STATE OF VERMONT

SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No. 59-5-19 Vtec

Capitol Plaza Act 250	DECISION ON MOTION

The present action is an appeal of Act 250 Findings of Fact, Conclusions of Law and Order 5W1591 issued on May 2, 2019 by the District #5 Environmental Commission (DC) pursuant to 10 V.S.A. § 6086b, to the City of Montpelier (City) and Capitol Plaza Corporation (collectively Applicants) to construct a hotel and neighboring parking garage (the Projects). Mr. Les Blomberg and Mr. Daniel Costin (Appellants) appealed the DC's decision to this Court. Presently before the Court are Applicants' motion for partial summary judgment, Appellants' cross-motion for summary judgment, and Natural Resourses Board's (NRB) cross-motion for summary judgment.

In this matter, Appellants are represented by James A. Dumont, Esq. Applicants are represented by Joseph S. McLean, Esq. and David W. Rugh, Esq. NRB is represented by Greb Boulbol, Esq.

Legal Standard

The Court will grant a motion for summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a), applicable here through V.R.E.C.P. 5(a)(2). We accept as true allegations made in opposition to the motion for summary judgment, "so long as they are supported by affidavits or other evidentiary material." White v. Quechee Lakes Landowners' Ass'n, Inc., 170 Vt. 25, 28 (1999) (citation omitted); V.R.C.P. 56(c)(1)(A). In considering cross-motions for summary judgment, we consider each motion individually and give the opposing party the benefit of all reasonable doubts and inferences. City of Burlington v. Fairpoint Commc'ns, Inc., 2009 VT 59, ¶ 5, 186 Vt. 332.

Factual Background

We recite the following facts based upon the record before us solely for the purposes of deciding the pending motions. The following are not specific factual findings with relevance outside this summary judgment decision. Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) (mem.); see also Blake v. Nationwide Ins. Co., 2006 VT 48, ¶ 21, 180 Vt. 14.

1. On August 16, 2018 Applicants' architectural firm, Rabideau Architects, sought a jurisdictional determination from District #5 Coordinator Susan Baird concerning whether a proposed project to construct a 2.74-acre, five-story, 81 room hotel (hotel project) in the City of Montpelier's Downtown Development District was subject to Act 250 jurisdiction.
2. On September 12, 2018 the District Coordinator (DC) concluded the hotel project was not exempt from Act 250 jurisdiction.
3. On September 13, 2018, Rabideau Architects corresponded with the District coordinator seeking advice on whether to prepare separate applications for the hotel project and a parking garage project.
4. On September 14, 2018, the district coordinator responded, indicating the parking garage and hotel would be reviewed under one application.
5. On November 2, 2018, Capitol Plaza Corporation, City of Montpelier, and Mary Heney Trust submitted Act 250 Application #5W1591, which proposed to construct a 2.74-acre, five-story, 81 room hotel located at 100 State Street and a neighboring 348-space parking garage.
6. On May 2, 2019 the DC concluded the Projects complied with Act 250 criteria, pursuant to 10 V.S.A. § 6086(b). Appellants appealed to this Court.
7. The proposed garage parcel includes two parcels of land: (1) a 0.56-acre lot, subdivided from the hotel parcel, and (2) a 0.55-acre lot located at 60 State Street (Heney Lot), which the City leases from the Lawrence P. Heney Family Trust and the Mary M. Heney Family Trust.
8. The proposed subdivision plat, submitted by Applicants, shows two access easements for a new private street, "Plaza Park Drive." These include a north-south segment,

connecting to State Street, and an east-west segment, connecting with Taylor Street. The easements for Plaza Park Drive are 24 feet wide, with the exception of a marginally wider easement at the entrance to the parking garage.

