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

Re: Vermont RSA Limited Partnership
d/b/a Verizon Wireless

Declaratory Ruling #441

Findings of Fact, Conclusions of Law, and Order

This proceeding involves a Petition for a Declaratory Ruling filed with the Environmental Board (Board) by Vermont RSA Limited Partnership d/b/a Verizon Wireless (Vermont RSA) from a Jurisdictional Opinion which asserts jurisdiction pursuant to 10 V.S.A. Ch. 151 (Act 250) over the proposed construction of an equipment shelter/building and cellular panel antennas and personal communication services (PCS) antennas on land and in the towers of St. Mary's Star of the Sea Church (Church) in Newport, Vermont (Project).

I. History

On June 24, 2004, in response to a January 27, 2004 request for a Jurisdictional Opinion from Vermont RSA, the District 7 Environmental Commission Assistant Coordinator issued Jurisdictional Opinion #7-219, which found Act 250 jurisdiction over the Project. Vermont RSA timely requested reconsideration of this decision.

On October 22, 2004, the District 7 Environmental Commission Coordinator issued Jurisdictional Opinion #7-219 (Reconsideration), concluding that the Project is subject to Act 250 jurisdiction.

On November 18, 2004, Vermont RSA filed the Petition. Vermont RSA requested that its Petition be held in abeyance pending action by the District Commission on an intended Act 250 permit application.

On December 16, 2004, Gerald R. Tarrant, Esq., representing Clark Curtis, Linda Curtis, Christine Hilliker, Richard Hilliker, Elizabeth Lemieux, Romeo Lemieux, Paul Major, Norma Major, Stephanie Rosamilia, John Snay, Nelson Stevens, Rachel Stevens, Susan Zaffis and Thomas Zaffis (Intervenors), filed a Memorandum with the Board, asking that proceedings on the Petition go forward.

Vermont RSA replied to Mr. Tarrant's Memorandum on January 7, 2005, and on January 25, 2005, the Board issued a Memorandum of Decision in which it decided to move forward with the Petition.

The Board issued a Memorandum of Decision on party status issues on May 11, 2005.

Vermont RSA filed a motion for partial summary decision as to criteria 8 (historic sites) and 10 (Town Plan) on May 24, 2005.

The Intervenors filed a motion for summary decision on May 25, 2005.

Both parties filed subsequent memoranda in late May 2005.

The Board held a site visit and heard argument on the pending motions on June 29, 2005.

The Board deliberated on August 17 and September 28, 2005.[1]

II. 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

The Project

1. Vermont RSA seeks to construct and install a wireless, cellular and personal communications services (PCS) installation.

2. The Project involves the installation of three cellular panel antennas (each measuring 96 inches by 12 inches) and three PCS antennas (each measuring 56 inches by 8 inches) within the existing bell towers of St. Mary's Star of the Sea Catholic Church in the City of Newport. Three antennas would be located in each of the Church's two bell towers.

3. The Project also involves the construction of a 12-foot by 30-foot by 10-foot high equipment shelter/building to house a generator and communications equipment as part of a reconstructed garage in the Church parking lot adjacent to the back of the Church.

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[1] Board Member Jill Broderick participated in the hearing but not in the deliberations or final decision.

St. Mary's Church

4. St. Mary's Star of the Sea Catholic Church is presently located on the property where the Project would be located.

5. St. Mary's Church was constructed in the early 1900's.

6. The owner of the land on which the Church sits is the Roman Catholic Diocese of Burlington Vermont, Inc.

7. The Church is the only use or structure on the lot owned by the Diocese.

8. The lot size of the property on which St. Mary's Catholic Church sits is 2.9 acres, more or less.

The City of Newport's local regulations

9. The City of Newport has not adopted permanent subdivision regulations.

Impacts on the Act 250 Criteria

Historic Structures

10. On November 15, 2002, by letter sent to Vermont RSA, Eric Gilbertson, the Deputy State Historic Preservation Officer of the Vermont Division for Historic Preservation, commented as regards the Project:

> We concur with your determination that St. Mary's Star of the Sea Catholic Church and the associated Rectory are eligible for listing on the National Register of Historic Places under Criterion C. We also concur with your determination that the proposed project will have no adverse effect to this historic resource.

