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

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

Declaratory Ruling #421

## Memorandum of Decision

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

## I. History

On November 25, 2003, the Board issued Findings of Fact, Conclusions of Law, and Order (Decision) in which it determining that the Project is subject to Act 250 jurisdiction. The history of this matter through November 25, 2003 appears in that Decision.

On December 23, 2003, S-S filed a Motion to Alter the Board's Decision.

The Board deliberated on S-S's Motion on January 21, 2004.

## II. Discussion

### *A. Whether the Owen House and the Harvey House are intended to be occupied on a "temporary or intermittent basis"*

The primary focus of S-S's Motion is that the Owen House and the Harvey House are not intended to be occupied on a "temporary or intermittent basis" and therefore do not fit within the Board's rule which defines "commercial dwelling." If the Houses are not "commercial dwellings," they are not "development" and are not subject to Act 250 jurisdiction.

Act 250 has jurisdiction over "development." [1] Environmental Board Rule (EBR) 2(A)(1)(c) defines "development" to include "the construction of … *commercial dwellings* with ten or more units constructed or maintained on a tract or tracts of land owned or controlled by a person within a radius of five miles of any point on any involved land within any continuous period of five years." (Emphasis added).

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[1] The statutory definition of "development" includes the construction of "housing projects … with 10 or more units, constructed or maintained on a tract or tracts of land, owned or controlled by a person, within a radius of five miles of any point on any involved land, and within any continuous period of five years." 10 V.S.A. §6001(3)(A)(iv).

Board Rules define "commercial dwelling" as:

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

EBR 2(M).

S-S provides definitions for the words "temporary" and "intermittent" and, noting Finding of Fact 13,[2] contends that the residents of its homes do not fit that definition. *S-S Memorandum* at 2 - 3.

*Analysis*

It is true that many of the residents of the Harvey and Owen Houses are long time clients of Mrs. Rooney. The question is whether that particular fact should alter the Decision.

In its Decision the Board addressed the "temporary" and "intermittent" elements of the definition of "commercial dwelling" and wrote:

> S-S notes that many of their residents have been in their care for years, and it therefore claims that it is not the intent for either the Harvey House or the Owen House to be occupied on a temporary or intermittent basis. However, some residents occupy the Houses temporarily, leaving and returning intermittently, as their needs require.
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> The Board notes that EBR 2(M) explicitly lists nursing homes and rooming houses as examples of "commercial dwellings;" the inference is that these types of housing are temporary or intermittent. While the Owen and Harvey Houses may be called “residential care homes” or "group homes," and such facilities are not specifically listed in the definition, the definition refers to "other places for the accommodation of people," and it

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2 Finding of Fact 13 reads:

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

> employs the prefatory phrase "included but not limited to." Further, in their physical appearance and utilization, the Houses have similarities to nursing homes in all respects important for Act 250 review; indeed, it appears that the only differences between the Harvey and Owen Houses and nursing homes are licensing requirements and level of care. [Footnote 1]
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> [Footnote 1] While S-S's record of providing quality care may be inferred from the length of time that residents lived in The Washington Street Home, *the Board's jurisdictional determination in this case cannot depend on the personal level of satisfaction of the residents in the care that they receive. Rather, the Board must look to the aspects of the Harvey House and the Owen House that are relevant to Act 250 and ask whether the type of construction and occupation at issue in this matter is typical of the sorts of housing described in Rule 2(M). Thus, the Board must look to the physical structures and general usage of the Harvey House and the Owen House, not to the subjective particulars that may result from their operation.*

Decision at 6 (emphasis added). Thus, the Board held that it would not look to the fact that the specific residents of the group homes run by S-S might live in such homes for a long time. Rather, the Board looked to *the character of such homes as a general group of dwellings.* The Board noted:

1. that the definition of "commercial dwellings" *includes but is not limited to* examples such as nursing homes and rooming houses;

2. that, while some people may live in nursing homes and rooming houses for many years, the Rule includes nursing homes and rooming houses within the scope of housing that it considers to be of a "temporary or intermittent" nature,[3] and

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[3] S-S argues that there should be a distinction between nursing homes that have short-term residents and those that have long-term residents, with the result that the former are subject to Act 250 jurisdiction, because they are occupied on "a temporary or intermittent basis," whereas the latter are not. *S-S Memorandum* at 5.