9. The subdivision plat depicts a 7 foot sidewalk easement along the north-south segment of Plaza Park Drive.
10. According to a Letter of Intent between Capitol Plaza and the City, Capitol Plaza will convey 0.56-acres on the southwesterly portion of Capitol Plaza's property to the City. The parcel will be conveyed by warranty deed, free of all encumbrances.
11. The Letter of Intent outlines that the City will use this parcel, together with a portion of an adjoining parcel leased by the City from the Heney Trust to construct a 348-space parking garage.
12. The City will own, operate, and be responsible for maintenance of the parking garage.
13. The Letter of Intent further states that Capitol Plaza will enter into a 30 year agreement with the City to use up to 200 parking spaces in the parking garage.
14. The Letter of Intent states the City shall be responsible for the costs of recording the deed and transfer return, and payment of any property transfer tax due.
15. The parking garage's construction will be financed by a $20 million tax increment financing (TIF) bond, which was approved by the City's voters on November 6, 2018. The TIF bond will be repaid from the increase in tax increment within the City's TIF District and from parking revenues.
16. The parking garage will have approximately 50 parking spaces available for use by the general public.

Discussion

Presently before the Court are three pending motions: Applicants' motion for partial summary judgment on Question 1 of their Statement of Questions, Appellants' cross motion for summary judgement, and the NRB's cross motion for summary judgment. Appellants and the NRB raise multiple challenges to this Court's subject matter jurisdiction and application of Act 250 Jurisdiction to the proposed parking garage. Applicants' motion addresses whether the

proposed parking garage is exempt from Act 250 Jurisdiction. We will address these concerns in order.

I. Whether the District Coordinator's September 14, 2018 correspondence constituted a Jurisdictional Opinion

Appellants move for summary judgement on Applicants' Statement of Questions, contending that the District Coordinator's jurisdictional opinion, in the form of email correspondence, was not timely appealed pursuant to 10 V.S.A. §§ 6007(c), 6089, and 8504. Appellant's reply memorandum in support of their cross motion for summary judgment and in opposition to Appellees' motion for summary judgment at 1–9, filed Feb. 6, 2020 (stating that Question 1 of Applicants' Statement of Questions should be dismissed as Applicants failed to timely appeal a jurisdictional opinion). The NRB argues that considering informal email correspondence as rising to the level of a jurisdictional determination runs counter to the interests of public policy. NRB's Reply to Cross-Applicant's Omnibus Filing Dated March 6, 2020 at 4–5, filed March 27, 2020. Applicants contend there was no formal jurisdictional opinion issued concerning the proposed parking garage. Cross-Appellant-Applicants' Sur-Reply Memorandum in opposition to Appellants' and the Natural Resources Board's Cross-Motions for Summary Judgement at 6–10, filed Apr. 10, 2020. .

Under 10 V.S.A. § 6007(c), "any person . . . may request a jurisdictional opinion from the district coordinator." Once requested, the district coordinator is required to make a jurisdictional determination, "which then becomes final unless it is appealed by any statutory party within thirty days."[1] In re Vermont Verde Antique Int'l, Inc., 174 Vt. 208, 211 (2002) (citing 10 V.S.A. § 6007(c)); see also 10 V.S.A. § 8504(a). Indeed, where an Act 250 permit decision has become final, a party cannot later collaterally attack that final decision though a separate proceeding. In re Taft Corners Assocs., Inc., 160 Vt. 583, 593 (1993); see also Levy v. Town of St. Albans Zoning Bd. of Adjustment, 152 Vt. 139, 141 (1989) (addressing collateral attacks).

[1] To the extent that a judicial determination becomes final pursuant to 10 V.S.A. § 8504(e), the legislative intent indicates final jurisdictional opinions are protected from collateral attack. See 10 V.S.A. §§ 6007(c),6089, and 8504 (indicating a 30 day deadline for appeals).

While a district coordinator's determination becomes final unless appealed, the jurisdictional determination must be sufficiently clear concerning the applicability of Act 250 and rise to a level of formality indicative of a binding decision. See In re Estate of Webster, 117 Vt. 550, 552 (1953) (indicating that the test for finality is whether the order makes a final disposition of the subject matter). This serves the purpose of preventing "premature interruption of the administrative process." In re Pelham N., Inc., 154 Vt. 651, 652 (1990) (quoting McKart v. United States, 395 U.S. 185, 193–95 (1969); see 10 V.S.A. § 6007(c) (requiring the district coordinator publish notice of the issuance of an opinion); see also In re Request for Jurisdictional Opinion re Changes in Physical Structures & Use at Burlington Int'l Airport for F-35A, 2015 VT 41, ¶ 4, 198 Vt. 510 (discussing conclusions and findings included in an Act 250 jurisdictional opinion).

