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State of Vermont

AGENCY OF ENVIRONMENTAL CONSERVATION
Montpelier, Vermont 05602

Department of Fish and Game
Department of Forests and Parks
Department of Water Resources
Environmental Board
Division of Environmental Protection
Division of Recreation
Division of Planning
Natural Resources Conservation Council

ENVIRONMENTAL BOARD
Schuyler Jackson, Chairman
828-3309

January 30, 1975

Kenneth V. Fisher, Jr., Esq.
Weber, Fisher, Perra & Gibson
139 Main Street
Brattleboro, Vermont 05301

Re: Town Plan - 10 VSA §6086(a)(10)

Preliminary Declaratory Ruling #64

Dear Mr. Fisher:

The facts relevant to the Declaratory Ruling are as follows:

John and Ray Poor on September 18, 1973 made application to the Woodford Board of Adjustment for a variance to develop a camp ground under interim zoning. The proposed project was also subject to the permit requirements of Act 250 and the Poors had in fact ceased development activities at the beginning of that summer after being so informed by the District Environmental Coordinator for District Commission #8. At the time of the application the campground was in conformity with the town plan adopted August 10, 1970.

The application, heard by the Board of Civil Authority, was denied and this decision was appealed to the Bennington Superior Court. The decision of the Superior Court, issued on October 29, 1974, reversed the Board of Civil Authority and issued a permit to the Poors subject to certain conditions.

Prior to the issuance of the Superior Court's ruling, the town adopted a new town plan (January 2, 1974) which was inconsistent with the proposed camp ground.

At this time the Poors have filed an application for a 250 permit. Under Criterion (10) of the Act, a District Commission may not issue a permit unless it finds that the development is in conformance with the town plan; and therefore if the new town plan is applied, a 250 permit could not be issued.

You have requested on behalf of the Poors a ruling on whether the new town plan or the town plan in effect at the time application was filed for a variance under interim zoning should govern under Criterion (10).

1 VSA section 213 provides:

> Acts of the general assembly, except Acts regulating practice in court, relating to the competency of witnesses or to amendments of process or pleadings, shall not affect a suit begun or pending at the time of their passage.

The Vermont Supreme Court in In re: Application of J. Paul and Patricia A. Preseault, Vermont Supreme Court docket no. 181-73, held that local ordinances came under this prohibition since the authority to enact ordinances derived from state authority.

The first issue is whether for the purposes of this ruling a town plan is to be considered a local ordinance. As with ordinances, the authority of a town to adopt a local town plan is derived from state statute (24 VSA section 4381 et seq). The general assembly through Act 250 has given a duly adopted local plan the status of an ordinance with regard to property owners who propose to develop land subject to the provision of the Act. Once adopted persons subject to Act 250 are as bound by the contents of the town plan as they would be if the town plan were implemented through a zoning ordinance as is provided for in 24 VSA §4401. The path by which local authority is asserted may be different but the results for all practical purposes are the same. For this reason it appears proper to hold that a town plan as applied under Act 250 is an ordinance and therefore subject to the limitations prescribed by section 213 of Title 1.

The second issue raised is whether 1 VSA §213 applies in this instance since at the time the new town plan was adopted no application was pending for an Act 250 permit and therefore the plan did not affect the outcome of a pending suit.

This literal and limited construction, in view of the decision in Preseault v. Wheel, Vermont Supreme Court docket no. 144-73, is not supportable. The Poors knew prior to applying for a zoning variance that a permit under Act 250 would be required and in fact stopped construction activities when informed of this fact. Equally clear was the fact that applying for a 250 permit would have been a futile step in view of the more clearly defined limitation raised under interim zoning; namely that the camp ground was not entitled to a permit unless granted by a Board as a discretionary administrative act. Therefore, as preparatory to seeking a permit under Act 250, the Poors sought to obtain the necessary permission from the town.

As stated in Preseault v. Wheel, the procedures to obtain state and local land use permits cannot be treated as unrelated; obviously the town plan and zoning ordinance as adopted under Chapter 91 of Title 24 are closely allied and related to Act 250 and its various criteria, including a development's conformity with the town plan. The two cannot be rationally separated and treated as if the burdens and responsibilities placed upon the developer under local zoning and those under Act 250 are unrelated.

When the Poors filed for a zoning permit, they were undertaking the first but vital step in the process of obtaining their land use permits, a process in which the town would play a key and continuing role first as a regulator under its own zoning provisions and as a party to the Act 250 permit, including application of its town plan (10 VSA §6085(c)).

The Poors have proceeded expeditiously and have not sat on their rights under the permit issued by the Superior Court. To hold that the town can change the rules once the process had begun would be contrary to the intent of 1 VSA §213 as amplified in Preseault v. Wheel.

On the basis of the above facts and discussion, it is my ruling that the Woodford town plan in effect at the time the Poors made application for a zoning permit governs in the application of Criterion (10) under Act 250.

Any party may object to this preliminary ruling upon filing an objection by Monday, February 10, 1975, in which event a hearing on the matter will be held on Thursday, February 13, 1975 at 1:30 p.m. at the City Hall, South Burlington.

Thank you for your cooperation in this matter.

Very truly yours,

Schuyler Jackson
Chairman

SJ/h

cc: Parties
Robert S. Brown