For several reasons, the Board cannot agree with this contention. First, there is no such distinction in the Rule. Second, the Board is empowered to interpret its own Rules. *In re Woodford Packers, Inc.*, 2003 VT 60 ¶4 (2003) (when reviewing a decision of the Environmental Board, Vermont Supreme Court gives deference to the Board's "interpretations of Act 250 and its own rules, and to the Board's specialized knowledge in the environmental field.") *Accord, In re Nehemiah Associates, Inc.*, 168 Vt. 288, 292 (1998); *In Re Wal*Mart Stores, Inc.*, 167 Vt. 75, 79 (1997); *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 285 (1995). Third, even assuming that any such homes actually exist, under Act 250, the Board is tasked with looking at the *environmental*

3. that "in their physical appearance and utilization, the Houses have similarities to nursing homes in all respects important for Act 250 review; indeed, it appears that the only differences between the Harvey and Owen Houses and nursing homes are licensing requirements and level of care." Decision at 6.

It is these three grounds, not the resident's length of stay, that ultimately bring the Houses within the ambit of what the Rule considers to be "commercial dwellings."

Act 250 requires a focus on *the impact of the land use*, not the nature of the institutional activity. *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 287 (1995); *In re Baptist Fellowship of Randolph, Inc*., 144 Vt. 636, 639 (1984); see *In re BHL Corp*., 161 Vt. 487, 490-91 (1994) (approving Board's premise that proper starting point for determining Act 250 jurisdiction is actual use of land); *In re Trono Construction Co.,* 146 Vt. 591, 593 (1986) (Act 250 establishes a mechanism for review of certain land use activity at the state level); *In re Juster Assoc.*, 136 Vt. 577, 581 (1978) (Act 250 is intended, by a system of notice and hearings, to assure full consideration of land use proposals for all parcels of land); *In re Wildlife Wonderland, Inc*., 133 Vt. 507, 520 (1975), quoting *Findings and Declaration of Intent*, 1969, No. 250 (Adj. Sess.) (Act 250 expresses a concern for the prevention of 'usages of the lands and the environment which may be destructive to the environment and which are not suitable to the demands and needs of the people of the state of Vermont . . ..' The only usages to be permitted are those 'not unduly detrimental to the environment, (and those that) will promote the general welfare through orderly growth and development . . ..'.)

In a 1992 zoning decision, the Vermont Supreme Court noted that it is the *use of land* that is the proper subject of regulation, not such things as who owns or occupies the structure. In *Vermont Baptist Convention v. Burlington Zoning Board*, 159 Vt. 28, 30 (1992), the Vermont Baptist Convention had, for many years, used a property in the "R-40" zoning district to provide business support to Baptist Churches; the property had never been used for worship, counseling or any traditional church functions. In 1986, an amendment to the zoning ordinances eliminated offices as a permitted use within the R-40 district.

A prospective purchaser of the Convention's property, who planned to use the building for offices, asked the Convention to obtain a determination that the Convention's use of the building constituted a nonconforming use that the Convention could transfer to the purchaser. The Zoning Board disagreed, classifying the Convention's use as a "semi-public" use, which the ordinance defined to include non-

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impacts of construction, and there are no environmental grounds to distinguish between the two types of homes. Thus, an interpretation of Rule 2(M) which resulted in such a distinction would be irrational, something that the Board must avoid. *See*, *In re McShinsky*, 153 Vt. 586, 591 (1990); *ANR v. Henry et al.,* 161 Vt. 556, 560 (1994); *In re Southview Assocs*., 153 Vt. 171, 175 (1989) (statutes should be construed to avoid irrational results).

profit organizations. Because the purchaser was a for-profit entity, it could not use the property as desired. The Convention appealed to superior court, which affirmed the Zoning Board.

On appeal, the Supreme Court reversed, holding that the Convention's business use of the building was not in the nature of a non-profit use. The Court continued:

> The Zoning Board's position would allow the zoning ordinance to be construed as permitting regulation of property based on the identity of the owner, not the use of the land. This result is inconsistent with the Legislature's grant of authority to adopt zoning regulations. … [The Legislature's] enumeration of power refers only to uses and structures, not the identity of the owner. … A distinction based upon the identity of the owner rather than public health, safety, morals or general welfare would be invalid.

*Vermont Baptist Convention, supra,* 159 Vt. at 31.

Likewise, the Environmental Board is empowered to regulate property based upon its use, not the identity or the specific characteristics or attributes of its users. Thus, the Board cannot make a distinction between the Harvey and Owen Houses with their long-term residents, and other group homes, which might be identical in all relevant physical and operational respects to the Harvey and Owen Houses, but whose residents stay only a few weeks or months before, for whatever reasons, they move out.

In its Motion to Alter, S-S provides no new argument that the Board has not already considered in its November Decision. The Board finds no grounds for altering the Decision.