Here, the NRB asserts the district coordinator's September 14, 2018 email correspondence responding to Applicants' architectural firm does not rise to the level of a final jurisdictional determination. We agree. The architectural firm's August 16, 2018, correspondence clearly requests confirmation of emption from Act 250 for the hotel project and provides relevant materials for consideration. Appellants' Reply Memorandum in Support of their Cross-Motion for Summary Judgment and in Opposition to Appellee's Motion for Summary Judgment at Attachment B 1–3, Filed Mar. 24, 2020 [hereinafter Appellants' Memorandum]. In contrast, the architectural firm's September 13, 2018, email correspondence provides no additional materials and merely seeks an opinion on whether the Applicant should prepare separate applications for the hotel and parking garage projects. Moreover, the district coordinator's September 12, 2018 response analyzes 10 V.S.A. § 6001(3)(A)(iv) and provides procedural measures for requesting findings and conclusions under § 6086(b). Id. The district coordinator's follow-up correspondence on September 14, 2018 is responsive to a limited question and operates as clarification, not a binding decision. Indeed, weighing responsive emails as tantamount to jurisdictional opinions would frustrate and prematurely interrupt the administrative process. For these reasons, we conclude the September 14, 2018 correspondence was not a jurisdictional determination. Therefore, because there is no final jurisdictional opinion, Applicants are not barred from challenging Act 250 jurisdiction over the parking garage project and we **DENY** Appellants' motion for summary judgment.

II. Whether this Court has Subject Matter Jurisdiction absent a Jurisdictional Opinion

Having reached the above conclusion, we turn to whether this Court has subject matter jurisdiction when no jurisdictional opinion has been obtained from the district coordinator, pursuant to 10 V.S.A. §§ 6007(c) and 8504(e). Appellants assert the exclusive means for determining jurisdiction is by request of a jurisdictional opinion and therefore this Court lacks jurisdiction to decide Question 1 of Applicants' Statement of Questions. Applicants argue Act 250 Jurisdiction was properly challenged as Applicants were not required to seek a jurisdictional determination from the district coordinator.

We first address whether 10 V.S.A. § 6007(c) requires a jurisdictional determination by a district coordinator in advance of and as an exclusive means of this Court having the power to review Act 250 jurisdiction over a project. In conducting statutory interpretation, the paramount goal "is to give effect to the Legislature's intent." Burr & Burton Seminary v. Town of Manchester, 172 Vt. 433, 436 (2001); see McClellan v. Haddock, 2017 VT 13, ¶ 13, 204 Vt. 252. "The definitive source of legislative intent is the statutory language, by which we are bound unless it is uncertain or unclear." In re Bennington Sch., Inc., 2004 VT 6, ¶ 12, 176 Vt. 584, 845 A.2d 332 (mem.); State v. Villar, 2017 VT 109, ¶ 7, 206 Vt. 236 (stating that the plain, ordinary meaning controls when unambiguous); Brennan v. Town of Colchester, 169 Vt. 175, 177, 730 A.2d 601, 603 (1999) (holding the Court will not include "an implied condition into a statute unless it is necessary in order to make the statute effective").

We begin with the language that, in Appellants' view, limits this Court's jurisdiction. The plain language of § 6007(c) states ". . . any person *may* submit to the district coordinator an "Act 250 Disclosure Statement" and other information required by the rules of the Board, and *may* request a jurisdictional opinion from the district coordinator concerning the applicability of this chapter." 10 V.S.A. § 6007(c) (emphasis added); see also Act 250 Rules, Rule 3(A) (stating a person "may request" a jurisdictional opinion). This language is unambiguous. The use of the permissive term "may" indicates that a § 6007(c) jurisdictional determination is optional.[2] See Weitz v. Weitz,

[2] Appellants argument that interpreting "may" as indicating an optional course of action "turns the Court's jurisdiction on its head" misapplies this Court's authority to review district commission decisions. While this Court reviews appeals from the district commissions de novo, there is no specific requirement a jurisdictional determination be obtained prior applying for an Act 250 permit or challenging Act 250 jurisdiction. cf. Maple Tree

2019 VT 35, ¶ 8 (interpreting "may" and optional); Marsigli Estate v. Granite City Auto Sales, Inc., 124 Vt. 467, 470 (1965) (stating the Legislature's use of "may" in a statute indicates that the decision is discretionary). Thus, § 6007(c) is not a mandatory prerequisite to challenging Act 250 jurisdiction before the Environmental Division.