Aesthetics

11. The Church faces north and sits high on a bluff overlooking downtown Newport and Lake Memphremagog.

12. The Church is a tall building, about five "stories" (including the bell towers) high.

13. The Church has two bell towers. There are eight openings in each of the two towers. Two or three of the openings in each tower are visible from any

given location.

14. Visibility through the east tower is presently diminished because of a dark mesh screen placed over the openings to keep birds out. In the west tower, a finer mesh installed by Vermont RSA allows one to more easily see through the towers.

15. Non-functional antennas have been installed in the west tower in order to provide an example of the visual impacts of the Project on the bell towers.

16. Groundwires run from lighting rods on the Church roof, along the roof lines, to the ground.

Context of the Project area

17. The Church is in a residential area, with the three-story rectory to the west and residences to the east and south. Some trees screen views of the Church from some of these residences. There is a convent to the west of the Church.

18. There are small communications antennas and satellite dishes on some homes to the east and south of the Church.

19. The equipment building will be installed immediately south of an existing Church garage in the existing parking lot to the southwest of the Church.

20. Ambient background noise at Church parking lot where the Project's equipment building will be installed is moderate.

21. The land to the south of the Church slopes upward to a small hill.

22. Views of the bell towers from a residence located on the hill to the south of the Church are a little above eye-level, through a line of trees.

The City Plan

23. Neither party indicated any particular section of the Newport City Plan that would be applicable to the Project.

IV. Conclusions of Law

A. The law and the shifting burdens of proof

The burden of proof consists of the burden of producing the evidence, and the burden of persuading the Board. *See, Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267, 272-274 (1994) (discussing burden of production and burden of persuasion); *Re: Thomas Howrigan Gravel Extraction*, Declaratory Ruling #358, Findings of Fact, Conclusions of Law, and Order at 9 (Aug. 30, 1999), citing *Re: Champlain Construction Co.*, Declaratory Ruling #214, Memorandum of Decision at 2-4 (Oct. 2, 1990).

The issue in this case is whether the Project is subject to the Land Use Permit requirements of Act 250.

1. Burden of proof

The burden of proof is on the party that claims that jurisdiction should attach. *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, Declaratory Ruling #409, Findings of Fact, Conclusions of Law, and Order at 9-10 (Dec. 5, 2002), *aff'd, In re Real Audet,* 2004 VT 30 (2004); *Re: Town of Williston Road Improvements,* Declaratory Ruling #381, Findings of Fact, Conclusions of Law, and Order at 4-5 (Jan. 13, 2001); *Re: W. Joseph Gagnon*, Declaratory Ruling #173, Memorandum of Decision at 4 -6 (Jul. 3, 1986); *Re: Lincoln Haynes Gravel Pit*, Declaratory Ruling #192, Findings of Fact, Conclusions of Law, and Order at 8 (Sep. 25, 1987), *aff'd*, *In re L.W. Haynes, Inc.*, 150 Vt. 572 (1988).

2. Developments require Land Use Permits

In jurisdictional matters which involve questions of preexisting status and substantial change, however, the burden of proof shifts between the parties at each stage.

The party which asserts that a project is subject to Act 250 must prove that the project, if constructed today, would be either a "development' or "subdivision" and thus within the reach of the law. *See, Re: Robert and Barbara Barlow,* Declaratory Ruling #222, Findings of Fact, Conclusions of Law, and Order at 3 (Dec. 26, 1990). s*ee also Re: Village of Ludlow*, Declaratory Ruling #212 (Dec. 29, 1989); *Re: Vermont Marble Co.*, Declaratory Ruling #101, Findings of Fact, Conclusions of Law, and Order at 3 (Dec. 13, 1978).

Act 250 requires that a land use permit be obtained prior to commencing construction on a development. 10 V.S.A. §6081(a). "Development" is defined in

relevant part as "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).

Newport does not have subdivision regulations and is therefore a "one acre town."

The Church, if built today would be an Act 250 "development" and require a Land Use Permit. *In re Baptist Fellowship of Randolph, Inc*., 144 Vt. 636, 639 - 640 (1984).

