ENB 1998-053

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: NYNEX Mobile Limited Partnership 1,
d/b/a Bell Atlantic NYNEX Mobile
and
Mount Mansfield Television, Inc.,
d/b/a WCAX-TV
Declaratory Ruling #350

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

As explained more fully below, the Vermont Environmental Board ("Board") determines that, pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250"), no state land use permit is required for the construction of a proposed communications tower at the existing WCAX-TV studio facility on Joy Drive in the City of South Burlington, Vermont ("Project").

I. PROCEDURAL SUMMARY

On June 30, 1997, NYNEX Mobile Limited Partnership 1, d/b/a Bell Atlantic NYNEX Mobile ("BANM") and Mount Mansfield Television, Inc., d/b/a WCAX-TV ("WCAX") filed with the District Coordinator of the District #4 Environmental Commission ("District Coordinator") a Request for a Jurisdictional Opinion concerning whether Act 250 jurisdiction attaches to the Project.

On August 5, 1997, the District Coordinator issued Jurisdictional Opinion #4-127 ("JO").

On August 25, 1997, BANM and WCAX (collectively the "Petitioners") filed a Petition for a Declaratory Ruling with the Board contending that the JO incorrectly found that the Project is subject to Act 250 jurisdiction. Specifically, Petitioners claim that they have a vested right to a jurisdictional determination under Act 250 as the law existed on June 30, 1997 not as it was amended effective July 1, 1997. Also on August 25, 1997, Petitioners filed a Memorandum of Law Supporting Petition for Declaratory Ruling.

On September 29, 1997, then Board Chair John T. Ewing convened a prehearing conference with Petitioners, by Jon Anderson, Esq., participating.

On September 30, 1997, Chair Ewing issued a Prehearing Conference Report and Order, which is incorporated herein by reference. Among other things, the Order scheduled the proceeding for limited fact finding, oral argument, and full Board deliberation on October 22, 1997.

On October 10, 1997, Petitioners filed a list of witnesses who would be available on its behalf at the October 22, 1997 proceeding.

On October 20, 1997, at Petitioners' verbal request, Chair Ewing issued a Memorandum to Service List postponing the limited fact finding, oral argument, and Board deliberation until January 28, 1998.

On January 1, 1998, Marcy Harding assumed the office of Chair of the Board.

On January 28, 1998, the Board convened a hearing in Montpelier, VT. Petitioners, by Brian J.

Sullivan, Esq., participated. The Board accepted documentary and oral evidence into the record. It also heard oral argument of Petitioners' attorney. After recessing the hearing, the Board deliberated on January 28, 1998 and February 25, 1998.

Based upon a thorough review of the record and related argument, the Board declared the record complete and adjourned. The matter is now ready for final decision.

II. ISSUE

Whether, by filing a request for a jurisdictional opinion with the District Coordinator and taking other actions in connection with the Project on or before June 30, 1997, Act 250 jurisdiction over the Project is determined based upon the statute as it existed on June 30, 1997 or, alternatively, whether jurisdiction over the Project attaches based upon amendments made to the statute effective July 1, 1997.

III. OFFICIAL NOTICE

Under 3 V.S.A. § 810(4), notice may be taken of judicially cognizable facts in contested cases. In addition, "[t]he rules of evidence as applied in civil cases . . . shall be followed" in contested cases before administrative bodies. Id. § 810(1). Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); See In re Handy, 144 Vt. 610, 612 (1984). Official notice of a judicially cognizable fact may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. § 810(4); V.R.E. 201 (c) and (f). Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e). Findings of fact may be based upon officially noticed matters. 3 V.S.A. § 809(g).

In addition to the officially noticed matters set forth in the Prehearing Conference Report and Order issued September 30, 1997, the Board takes official notice of the following evidence submitted on January 28, 1998:

(i) State of Vermont Subdivision Permit #EC-4-2073 dated October 27, 1997.