We next address whether Applicants may properly challenge Act 250 jurisdiction. The Vermont Supreme Court has held that "[i]t is axiomatic that lack of subject matter jurisdiction of the trial court may be raised for the first time on appeal" to this Court. Town of Charlotte v. Richmond, 158 Vt. 354, 358 (1992) (citing Soucy v. Soucy Motors, Inc., 143 Vt. 615, 617 (1983)). As a general principle, a court's lack of subject matter may be raised at any time.[3] V.R.C.P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); Berry v. Arnoldware-Rogers, Inc., 127 Vt. 188, 192 (1968) ("[O]bjections to jurisdiction over the subject-matter in litigation are always timely."); Smith v. White Estate, 108 Vt. 473, 480 (1937); Boisvert v. Boisvert, 143 Vt. 445, 447 (1983).

Applicants' Question 1 in their Statement of Questions asks whether the parking garage project is exempt from review under Act 250. Cross-Appellant-Applicants' Statement of Questions at 1, filed July 1, 2019 [hereinafter Applicants' SOQ]. The district coordinator's September 14 correspondence did not constitute a final determination, and therefore, Applicants are not barred from challenging Act 250 jurisdiction. See Boutwell v. Town of Fair Haven, 148 Vt. 8, 10 (1987) (discussing the loss of subject matter jurisdiction). We **DENY** Appellants' motion for summary judgment.

Place, 156 Vt. at 500, 594 (stating this Court is limited by de novo review to issues presented at the planning commission).

[3] Appellants raise the issue that, particularly in Act 250 cases, subject matter jurisdiction differs from the authority to act. Natural Resources Board Land Use Panel v. Dorr, 2015 Vt. 1 ¶ 14, 198 Vt. 226 (stating that Courts "must be careful to limit the concept in Act 250 cases and other administrative contexts where the agency generally exercises limited powers and 'virtually any disagreement with its actions can be phrased in jurisdictional terms'")(citing In re Denio, 158 Vt. 230, 235 (1992) (indicating that subject matter jurisdiction is not preserved in an Act 250 setting where the issue was not raised before the commission or the environmental review board). In Denio, the court was guided in their interpretation of the preservation statute by the law of exhaustion of administrative remedies. Id. In contrast to Denio, Applicants are raising subject matter jurisdiction as cross-appellants under 10 V.S.A. § 6068(b) under de novo review. 10 V.S.A. § 8504(h).

III. Whether the Proposed Garage is a "development" under § 6001(3)(A)(iv)

Applicants move for partial summary judgment on Question 1 of their Cross-Appeal Statement of Questions. Question 1 asks whether the "parking garage is exempt from review under Act 250 jurisdiction since it is not a 'development'" pursuant to 10 V.S.A. § 6001(3)(A)(iv). Applicants' SOQ at 1. Applicants contend the parking garage is a construction for municipal purposes on less than ten acres of land and therefore does not qualify as a "development" pursuant to 10 V.S.A. § 6001(3)(A)(iv). See Cross-Appellant-Applicant's Motion for Partial Summary Judgment and Memorandum of Law at 1, filed Aug. 15, 2019 [hereinafter Applicant's Motion].

Appellants and the NRB counter that the parking garage is an extension of the proposed hotel, and therefore, is subject to Act 250 jurisdiction. Both parties advance the argument that: (1) Capitol Plaza Corporation has the requisite "control" over the parking garage for purposes of § 6001(3)(A)(iv) and (2) the parking garage is "involved land" with respect to the hotel project. See Appellant's Cross-Motion for Summary Judgment at 4–7, filed Feb. 1, 2019 [hereinafter Appellants' Motion]; NRB's Opposition to Appellant-Applicant's Motion for Partial Summary Judgment and NRB's Cross Motion for Partial Summary Judgment at 3–7, filed Feb. 6, 2019 [hereinafter NRB's Motion].