The Project, if it were to be considered in isolation, is also "development." 10 V.S.A. §6001(3)(A)(ii).

3. Preexisting developments are exempt

Land Use Permits are generally not required for developments that predate the adoption of Act 250. A "development which is not also a subdivision, which has been commenced prior to June 1, 1970, if the construction will be completed by March 1, 1971…." is presumptively grandfathered from the Act's permit requirements. 10 V.S.A. §6081(b).

If the proponent of jurisdiction satisfies the initial burden of proof threshold (and demonstrates that the project, if built today, would fall within Act 250's ambit), then the party seeking the benefit of Act 250's exemption for preexisting developments bears the burden of proving that the exemption applies. *Re: Hale Mountain Fish and Game Club, Inc.,* Declaratory Ruling #435, Memorandum of Decision at 5 (Sep. 24, 2004); *Re: Raleigh B. Palmer, Isle La Motte Gravel Pit,* Declaratory Ruling #424, Findings of Fact, Conclusions of Law, and Order at 7 (Nov. 4, 2004); *Re: F.W. Whitcomb Construction Co.*, Declaratory Ruling #408, Findings of Fact, Conclusions of Law, and Order at 8 (2002), citing *Re: Thomas Howrigan Gravel Extraction*, *supra,* at 9, citing *Re: Champlain Construction Co.*, *supra,* at 2 – 4.

Vermont RSA has met this burden. The Church was constructed in the early 1900s and therefore is a preexisting development.

4. Substantial changes will cause preexisting developments to be subject to Act 250's permitting requirements

Once a project is found to be preexisting, the burden of proof then shifts back to the proponent of jurisdiction to show that there has been a "substantial change" to the preexisting development. 10 V.S.A. § 6081(b); *Re: Hale Mountain, supra,* at 5 - 6*; Re: Thomas Howrigan, supra,* at 9, citing *Re: Champlain Construction Co.*, *supra,* at 2-4:

"[T]he burden of persuasion with respect to substantial change lies with those who contend that a permit is required."

A permit is required for a "substantial change" to a preexisting development. 10 V.S.A. §6081(b): "[10 V.S.A. §6081(a)] shall apply to any substantial change in such excepted subdivision or development;" Environmental Board Rule (EBR) 2(A)(1)(e).

A "substantial change" is "any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. §6086(a)(1) through (10)." EBR 2(G); *In re Barlow,* 160 Vt. 513, 520 (1993); *In re H.A. Manosh Corp*., 147 Vt. 367, 369 (1986); *In re Orzel*, 145 Vt. 355, 360 (1985). "There is no presumption that a substantial change either has or has not occurred since the enactment of Act 250." *Re: Raleigh B. Palmer, supra,* at 7, quoting *Re: Lake Champagne Campground*, Declaratory Ruling Request #377, Chair's Preliminary Ruling, at 4 (Feb. 2, 2000).

A determination of whether there has been a "substantial change" involves a two-step process: First, there must be a cognizable change to the preexisting development. Second, the change must have the potential for significant impact under one or more of the ten Act 250 criteria. *Re: Robert and Barbara Barlow,* Declaratory Ruling #234, Findings of Fact, Conclusions of Law, and Order at 3 (Sep. 20, 1991). And see; *Re: Champlain Marble Corp. (Fisk Quarry)*, Declaratory Ruling #319, Findings of Fact, Conclusions of Law, and Order at 10 (Oct. 2, 1996), citing *Re: L.W. Haynes,* Declaratory Ruling #192, Findings of Fact, Conclusions of Law, and Order at 7 (Sept. 5, 1987), *aff'd, In re Haynes*, 150 Vt. 572 (1988); *see also, Re: Stonybrook Condominium Owners Ass'n,* Declaratory Ruling #385, Findings of Fact, Conclusions of Law, and Order at 9 (May 18, 2001), citing *Re: Hiddenwood Subdivision,* Findings of Fact, Conclusions of Law, and Order at 9 (Jan. 12, 2000).

The Board's substantial change test has been upheld by the Vermont Supreme Court. *In re Greg Gallagher*, 150 Vt. 50, 51 (1988); *In re Manosh Corp*., 147 Vt. 367, 369 (1986).