(ii) Transmittal letter from Joe Weith, City Planner, City of South Burlington, dated September 11, 1997 together with enclosed:

(iii) Findings of Fact and Decision of the South Burlington Planning Commission, dated September 9, 1997, and concerning the application of WCAX to amend its previously approved site plan in order to construct the Project.

IV. FINDINGS

1. WCAX maintains its television studios in a two-story building at 30 Joy Drive in South Burlington, Vermont. The building and parking lot sit on two parcels of land which together total 5.2 acres. WCAX does not own any other land adjacent to or in the vicinity of the 5.2 acres.

2. A communications tower was erected on the roof of the building in 1991. The tower is a triangular lattice tower which extends 60 feet above the roof of the building. The building roof is 24 feet above the ground. A two foot antenna is mounted at the top of the tower. A dish antenna is mounted half way down the tower. The antennae mounted on the tower allow WCAX to maintain communications

between its studio and remote facilities.

3. BANM and WCAX propose to replace the existing tower with a self-supporting monopole mounted at ground level next to the studio building. The top of the monopole will be 100 feet above the ground. BANM and WCAX propose to mount nine 12 foot whip antennae at the top of the monopole and two dish antennae further down the monopole. The top of the whip antennae will be 110 feet above the ground.

4. An equipment building measuring 10 feet by 20 feet will be constructed next to the monopole.

5. The legislature recently approved 10 V.S.A. § 6001c, which provides for Act 250 jurisdiction over communication support structures extending vertically 20 feet or more above the ground. The law became effective July 1, 1997.

6. The request for jurisdictional opinion regarding the proposed BANM/WCAX tower was filed with the District Coordinator on June 30, 1997 ("JO Request").

7. On June 27, 1997 BANM and WCAX filed complete applications for all required local permits with the City of South Burlington Zoning and Planning Office.

8. The City of South Burlington has both permanent zoning and subdivision bylaws.

9. October 27, 1997, the State of Vermont, Department of Environmental Conservation ("DEC") issued Subdivision Permit #EC-4-2073 to WCAX, approving the Project according to the plans submitted on June 27, 1997.

10. On September 9, 1997, the South Burlington Planning Commission ("Planning Commission") approved the application of WCAX to amend its previously approved site plan in order to construct the Project. The approval was based upon the plans as submitted to the Planning Commission in June, 1997. The approval was conditioned on WCAX obtaining a zoning permit within 6 months of the Planning Commission's approval.

11. The Project approved by the DEC and Planning Commission is identical to the Project set forth in the plans provided to the District Coordinator in connection with Petitioners' JO Request.

12. As of June 30, 1997 when Petitioners filed the JO Request, their plans for the Project were completely drafted.

13. As support for their JO Request, on June 30, 1997 Petitioners submitted to the District Coordinator copies of the complete applications filed with the South Burlington Zoning Office and the Planning Commission on June 27, 1997, including a narrative, photographs of the site, detailed information concerning the proposed monopole, antennae, and storage building, and a map of BANM's signal coverage area. Also submitted was a plat of survey, the warranty deed conveying title to the Project site, a site plan for the Project, west and south elevations for the WCAX building (showing dimensions for the monopole and equipment building, as well as the type, size, and number of antennae and dishes); a photograph of the equipment building, and a location map, among other documents.

14. Prior to June 30, 1997, BANM and WCAX entered into a lease agreement concerning the Project.

15. As of July 1, 1997, Petitioners had not commenced construction on the Project, in part because they had not yet obtained the requisite DEC and Planning Commission approvals.

V. CONCLUSIONS OF LAW

A. Standard of Review and Burden of Proof

A petition for declaratory ruling is conducted de novo to determine the applicability of any statutory provision or of any rule or order of the Board. 10 V.S.A. § 6007(c) and EBR 3(D). Although the petition may come to the Board as an appeal of a jurisdictional opinion, the issue in a declaratory ruling proceeding is not whether a jurisdictional opinion, or any part thereof, is correct. Thus, facts stated or conclusions drawn in the opinion are not considered by the Board. Provided a petition is timely filed and the petitioner has standing to request a declaratory ruling, the only issue is the applicability of any statutory provision or of any rule or order of the Board over the project described in the jurisdictional opinion. E.g., Re: David Enman, Declaratory Ruling #326 at 11 (Dec. 23, 1996).