The heart of the dispute between the parties concerns the degree of unity in ownership and control by a "person" of the proposed hotel and the proposed adjacent parking garage. This analysis is dependent upon the characterization of the proposed parking garage as a municipal development pursuant to § 6001(3)(A)(v); a part of the proposed hotel pursuant to § 6001(3)(A)(iv); or as exempt entirely from Act 250 jurisdiction. Act 250 defines "development" as both:

> (iv) The construction of housing projects such as cooperatives, condominiums, or dwellings, or construction or maintenance of mobile homes or mobile home parks, 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.

> (v) The construction of improvements on a tract of land involving more than 10 acres that is to be used for municipal, county, or State purposes. In computing the amount of land involved, land shall be included that is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings.

10 V.S.A. § 6001(3)(A) (emphasis added). Act 250 further defines a "person" as "(i) an individual, partnership, corporation, association, . . . or commercial entity including a joint venture or affiliated ownership" and "(ii) a municipality or State agency." 10 V.S.A. § 6001(14)(A).

a. Whether Capitol Plaza Corporation and the City Constitute One "Person" Under § 6001(14)(A)

Appellants raise multiple arguments asserting that Capitol Plaza and the City constitute a commercial entity, association, affiliated ownership, or joint venture such that they should be considered the same "person" for Act 250 purposes.[4] In contrast, the NRB asserts the City and Capitol Plaza are not the same person. The NRB suggests instead that Capitol Plaza controls the parking garage parcel to a sufficient extent, as the projects are factually indistinct and economically codependent, such that Act 250 jurisdiction extends from the hotel project to the parking lot. Applicants contend Capitol Plaza and the City are disparate entities because (1) § 6001(14)(A) addresses state agencies and individuals in separate subparts[5] and (2) in the alternative, Applicants neither share a mutual purpose nor are they engaged in a business venture for joint profit.

When considering issues of statutory construction, the "primary goal is to give effect to the legislative intent and . . . we first look to the plain meaning of the statute." Village Assocs., 2010 VT 42A, ¶ 9, 188 Vt. 113. In the Act 250 context, the Vermont Supreme Court has noted that the "primary indication of the intent of Act 250's drafters is that they explicitly chose to

[4] Appellants argue the July 19, 2019 Letter of Intent evidences (1) an association's common purpose in providing parking; (2) a commercial entity's economic interest in providing parking spaces to consumers; and (3) an affiliated ownership's subordination of interest in limiting the City's management and control of a majority of the available parking spaces.

[5] As a function of Act 250, Applicants and Appellants agree that an association or joint venture that includes a municipality qualifies as a person under Act 250. Cross-Appellant-Applicants' Omnibus Memorandum of Law in Opposition to Appellants and the NRB Cross Motions for Summary Judgment and Reply to their Opposition Memoranda at 12–15, filed Mar. 6, 2020 [hereinafter Applicants' Omnibus Memorandum]; Appellants' Reply Memorandum in Support of their Cross Motion for Summary Judgment and in Opposition to Appellees' Motion for Summary Judgment at 11, filed on Mar. 24, 2020 [hereinafter Appellants' Reply Memorandum].

include language limiting Act 250 jurisdiction to only those improvements operated for a commercial purpose." In re Laberge Shooting Range, 2018 VT 84, ¶ 28, 208 Vt. 441, reargument denied (Oct. 1, 2018) (holding that a private firing range, which did not charge for use or rely on donations for its operation, was not operating for a commercial purpose); see 10 V.S.A. § 6001(3)(A)(i)); see In re Agency of Admin., 141 Vt. 68, 76 (1982) (noting that the Legislature specifically intended not to regulate all land use that has environmental impacts).