B. Analysis

1. Whether jurisdiction exists because the Project is a "substantial change"

Whether a "substantial change" will occur to the Church if the Vermont RSA Project is installed is an issue in the present matter.

a. Cognizable change

The construction of the Project, both the installation of the antennas in the bell towers and the construction of the equipment building, is a cognizable change.

b. Impacts on the criteria [2]

i. Criterion 8 (aesthetics)

The present mesh screening prevents clear views through the bell towers; the proposed screens will allow such views, and while the proposed antennas will be visible

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[2] The Intervenors argue that because the Board has granted them party status as to Criterion 8 (aesthetic and historic sites) and 10 (City Plan),this is a finding that the Project may have impacts under those criteria and thus is a substantial change under the test approved by the Vermont Supreme Court in *In re Barlow, supra.*.

The Intervenors sought party status (standing) to participate in this Declaratory Ruling pursuant to EBR 14(A)(5) and (6). EBR 14(A)(5) grants party status to Any adjoining property owner who demonstrates a property interest under any of the criteria listed at 10 V.S.A. Section 6086(a) which may be directly affected by the outcome of the proceeding." EBR 14(A)(6) uses nearly identical language in discussing a grant of party status to non-adjoiners: "Any person who demonstrates an interest under any of the criteria listed at 10 V.S.A. Section 6086(a) which may be directly affected by the outcome of the proceeding."

Thus, a conclusion by the Board that the Intervenors have party status is a finding that they have an interest under a criterion that may be affected by the proceeding. *Re: Hale Mountain Fish and Game Club, Inc,* Declaratory Ruling #435, Memorandum of Decision (Sep. 27, 2004). It is not, however, the equivalent of a finding that the Project may have an effect on that interest.

If the Intervenors want to prove that a substantial change has occurred, they must do more than just show that they have been granted party status. They may attempt to make their case (as least as to Criterion 8) through the site visit, *see In re Quechee Lakes Corp.*, 154 Vt. 543, 553 (1990) (10 V.S.A. §6088 imposes no limits, direct or indirect, on the evidence the Board is allowed to consider in deciding whether a particular issue has been proved), but they cannot rest on the mere grant of party status.

through the openings in the bell towers, the Board concludes that they do not significantly detract from the Church's overall visual aesthetic quality.[3]

While the equipment building may cause some increased levels of noise as a result of its operation, the Board concludes that the Intervenors have not provided sufficient evidence to show that such noise may have any impacts on the ambient noise levels of the area. The Board further concludes that the visual impacts from the construction of the planned equipment building in the existing parking lot south of the Church garage will not have significant visual impacts on the aesthetics of the area.

Therefore, based on a consideration of the context of the Project (the Church and its surroundings), and the scope of the Project (its potential visual and auditory impacts on its context), the Board concludes that, because it will have no significant impacts on Criterion 8 (aesthetics), the Project does not rise to the level required to trigger jurisdiction as a "substantial change."

ii. Criterion 8 (historic sites)

The only documentary evidence in the record as to Criterion 8 (historic sites) is a November 15, 2002 letter from Eric Gilbertson of the Vermont Division for Historic Preservation which states that, while the Church is an historic site, the Project "will have no adverse effect to this historic resource."

The Intervenors have not presented any evidence specifically as to this criterion.

iii. Criterion 10

Neither party cites to any particular provision of the City Plan that arguably applies to the Project. Rather, both parties focus on several sections of the Newport zoning bylaws which have been the subject of much litigation before the Environmental Court.

Earlier this year, the Environmental Court issued a decision in Vermont RSA's favor as to the zoning bylaws at issue. *In re Appeal of Curtis,* Dkt. Nos. 203-11-03 Vtec and 231-12-03 Vtec. Decision and Order at 7 (Jan. 24, 2005). While this decision has been appealed to the Vermont Supreme Court (Dkt. No. 2005-129), the Environmental Court's ruling indicates to the Board that any claims that the Intervenors might raise as to the City Plan relevant to Criterion 10 are not likely to rise to levels sufficient to find jurisdiction under the Board's "substantial change" test.