*B. Whether certain Findings of Fact are valid or supported by the evidence*

S-S also notes the Board's Finding of Fact 12:

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

*1. the first sentence of Finding 12*

S-S contends that, "The first sentence of Finding 12 is true of just about everyone in Vermont," and that, "To conclude that every Vermonter occupies her or his home on a temporary or intermittent basis is plainly insupportable." *S-S Memorandum* at 4.

S-S does not challenge the truth of the first sentence of Finding 12, nor does S-S assert that there is no evidence to support the statement in the first sentence of Finding 12. Rather, S-S claims that it can apply to all Vermonters, not only the residents of the Harvey and Owen Houses. Even assuming that this is correct, it does not make the sentence - as it applies to the Houses - inaccurate or misleading or without an evidentiary basis.

Further, contrary to S-S's presumption, the Board has not concluded "that every Vermonter occupies her or his home on a temporary or intermittent basis." That question is not before the Board, and "conventional residences" are specifically exempted from the Rule's definition of "commercial dwellings."

*2. the second sentence of Finding 12*

S-S contends that there is no evidence to support the second sentence of Finding of Fact 12.[4] *S-S Memorandum* at 5.

*Analysis*

A review of the tape recording of the hearing reveals the following discussion:

> Q: (by the Chair) And, is it safe to assume that most of your residents don't have an alternate home, i.e. family members who would….
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> A: (by Yvonne Rooney) Quite a few, some of them do, some of them do or whatnot, but more - more than not - do not have anywhere or anyone to call them "family" or "home."

*Hearing*, September 24, 2003, Tape 1 Side B

The Board concludes that there is sufficient evidence in the Record to support the challenged Finding.

*3. Board's Conclusion on page 6 of the Decision*

S-S also claims that, as to the Board's conclusions on page 6 of the Decision, "Nor is there any evidence that some residents leave Petitioner's homes and return intermittently as their needs require, as the Board states in Conclusion IV B. 1 b. That

[4] S-S states in its memorandum in support of reconsideration that it requested of the Board a transcript of the September 24, 2003 hearing. The Board has no record of any such request.

statement is not true of any resident and the record shows that the opposite is true." *S-S Memorandum* at 5.[5]

There *is* evidence to support the proposition "that some residents leave Petitioner's homes and return intermittently as their needs require." A review of the tape recording of the hearing reveals the following discussion:

> Q: (by the Chair) And, you've indicated in both your prefiled and here today that your residents tend to be with you pretty long term.
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> A (by Yvonne Rooney) Yes.
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> Q. And that it would be a health issue that would typically mean that they would perhaps move to a nursing home or hospital. Would that be a temporary residence that - - residency in a nursing home or hospital and you'd anticipate they'd come back …
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> A. Depends on, yeah, it depends on what happens. I mean we've had folks that have gone out and, and, have fallen and broken a hip. They've gone to the hospital, then they go to rehab, and then they've come back.
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> I've had people who I've gotten - who've gone to the hospital for, you know, a surgery or something and, I - - I mean I've fought with the hospital when whatever lots of times, because they said, "Well, they need to go in a nursing home." Well, this person's been with me all this time; I know he's not going to do well in a nursing home - not with us - and gone and requested a waiver thing and taken the person back and they're still with us and everything.
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> Also had cases where I didn't win, and I don't have that person anymore, and neither do they. And it's a real stick to me that I've lost those people because - what I feel is because of that - because they didn't get to come back home, because we are "home."

*Hearing,* September 24, 2003, Tape 1 Side B

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[5] The Board stated on page 6 of the Decision: "However, some residents occupy the Houses temporarily, leaving and returning intermittently, as their needs require." Perhaps the word "temporarily" is ill-advised, as it could be read to imply that the residents are out of the Houses more often than they are in them. This was, however, intended to be merely a restatement of the first sentence of Finding 12, and it should be considered only as such.

Clearly, the evidence does support a finding that some residents leave the Houses as their needs require, and some return, while some do not.

## III. Order

S-S Corporation/Rooney Housing Developments' Motion to Alter is denied.

Dated at Montpelier, Vermont this 5th day of February 2004.

ENVIRONMENTAL BOARD

*/s/Patricia Moulton Powden*_____
* Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
Don Marsh
* W. William Martinez
* Patricia Nowak
Jean Richardson
Alice Olenick

* Chair Moulton Powden, concurring:

I concurred, with reservations, with the Board's November 25, 2003 Decision. These reservations are not assuaged by the Board's reasoning in this Memorandum of Decision. Nonetheless, for the reasons which I stated in November, I again reluctantly concur with the decision to find jurisdiction.

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