In this context, an association, commercial entity, joint venture, or affiliated ownership each imply a degree of collaboration for either a mutual purpose or commercial endeavor for profit. See State of Vt. Envtl. Bd. V. Chickering, 155 Vt. 308, 316–318 (1990); Winey v. William E. Dailey, Inc., 161 Vt. 129, 139 (1993) (stating that a joint venture requires an agreement to joint control, interest in the performance of a common purpose, and to share in profits and losses); In re Shenandoah, 2011 VT 68, ¶ 7, 190 Vt. 149 (holding that residential developers were affiliated owners *for profit* and therefore constituted "one person" for Act 250 purposes) (emphasis added). Act 250 rules define a 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 or service having value." Act 250 Rule 2(C)(4). The Vermont Supreme Court has explained that this Rule includes: "(1) the provision of facilities, goods or services, (2) by a person, (3) *other than for a municipal or state purpose,* (4) to others, (5) in exchange for, (6) payments of a purchase price, fee, contribution, donation or other object having value." In re Spring Brook Farm Found., 164 Vt. 282, 286 (1995) (emphasis added); see also In re Baptist Fellowship of Randolph, Inc., 144 Vt. 636, 639 (1984) (noting that there exists a commercial purpose where the subject of a jurisdictional opinion "could not provide the facilities and services" without reliance upon the profits, including contributions or donations, generated).

While Capitol Plaza and the City have engaged in a mutually beneficial agreement, the Letter of Intent does not rise to the level of considering them one person under § 6001(14)(A). The City is independently responsible for the proposed parking garage's construction, financing, ownership, and operation. See Chickering, 155 Vt. at 314 (noting that a controlling person is one that directs activities); see also Sunshine Art Studios, Inc. v. Federal Trade Comm'n, 481 F.2d

1171, 1175 (1st Cir.1973) (inferring that a controlling person is one who formulates and directs policies or is involved in business affairs). Moreover, the proposed parking garage will be operated on a non-profit basis and is intended for a municipal purpose: to address the City's insufficient parking. See In re Laberge Shooting Range, 2018 VT 84, ¶ 32–36, 208 Vt. 441 (implying that an entity which makes its facilities available to the general public and is not reliant upon contributions or donations has no commercial purpose); 24 V.S.A. § 2291(26) (stating that municipal parking garages constitute public improvements). Indeed, the Letter of Intent fails to designate terms commonplace for joint business ventures and affiliated ownerships such as "share[d] profits and losses, joint control or rights to control, a joint proprietary interest in the subject matter and a community of interest in the performance of the common purpose." Winey, 161 Vt. at 139 (1993) (citation omitted). Furthermore, the Letter of Intent does not indicate a subordination of the City's interest nor does it afford any rights of control retained by Capitol Plaza; it primarily serves to convey 0.56-acres and states the City and Capitol Plaza will enter into a parking license agreement, which will reserve a portion of parking spaces for Capitol Plaza. Thus, this agreement does not rise to the level of a joint venture, affiliated ownership, or association for a non-profit municipal purpose of providing parking when the City maintains absolute control over construction and operation of the parking garage.

b. Whether Capitol Plaza Sufficiently "Controls" Under § 6001(3)(A)(iv)

Under § 6001(3)(A)(iv), the meaning of exercising sufficient ownership or control by a person is not entirely plain. In re Eastland, Inc., 151 Vt. 497, 499 (1989). While control need not denote legal control, control must be "exercised by a restraining or directing influence over it." See id. (holding that absent holding legal title to property, a corporation controlled by making subdivision decision, surveying arrangements, payments, and acting as equitable owner of the parcel); In re Ochs, 2006 VT 122 ¶¶ 7, 17, 181 Vt. 541 (considering management as a degree of control); Snowstone, LLC Act 250 Jurisdictional Opinion Appeal (#2-308), No. 151-11-17 Vtec slip op. at 11–13 (Vt. Super. Ct. Envtl. Div. Nov. 27, 2018) (Durkin, J.) [hereinafter Snowstone]; In re Vitale, 151 Vt. 580, 584 (1989) (citing Black's Law Dictionary 298 (5th Ed. 1979))(defining control as: to "regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern . . .").