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[3] Observations taken at the site visit provide the best evidence as to the impacts that the Project could have on aesthetics.

This being the case, the Board finds that the Intervenors have not met their burden in this regard.

The Board therefore concludes that the Project is not a "substantial change" to the Church as a preexisting development and no permit is required under 10 V.S.A. §6081(b).

2. Whether jurisdiction exists because the Project is a "development" that is not entitled to the benefits of the Church's status as a "preexisting development"

a. The Project is a present "development"

The Intervenors argue in the alternative that the Board need not consider whether the Project is a substantial change to an existing development - the Church - because the Project, standing alone, is itself a "development." It is true that, if nothing were to have ever been built on the 2.9 acre site (on which the Church presently stands) a proposal to construct cellular panel antennas, PCS antennas, and an equipment shelter/building to house a generator and related communications equipment would be a "development" under 10 V.S.A. §6001(3)(A)(ii) because:

1) the antennas and the equipment building are "the construction of improvements for commercial … purposes;"

2) the Church parcel is "more than one acre of land;" and

3) the City of Newport is "a municipality that has not adopted permanent … subdivision bylaws" and is therefore a "one acre town."

Intervenors argue that the case is thus simple; the Project is a "development" and thus subject to Act 250.

Analysis of the Intervenors' argument is not, unfortunately, black and white. The potential fly in the argument's ointment is the existence of 10 V.S.A. §6081(b) which exempts construction of improvements to preexisting developments unless such construction rises to the level of being a "substantial change."

There is no question that the Church, if built today would be an Act 250 "development" and require a Land Use Permit. *See, In re Baptist Fellowship of Randolph, Inc.*, *supra.* Because it was built before 1970, however, the Church is a "preexisting development" and therefore - if no substantial change occurs - exempt from Act 250 jurisdiction under §6081(b).

If every new construction of improvements for commercial purposes on a two acre site in a "one acre town" were a *per se* "development" - even in situations where a preexisting development sits on the site of the construction - then the concept of "preexisting developments" and the protection afforded preexisting developments by §6081(b) would have no meaning. To effectively interpret the concept of "preexisting developments" out of existence would be in conflict with general statutory construction rules which require the Board to presume that language is inserted in a law for a purpose, *Slocum et al. v. Department of Social Welfare*, 154 Vt. 474, 481 (1990), citing *State v. Racine*, 133 Vt. 111, 114 (1974), and with the intent that it be given meaning and force. *In re Munson Earth Moving Corp*., 169 Vt. 455, 465 (1999); *Committee to Save the Bishop's House, Inc., v. MCHV, Inc.*, 137 Vt. 142, 153 (1979) (the Legislature does not intend to create surplusage). "In construing a statute, every part of the statute must be considered, and every word ... given effect if possible." *In re Eastland, Inc*., 151 Vt. 497, 499 (1989), quoting *State v. Stevens*, 137 Vt. 473, 481 (1979).

We decline to so easily render nugatory the protections afforded to preexisting developments by §6081(b). The legislature has seen fit to entitle such developments to special dispensation: only substantial changes to them are subject to jurisdiction. Indeed, our own precedent indicates that we have been cautious in asserting jurisdiction. Even where substantial changes have occurred, only the changes themselves are subject to Act 250 permitting requirements; the preexisting development as a whole need not seek a permit "unless the changes permeate the entire project." *Re: Champlain Construction Co.,* Declaratory Ruling #214, Findings of Fact, Conclusions of Law, and Order at 9 (Sep. 14, 1992), citing *Re: Ronald E. Tucker,* Declaratory Ruling #165, Findings of Fact, Conclusions of Law, and Order at 7 (Feb. 27, 1985), aff'd, *In re R.E. Tucker, Inc.*, 149 Vt. 551, 553 (1988).

We are aware of the Intervenors' claim that the Vermont RSA Project is not related to the workings of the Church and should therefore be separated from the protections afforded by §6081(b), but we decline to do so. To engage in such parsing of purposes would draw the Board into too many gray areas and would cause identical construction to be treated differently. For example, were we to accept the Intervenors' argument, the present Project would be subject to jurisdiction but identical towers installed by the Church to broadcast religious messages would not. We decline to make such a distinction within a substantial change analysis.

