the impact of the land use, not the nature of the institutional activity); *accord, In re Baptist Fellowship of Randolph, Inc., supra,* 144 Vt. at 639; *and see* cases cited in *Re: S-S Corporation/ Rooney Housing Developments*, Declaratory Ruling #421, Memorandum of Decision at 2 - 5 (Feb. 5, 2004), *appeal dktd.*(Vt. S. Ct.); *Re: John J. Flynn Estate and Keystone Development Corp.,* #4C0790-2-EB, Findings of Fact, Conclusions of Law, and Order at 26 n. 9 (May 4, 2004).

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[9] The Board neither assumes nor finds, for purposes of the pending motions, that the BSI students fall within the federal definition of "handicapped individuals." The Board's decision today does not depend on a determination of this question.

[10] All construction, which falls within the definition of "development" under Act 250 is required to obtain a Land Use Permit, regardless of who will inhabit or use it.

Third, at oral argument, the Board asked BSI's counsel for case law to support the contention that the mere fact that an applicant must seek a permit for housing for handicapped individuals is *per se* discrimination and constitutes the denial of a reasonable accommodation. BSI has not presented any such authority.

Notwithstanding the above, the Board does not believe that the context of this case allows it to rule on the claims made by BSI in this matter. In effect, BSI asks the Board to determine that Act 250, to the extent that it requires BSI's group homes to file applications for Land Use Permits, violates federal law. The Board, however, cannot rule on the constitutionality of its own enabling legislation. *Westover v. Village of Barton Electrical Department*, 149 Vt. 356, 359 (1988); *Munson Earth-Moving Corporation*, #4C0986-EB, Findings of Fact, Conclusions of Law, and Order at 8 n. 1 (Apr. 4, 1997), *rev' on other grounds*, *In re Munson Earth Moving*, 169 Vt. 455 (1999).

Further, the posture of this case places the Board in a position of having to make judgments that it cannot make. For example, if the Board were to find that merely having to apply for a permit constituted a "disparate impact" – and that is the entire thrust of BSI's claim – the question would arise as to how the case should then proceed. *Tsombanidis* requires: "If a plaintiff makes a prima facie showing, the burden *shifts to the defendant to prove* that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." *Tsombanidis, supra,* 352 F.3d at 575 (emphasis added), quoting *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir. 1988).

The process, as it presents itself here, puts the Board in an impossible position. The federal statutory questions raised in this matter arise within the context of a Declaratory Ruling, and not within the context of a suit by a plaintiff against a defendant. Here, the Board would be placed both in the position of attempting to adjudicate whether requiring BSI to apply for an Act 250 permit has a disparate impact on BSI's students, and then, if it found that such an impact exists, having to "prove" (to itself?) that such a requirement serves a bona fide governmental interest which cannot be accomplished in a less discriminatory way. In effect, the Board itself is being asked to judge *whether its own process* violates the ADA and FHA, unlike a court which judges only whether a particular law or ordinance is discriminatory. Within the context of this Declaratory Ruling Petition, the Board is without authority to make the judgments that BSI asks it to make.

Thus, the Board's conclusions in this case are limited. The Board concludes that the Houses fall within the definition of "development" of 10 V.S.A. §6001(3) and,

as such, are subject to the jurisdiction of the Act and must seek and obtain Land Use Permits for any covered construction of improvements. The question of whether this ruling, by itself, violates federal law must await a decision in another forum.

V. Order

1. The property owned by BSI at 972 Vail Road in the Town of Bennington, Vermont (Vail House), which is the property at issue in Jurisdictional Opinion #8-235, is subject to the jurisdiction of 10 V.S.A. Ch. 151 (Act 250).

2. The property owned by BSI at 488 College Road in the Village of North Bennington, Vermont (Frost House), which is the property at issue in Jurisdictional Opinion #8-236, is subject to the jurisdiction of 10 V.S.A. Ch. 151 (Act 250).

3. The property owned by BSI at 968 Route 7 in the Town of Bennington, Vermont (Manning House), which is the property at issue in Jurisdictional Opinion #8-239, is subject to the jurisdiction of 10 V.S.A. Ch. 151 (Act 250).

Dated at Montpelier, Vermont this 9th day of March 2005.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden___
Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
W. William Martinez
Alice Olenick
Karen Paul
A. Gregory Rainville
Jean Richardson
Christopher Roy