While the statute is not definite, this Court has previously addressed varying degrees of control in the Act 250 context. In Vitale, the Vermont Supreme Court held that a purchaser has sufficient control over a parcel when he "assisted the sellers in obtaining [necessary] permits" and facilitated the conveyance of the property "in a manner to avoid Act 250 jurisdiction."[6] In re Vitale, 151 Vt. at 580–581; see also In re Eastland, 151 Vt. at 499–501 (demonstrating that while legal title to a parcel is not equivalent to control, directing influence or managing the property equates to ownership); In re Ochs, 2006 VT 122, ¶ 14 (considering control as defined by day-to-day maintenance of the property). In Snowstone, this Court concluded sellers did not retain sufficient ownership over an adjacent parcel when the seller had no "control, ownership, or governance . . . . [and] had no prior relationship, business or personal [,]" even when they shared "common goals." Snowstone, No. 151-11-17 Vtec at 14–15 (Nov. 27, 2018) (noting the contract does not allow the seller to retain any ownership or controlling interest over the parcel to be sold or in the access easement, does not include the right of first refusal, any restrictions on future development); see In re Stokes Commc'n Corp., 164 Vt. 30, 36 (1995).

Here, Appellants and the NRB advance the argument that the parking garage is sufficiently controlled by Capitol Plaza. We disagree. First, the NRB contends the proposed hotel and parking garage are "codependent" in that "one cannot happen without the other." NRB at 5. This misapplies the test for determining control. The Court looks instead to managerial or operational actions taken, contract agreements between the parties, circumvention of Act 250 jurisdiction by parties; and business or personal relationships when considering control; a determination that one proposed project will not occur "but for" another is not dispositive in this context.[7] See In

[6] Snowstone provides guidance on avoidance in contrast to evasion. Justive Peck states "[i]t is a truism that it is entirely proper, legally as well as morally, to "avoid" a law but not to "evade" it. . . . openings may be intended by the Legislature, or they may be inadvertent. However, if the opening does exist, it is an egregious abuse of judicial power for a court or quasi-judicial body, in its creative arrogance, to seal off a citizen's right to take advantage of it." In re Vitale, 151 Vt. at 589 (Peck, J., dissenting).

[7] In Ochs, the Vermont Supreme Court noted that "[f]or purposes of an Act 250 analysis, the Board found that ownership of the land is less important than the use to which the land is put." In re Ochs, 2006 VT 122, ¶ 15–16 (citing Vt. Baptist Convention v. Burlington Zoning Bd., 159 Vt. 28, 30–31 (1992)). While the instant case involves a different section of Act 250 than the one at issue in Ochs, the Court's analysis and conclusions are similar in both cases.

re Eastland, Inc., 151 Vt. at 498–501; In re Vitale, 151 Vt. at 580; In re Ochs, 2006 VT 122, ¶ 14; Snowstone, No. 151-11-17 Vtec at 13–15 (Nov. 27, 2018).

Second, both Appellants and the NRB argue the Letter of Intent evidences control as the City (1) has agreed to construct a parking garage, (2) will obtain relevant permits, and (3) agreed to a long term contract reserving parking for Capitol Plaza. NRB's Motion at 9; Appellants' Motion at 6–7. The City counters that while the 0.55-acre conveyance includes a license to Capitol to use up to 200 parking spaces, the Letter of Intent contains minimal restrictions on use and vests the City with control over day-to-day management and construction. Applicants' Omnibus Memorandum at 17–20. The undisputed facts show that the City will own and direct the day-to-day operations of the parking garage, has the right to solicit parking license agreements with other entities to reserve parking spaces, is tasked with obtaining necessary permits, and is responsible for the costs of recording the deed and any property transfer tax. Indeed, the only influence Capitol plaza retains is an interest in up to 200 parking spaces as there is no future right or reversion on the basis of use. The considerations highlighted Vitale and Eastland, including maintenance, obtaining permits, and future planning are elements of control retained by the City in this case. In re Eastland, 151 Vt. at 498–501; In re Vitale, 151 Vt. at 580. While the transaction in Snowstone was limited only to a conveyance of a parcel, this Court noted that the transaction served "common goals" including avoidance of Act 250 jurisdiction." Snowstone, No. 151-11-17 Vtec at 15 (Nov. 27, 2018). Similarly, Capitol Plaza and the City's actions serve a mutually beneficial result and do not evidence an attempt to unlawfully "evade" the law. On the facts currently before the Court, we do not find that Capitol Plaza sufficiently exerts control over the proposed parking garage. Therefore, we conclude the proposed parking garage is not a development pursuant to § 6001(3)(A)(iv) and **DENY** both Appellants' and the NRB's motions for summary judgment.