V. Order

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

Dated at Montpelier, Vermont this 20th day of October 2005.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden___
Patricia Moulton Powden, Chair
George Holland
W. William Martinez
Patricia Nowak
Alice Olenick*
Karen Paul
Richard C. Pembroke, Sr.
A. Gregory Rainville*

* Board Members Olenick and Rainville, concurring in part and dissenting in part:

While we agree with the majority's decision in Part IV(B)(1) that the Project does not trigger Act 250 jurisdiction as a "substantial change" to the preexisting Church, we do not believe that a "substantial change" analysis governs this case, as we find merit to Intervenors' alternative argument within their analysis of the concept of "substantial change."

Acknowledging the status of the Church as a "preexisting development," the Intervenors focus on the language of 10 V.S.A. §6081(b): "[10 V.S.A. §6081(a)] shall apply to any substantial change *in such excepted subdivision or development."* (Emphasis added) The Intervenors then contend that the new construction of the towers does not bear a sufficient relationship to the Church's preexisting development status such that the towers can be considered to be "changes in *such … development,*" and, therefore, the exemption afforded to the Church by virtue of its status as a preexisting development cannot extend to the towers. Consequently, jurisdiction over the towers must be considered as if the Church did not exist, and, because the towers are 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," they are a "development." 10 V.S.A. §6001(3)(A)(ii).

No Board precedent addresses the argument which the Intervenors present. Though too many to list here,[4] prior cases which have examined the question of substantial change, however, have done so only under circumstances in which the changes were *related to the purpose or the primary use of the preexisting development.* The Board has yet to analyze the question of whether a proposed new use or construction, which is wholly unrelated to a preexisting development,[5] should obtain the

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[4] Summaries of cases can be found at Note 130, et seq., of the Board's ENotes publication at http://www.state.vt.us/envboard/publications.htm#enote

[5] Vermont RSA argues that there is a relationship between the Project and the Church because in *In re Appeal of Curtis, supra,* the Environmental Court found that the Project is a "subordinate use" to the "principal use" on the site – the Church. Vermont RSA then asserts that the Intervenors are foreclosed (by the doctrine of collateral estoppel) from arguing that they are not such a "subordinate use." We find this claim to be questionable.

First, while the Board may give some deference to the Court's conclusions, collateral estoppel does not apply because the Court's decision is on appeal and there is therefore no "final decision" that can be binding on the parties.

Second, while the concepts of "subordinate use" and "principal use" may be relevant within the Court's interpretation of Newport's zoning bylaws, they are not necessarily relevant to a discussion of the extent of the exemption afforded to preexisting developments.

Lastly, the Court's decision lends some validity, albeit obliquely, to the Intervenors' arguments. In discussing the term "accessory" use within the Newport zoning bylaws the Court wrote:

> The placement of wireless telecommunications antennas on a church building does not fall within the use category of "accessory" use because the antennas are not 'customarily incidental' to the religious use; they are not functionally related to the principal use of the property. Compare *Appeal of Stanak and Mulvaney,* Docket No. 101-7-01 (Vt. Envtl. Ct., Feb 28, 2002) (antenna panels not accessory to a publicly-owned elderly housing use.) If this application were for approval of the proposal as an accessory use to the church, it would not qualify for approval.

In re Appeal of Curtis, supra, Decision and Order at 7.

[Footnote continues on page 14]

benefit of the more conservative assessment of jurisdiction that a preexisting development enjoys, simply because such new use or construction is located on the site of the preexisting development.

Intervenors argue by analogy to the zoning concepts of "non-conforming structures" and "non-conforming uses," 24 V.S.A. §4303(14); such structures and uses - legal at the time they were built or put into operation but presently prohibited under subsequent bylaws - are grandfathered. Intervenors note that exemptions to land use regulation afforded to non-conforming structures and uses are to be read narrowly.