The burden of proof to demonstrate an exemption from Act 250 jurisdiction is on the person claiming the exemption -- Petitioners in this proceeding. Re: Weston Island Ventures, Declaratory Ruling #169 at 5 (June 3, 1985) (citing Bluto v. Employment Security, 135 Vt. 205 (1977)). The burden of proof consists of both the burdens of production and persuasion. Re: Pratt s Propane, #3R0486-EB, Findings of Fact, Conclusions of Law, and Order at 4-6 (Jan. 27, 1987). [EB #311M]

B. Development

Act 250 provides that [n]o person shall . . . commence construction on a . . . development, or commence development without a permit. 10 V.S.A. §6081(a). The definition of development includes the "construction of improvements" for commercial purposes on a tract that exceeds a specified acreage. Id. § 6001(3); EBR 2(A)(2). As of July 1, 1997,

any support structure proposed for construction, which is primarily for communication or broadcast purposes and which will extend vertically 20 feet, or more, in order to transmit or receive communication signals for commercial, industrial, municipal, county or state purposes, shall be a development under [Act 250], independent of the acreage involved.

10 V.S.A. § 6001c.

1. Vested Rights

Petitioners argue that by filing complete applications for local permits and requesting a jurisdictional opinion prior to July 1, 1997, their right to have jurisdiction determined by pre-July 1, 1997 law "vested." Petitioners rely upon the Vermont Supreme Court's decisions in In re Molgano, 163 Vt. 25 (1994) and Smith v. Winhall Planning Commission, 140 Vt. 178 (1981) in support of this argument.

The facts and holding of Molgano are briefly as follows: Molgano filed a permit application with the municipal Zoning Board of Adjustment ("ZBA") in 1987. Although the proposed project was specifically allowed under zoning ordinance 6.34, the ZBA denied Molgano a permit under the town's interim growth management bylaw. After a successful appeal to the Superior Court, Molgano obtained a permit from the ZBA in 1990. In 1991, Molgano applied for an Act 250 permit. Shortly before he filed the Act 250 application, the town amended zoning ordinance 6.34 to prohibit proposals like Molgano's. On appeal from the Commission's determination, the Environmental Board held that if zoning bylaws

are relevant when determining a proposed project's conformity with a town plan pursuant to 10 V.S.A. § 6086(a)(10) ("Criterion 10"), then Molgano's project failed to comply with Criterion 10 because it violated ordinance 6.34 as amended.

The Vermont Supreme Court reversed the Board's determination. The Court stated that Molgano had a vested right to be judged against the version of the ordinance in effect when he first applied for the zoning permit. The Court held that where "a developer diligently pursues a proposal through the local and state permitting processes before seeking an Act 250 permit, conformance under § 6086(a)(10) is to be measured with regard to zoning laws in effect at the time of a proper zoning permit application." Id. at 33. The Court found that the Board's analysis would nullify Smith v. Winhall Planning Commission and would allow towns to apply zoning changes retroactively through the Act 250 process.

In Smith, a municipal planning commission denied Smith's application for a subdivision permit based upon the commission's belief that the zoning ordinances intended to require a minimum 5 acre lot size. While the denial was on appeal to the superior court, the planning commission amended the zoning regulations to explicitly require a 5 acre minimum. These amendments had been neither officially proposed nor in the process of enactment when the Smith application was originally filed. The superior court reversed the permit denial and remanded the matter to the planning commission. The planning commission denied the application based on the amended regulations. On appeal, the Supreme Court considered both the majority and minority rules regarding vested rights and zoning regulations. The Smith Court rejected the majority rule that neither the filing of an application nor the issuance of a permit vests an applicant's rights against future changes in zoning regulations, except in certain narrow circumstances. Instead, the Court held that an application for a local subdivision permit must be reviewed under the zoning regulation in effect at the time a "proper application is filed." 140 Vt. at 181. The Court found that the minority rule serves to avoid the maneuvering and litigation characteristic of zoning controversies. "It is . . . the more equitable rule in the long run application, especially where no amendment is pending at the time of the application . . . ." Id. at 182.