IV. Whether the Proposed Parking Garage is a "development for municipal purposes" on less than 10-acres

Applicants' motion for partial summary judgment on Question 1 of their Cross-Appeal Statement of Questions addresses whether the parking garage is exempt from Act 250 jurisdiction under § 6001(3)(A)(v). This provision defines development as "[t]he construction of

improvements on a tract of land involving *more than 10 acres* that is to be used for *municipal, county, or State purposes*." 10 V.S.A. § 6001(3)(A)(v) (emphasis added); see Act 250 Rule 2(C)(15) (defining municipal, county, or State purposes as "the construction of improvements undertaken by or for the state . . . to be used by the state, county, municipality, or members of the general public").

Generally, municipal and state projects enjoy greater latitude in triggering Act 250 review. Indeed, the Vermont Supreme Court has recognized that in passing Act 250 , the Legislature "did not purport to reach all land use changes within the state, nor to impose the substantial administrative and financial burdens of the Act, or interfere with local control of land use decisions, except where values of state concern are implicated through large scale changes in land utilization." In re Agency of Admin., State Bldgs. Div., 141 Vt. 68, 76 (1982) (citing Committee to Save the Bishop's House, Inc. v. Medical Center Hospital of Vermont, Inc., 137 Vt. 142, 150 (1979)); In re Vermont RSA Ltd. P'ship, 2007 VT 23, ¶ 9, 181 Vt. 589 (stating the "underlying purpose of Act 250 [is] to regulate the impacts of development, not the purpose served, nor the parties benefited by the construction").

We look to the undisputed facts concerning the proposed parking garage to determine whether the construction serves a municipal purpose. In re Request for Jurisdictional Opinion re Changes in Physical Structures & Use at Burlington Int'l Airport for F-35A, 2015 VT 41, ¶ 11, 198 Vt. 510. The municipal purpose of this project is readily evident. The City is constructing and financing the project though the use of a $20 million tax increment financing bond, which was approved on November 6, 2018 by the City's voters. Applicants' Motion at 4–7. The parking garage will be available for use in part by the general public. Id. In addition, the purpose of the proposed parking garage is to alleviate the insufficient parking issue in the City. Id. Thus, the City is "undertaking" the project through instigating, funding, and controlling the development and intends to use of the proposed parking garage for a municipal purpose. Id. at ¶ 15–16.

The second requirement for a development requires on a tract of land involving more than 10 acres. 10 V.S.A. § 6001(3)(A)(v) ("In computing the amount of land involved, land shall be included that is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings.").The proposed project does not meet the 10-arcre threshold. The

subdivision plat shows the proposed parking garage as consisting of a 0.56-acre lot, subdivided from the 2.74-acres Capitol Plaza property, and the 0.55-acre Heney Lot. Taking into consideration stormwater, pedestrian, and utility easements, the project is likely to encompass approximately 2.39 acres. Thus, the proposed project does not constitute a development for purposes of Act 250 jurisdiction. We therefore **GRANT** Applicants' partial motion for summary judgment on Question 1 of Applicants' Statement of Questions concluding that the parking garage is exempt from Act 250 jurisdiction under § 6001(3)(A)(v).

Conclusion

For the reasons set forth above, we conclude that the proposed parking garage is a development for municipal purposes on less than ten acres under 10 V.S.A. § 6001(3)(A)(v). Therefore, the proposed parking garage is not subject to Act 250 jurisdiction. Applicants' partial motion for summary judgment on Question 1 of their Statement of Questions is **GRANTED**. Appellants' cross-motion for summary judgment is **DENIED**. NRB's cross-motion for summary judgment is also **DENIED**.

This concludes this matter. A judgment order accompanies this decision.

So ordered.

Electronically signed on April 14, 2020 at 01:20 PM pursuant to V.R.E.F. 7(d).

Tom Walsh

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Thomas G. Walsh, Judge
Superior Court, Environmental Division

Notifications:
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