> The public interest in the regulation and gradual elimination of nonconforming uses is strong, and zoning provisions allowing nonconforming uses should be strictly construed. By their very nature, nonconforming uses … are inconsistent with that purpose. Such uses are recognized and permitted to continue, simply by virtue of their existence prior to the enactment of the ordinance. *However, their extension is carefully limited, since the ultimate goal of zoning is to gradually eliminate them.*

Id., at 559, citing *Appeal of Gregoire,* 170 Vt. 556 (1999) (mem.) (emphasis added and internal citations omitted).

Of course, the analogy to nonconforming structures within the zoning context is not a perfect one. For purposes of Act 250, the Church is not a "nonconforming structure" or a "nonconforming use;" it is simply a building that exists without an Act 250 permit - - a permit that would be required were it to be built today. That is where the direct analogy between the concepts of "nonconforming structures" and "preexisting developments" breaks down. But, in one respect, we believe that the analogy holds; the extension[6] of the exemption afforded to preexisting developments should also be "carefully limited." *Id.*

There are two ways to limit such extensions within the Act 250 context -- first, by the application of the substantial change test; and second, by a determination that the proposed use is not merely an extension of the preexisting development but, rather, is a

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Here, Intervenors would argue, uses that are truly "accessory" to the Church may fall within the shade cast by the umbrella of a preexisting development. Non-accessory uses, however, should not.

[6] Our concerns in this dissent are limited only to *extensions* of the exemption which preexisting developments enjoy, not to the elemental exemption afforded to such developments under 10 V.S.A. §6081(b) as grandfathered projects.

new development in and of itself and therefore subject to review without the benefit of the exemption afforded to preexisting developments.

We believe that there is a line between a mere extension of an existing use and the construction of a new use, and we believe that the concepts relating to accessory uses, as illustrated by the Environmental Court in *In re Appeal of Curtis, supra,* Decision and Order at 7, are applicable. Where a proposed new use or construction at a preexisting development is "customarily incidental" to the preexisting development's use or construction, or is "functionally related" to the principal use of or construction at the preexisting development, such proposals should be analyzed to determine whether they are "substantial changes." But where, as here, a proposed new use or construction does not share such relationships to the preexisting development, we can see no reason to extend to such new use or construction the advantages that grandfathering affords. We doubt that the legislature intended such a result.[7]

We also note that commercial developments on other Act 250-exempt structures do not gain an exemption from Act 250's permitting requirements merely because they are located on such structures. Under Act 250, certain activities – for example, farming or logging below 2500 feet – are not "development." 10 V.S.A. §6001(3)(D)(i). And any construction related to "farming," 10 V.S.A. §6001(22), is similarly beyond the scope of Act 250; thus, farm silos are exempt. But PCS towers which are placed on farm silos *are* subject to Act 250; they do not obtain the advantages afforded to such silos merely because they are constructed on such silos. We can see no reason why the PCS towers at issue here should be treated differently merely because they are to be built within the bell towers of an exempt church.

It may be argued that review under the substantial change analysis provides sufficient protections and safeguards to ensure that those changes to preexisting development which *should* be regulated by Act 250 *will* be regulated by Act 250. After all, one might argue that where, as here, the Board has found no potential for significant impacts under the criteria, what purpose would be served by the filing of an application for a permit?

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[7] As an example, a preexisting gas station on twenty acres with 10 pumps under two canopies which seeks to add another canopy with five more pumps would be an expansion of its existing business, and the Board would proceed to a substantial change analysis. But if that same gas station wants to build a pizza parlor on its twenty acres, one would be hard-pressed to argue that the restaurant is merely an extension of the preexisting development, or that the legislature intended that it should not be considered to be a new, stand-alone project, and therefore subject to jurisdiction if it meets the definition of development in 10 V.S.A. § 6001(3)(A).

But this is true in many instances; the vast majority of projects - about 75% - are handled by the District Commissions under the expedited "minor" permitting process of EBR 51 because the Commission has found little or no impact under the criteria. And yet these projects go through the process because they trigger the provisions of Act 250. The fact that a project is subject to the jurisdiction of Act 250 and the review that a project undergoes as a result of its being subject to Act 250 jurisdiction are two different things.

It is likely that, in this case, the Vermont RSA Project would proceed easily through the Act 250 permitting process. But that does not mean that it should be exempt from the process.