The Petitioners in the pending matter rely on both Molgano and Smith to support their contention that analysis of Act 250 jurisdiction must proceed under the law in effect at the time they filed complete applications for all necessary local permits -- three days prior to the day on which 10 V.S.A. § 6001c became effective. This reliance is unfounded. Molgano addresses the very narrow question of which zoning regulation should be considered when determining a proposed project's conformance with Criterion 10. Even if Molgano could be read broadly to apply to situations other than zoning / Criterion 10, it is only reasonable to apply it to situations in which a determination in an Act 250 proceeding is made by reference to local law. In contrast, whether a project is subject to Act 250 jurisdiction is a matter determined solely by Act 250 law - the Act 250 statute, Board rules, and case precedent. Therefore, even when read broadly, Molgano does not support a conclusion that the day on which Petitioners filed complete applications for local permits has any bearing on whether Act 250 jurisdiction attaches to the proposed project.

The Smith Court decided a similarly narrow issue when it held that rights vest regarding applicable zoning regulations at the time a "proper [zoning] application" is filed. In some ways, Smith is more analogous to the Petitioners' circumstances than Molgano. For the purposes of this analysis, the Board will read Smith broadly, as supporting the proposition that Act 250 jurisdiction must be determined under the law as it existed on the day a "proper application" for a land use permit under Act 250 is filed. This line of analysis is not ultimately helpful to Petitioners, however, because they did not file an Act 250 application prior to July 1, 1997, the day on which § 6001c became effective. The fact that Petitioners filed the JO Request before July 1, 1997 does not bring the facts of this case within the Smith analysis, because a request for a jurisdictional opinion cannot be considered a "proper application" for purposes of establishing vested rights. Cf. In re Ross, 151 Vt. 54, 57-58 (1989) (an application filed for

partial review is not a complete application for purposes of establishing vested rights); In re McDonalds, 146 Vt. 380 (1985) (Court held that developer had no vested rights in construction of project at the time a petition for declaratory ruling was filed).

Furthermore, Petitioners cannot argue that equity requires that a request for a jurisdictional opinion be considered a "proper application" in this instance, for at least two reasons. First, the law is well settled that Petitioners could have preserved their challenge to jurisdiction while simultaneously applying for an Act 250 permit. In re Barlow, 160 Vt. 513, 519 (1993); Re: Bernard and Suzanne Carrier, Declaratory Ruling #246, Findings of Fact, Conclusions of Law, and Order at 27 (Dec. 7, 1995). Second, the bill that was eventually enacted as 10 V.S.A. § 6001c was debated in the legislature during the spring of 1997, was passed by both houses on June 12, 1997, and was signed into law on June 19, 1997. Thus, at the time that Petitioners filed their applications for local permits and their JO Request, § 6001c was a fait accompli. In contrast, in the Smith case, the zoning amendment had neither been officially proposed nor was it in the process of enactment at the time Smith filed his complete application with the municipal planning commission. 140 Vt. at 182 (minority rule is "the more equitable rule in the long run application, especially where no amendment is pending at the time of the application." (emphasis supplied)).

Under well-established law, the Project is exempt from Act 250 jurisdiction only if it had achieved "such finality of design" before July 1, 1997 that "construction [could have been] said to be ready to commence." Petitioners' vesting arguments are simply not pertinent to the issue before the Board.

2. "Ready to Commence"

"Jurisdiction under Act 250 is triggered when 'the activity [is] about to impinge on the land.' It attaches to 'activity which has achieved such finality of design that construction can be said to be ready to commence.'" Re: Black River Valley Rod and Gun Club, #2S1019, Memorandum of Decision at 3 (July 12, 1996) (quoting Agency of Administration, 141 Vt. 68, 78-79 (1982)). See also In re Vermont Gas Systems, 150 Vt. 34, 38-39 (1988)(jurisdiction does not attach until construction is about to commence). However: "A sequence of events, by itself, does not imply the existence of a plan without further evidence that the activity has achieved such finality of design that construction can be said to be ready to commence." Re: Rinkers Communications and Atlantic Cellular Company, Declaratory Ruling #314, Findings of Fact, Conclusions of Law, and Order at 10-12 (May 23, 1996)(Board held there was no settled plan where it found that (i) replacement of old tower with new structure at same height (120') did not represent first stage of plan to build 180' tower and (ii) filing a Notice of Proposed Construction or Alteration with Federal Aviation Administration was a proposal of the direction in which Rinkers might go, sometime in the future, in meeting telecommunications tower space requirements). Therefore, whether Act 250 jurisdiction attaches to a proposed project is determined by reference to the status of the project itself.

In the instant matter, it is important to consider whether the Project had achieved "such finality of design" before July 1, 1997 that "construction [could have been] said to be ready to commence." If the Board answers this question in the affirmative, then jurisdiction is determined by the law as it existed before July 1, 1997. Under pre-July 1 law, the Project would be exempt because the site does not meet the acreage requirements necessary to constitute "development" under § 6001(3).

Although Petitioners did not submit an Act 250 application prior to July 1, 1997, they appended extensive Project plans and documentation to the JO Request. They had finalized their lease agreement. Their plans, as presented to the District Coordinator, were complete. They were simply awaiting state and local approval for these finalized plans. Had the conditions imposed by the DEC or Planning Commission approvals substantially changed the Project, then Petitioners would not have been "ready to

commence" the project, as amended by those conditions, before July 1, 1997. In fact, the DEC and Planning Commission approved a project identical to the one presented to the District Coordinator in connection with the JO Request.

It is irrelevant that WCAX had not obtained DEC or Planning Commission approval before July 1, 1997. An application filed with the District Commission will be deemed complete -- and jurisdiction asserted over a proposed project -- which has not yet acquired DEC or local permits. Therefore, the Board is not required to conclude that the Project was not ready to commence merely because Petitioners had not obtained these permits prior to July 1.

As stated above under the vesting analysis, the mere fact that Petitioners filed the JO Request prior to July 1, 1997 is insufficient, by itself, to require the Board to analyze jurisdiction under the law as it existed before that date. Based on a highly unique set of facts, however, the Board concludes that as of June 30, 1997, the day on which Petitioner requested the JO, Petitioners' plans were so "settled in intention and purpose" that the Project could be called ready to commence and those plans were presented to the District Coordinator. The Board is satisfied that if § 6001c had been effective prior to July 1, 1997, then on June 30 the Project plans were sufficiently "final" that a complete application could have been submitted for the District Commission's review. Accordingly, the Project must be reviewed pursuant to the pre-July 1, 1997 law. Under such analysis, jurisdiction does not attach to the Project.

VI. ORDER

1. In addition to those documents of which the Board has taken official notice in the Prehearing Conference Report and Order, official notice is hereby taken of State of Vermont Subdivision Permit #EC-4-2073 dated October 27, 1997, the transmittal letter from Joe Weith, City Planner, City of South Burlington, dated September 11, 1997 together with the enclosed Findings of Fact and Decision of the South Burlington Planning Commission, dated September 9, 1997, and concerning the application of WCAX to amend its previously approved site plan in order to construct the Project.

2. Act 250 jurisdiction does not attach to the Project as proposed. Petitioners did not and do not need to obtain a land use permit in connection with the Project.

Dated at Montpelier, Vermont this 26th day of February, 1997.

February 26, 1997

ENVIRONMENTAL BOARD

s/s/ Marcy Harding

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Marcy Harding, Chair
John T. Ewing
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