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

*Re: Rutland Public Schools* Land Use Permit
Application # 1R0038-8-EB

**Memorandum of Decision**

This proceeding concerns an interlocutory appeal by Rutland Public Schools (Applicant) from a Hearing Recess Memorandum and Order issued by the District 1 Environmental Commission (Commission) on June 6, 2002. For the reasons below, the Environmental Board (Board) denies the appeal.

## I. History

On March 22, 1974, the Commission issue Land Use Permit #1R0038 (Original Permit) to the Rutland City School Department for the construction of the Rutland Area Vocational-Technical Center (RAVTC) on Woodstock Road in Rutland.

On September 18, 1978, the Commission issued Land Use Permit #1R0038-3, an amendment to the Original Permit, authorizing the installation of lights and a scoreboard at the football field at the RAVTC.

On June 26, 1992, the Board issued Land Use Permit #1R0038-4-EB, an amendment to the Original Permit, authorizing the construction of a high school on the RAVTC premises.

On August 1, 2000, the Applicant filed the present application (Application #1R0038-8), seeking to replace the existing lighting and poles at the football field. During the processing of this application, at the request of the Coordinator for the Commission, the Applicant filed, on September 27, 2001 and January 9, 2002, supplements to its application concerning the use of a public address (PA) system and cannon at the football field.

By letter dated January 30, 2002, the Applicant informed the Coordinator that it did not believe that it needed a permit for the PA system, specifically noting that, by submitting supplemental information as to the PA system to the Commission in connection with Application #1R0038-8 it did not waive any claim that no jurisdiction existed over the PA system.

On June 6, 2002, the Commission issued a Hearing Recess Memorandum and Order (Order) concerning the application. In this Order, the Commission required the

Applicant to submit further information relative to the lighting and the noise created by the PA system and, apparently, the cannon.

The present appeal was filed on June 17, 2002.

## II. Discussion

The Applicant has filed a motion for an interlocutory appeal pursuant to Environmental Board Rule (EBR) 43. In this motion the Applicant raises three arguments: 1) the PA system and cannon are not subject to Act 250 jurisdiction; 2) the Commission's Order is overbroad and not authorized by Environmental Board Rule (EBR) 20; [1] and 3) three parties should not be granted party status to participate before the Commission. The Applicant also seeks a stay of the Order.

### *A. Interlocutory appeals*

When the Board receives a motion for an interlocutory appeal it must answer, as a threshold question, whether such motion is suitable pursuant to EBR 43. *Re: H.A. Manosh, Inc. and Vermont RSA Limited Partnership D/B/A Bell Atlantic Mobile*, #5L1331-EB, (Interlocutory), Memorandum of Decision at 2 (June 30, 1999); *Re: Sugarbush Resort Holdings, Inc*., # 5W1045-15-EB (Interlocutory), Memorandum of Decision at 2 (Aug. 12, 1997).

The Vermont Supreme Court has written:

> Interlocutory appeals are an exception to the normal restriction of appellate jurisdiction to the review of final judgments. There are weighty considerations that support the finality requirement. Piecemeal appellate review causes unnecessary delay and expense, and wastes scarce judicial resources. Furthermore, an appellate court labors under great disadvantages in disposing of interlocutory appeals. We are deprived of the benefits of a final trial court opinion. Interlocutory review requires us to decide legal questions in a vacuum, without benefit of factual findings. Appellate decisionmaking suffers from such abstractness. By its very nature then, interlocutory appeals impair this Court's basic functions of correctly interpreting the law and providing justice for all litigants.

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[1] The answer to the first argument raised by the Applicant necessarily controls the answer to its second argument. If there is no Act 250 jurisdiction over the PA and cannon, then the PA and cannon need not be a part of the present application, and the Commission's Order, to the extent that it seeks information about the PA and cannon, would be too broad. Conversely, if there *is* jurisdiction over the PA and cannon, then it would be within the Commission's discretion to seek the information noted in the Order.

> Despite those hazards, there is a narrow class of cases in which interlocutory review is nonetheless advisable.

*In re Pyramid Co. of Burlington*, 141 Vt. 294, 300 - 01 (1982) (internal citation omitted).

*1. the three required elements of interlocutory appeals*

There are three elements which a party seeking to take an interlocutory appeal must demonstrate. First, the party must show that the order appealed from involves a "controlling question of law;" second there must be a "substantial ground for difference of opinion" as to the correctness of that order; and third, an interlocutory appeal should "materially advance the termination of the litigation," in this case, the application process. *Pyramid*, 141 Vt. at 301; *State v. Wheel*, 148 Vt. 439 (1987); VRAP 5(b); *Catamount Slate, Inc. et al.,* Declaratory Ruling #389, Memorandum of Decision at 12 (July 27, 2001), *appeal docketed*, No. 2002-142. (Vt. Sup. Ct.); EBR 43(A). All three elements must be satisfied before a motion for an interlocutory appeal can be granted pursuant to EBR 43(A). See, *Re: Agency of Transportation*, #4C1010-EB, (Interlocutory), Memorandum of Decision at 2 (Oct. 22, 1997); *Re: H.A. Manosh, Inc, supra,* at 4.

The Applicant does not state how its motion satisfies the three elements required of interlocutory appeals. For this reason the motion must be denied.

*B. Application of the first interlocutory appeal element to Applicant's first argument*

Even assuming, *arguendo,* that the Applicant had addressed the required interlocutory appeal elements, permission to take an interlocutory appeal would not be granted as to the Applicant's first argument - that the PA system and cannon are not subject to Act 250 jurisdiction -, as it does not meet the first element.

*1. Controlling question of law*

The Vermont Supreme Court has held that "Interlocutory appeal is appropriate for questions of law, not fact," because "a question of law is one capable of accurate resolution by an appellate court without the benefit of a factual record. If factual distinctions could control the legal result, the issue is not an appropriate subject for interlocutory appeal." *Pyramid*, 141 Vt. at 304. *And see State v. Dubois*, 150 Vt. 600 (1988); ***Re**: Catamount Slate, supra,* at 6.

As a threshold matter, therefore, before the Board examines whether an interlocutory appeal concerns a "*controlling* question of law," it must first determine whether the appeal raises a *question of law*. An appeal involves a "question of law" if

no facts are required to resolve the issue or if a factual record has been previously developed by the district commission in a manner that allows the Board to assume the relevant facts without engaging in factual determinations. *Re: H.A. Manosh, Inc., supra,* at 2; *Re: Sugarbush Resort Holdings, Inc., supra,* at 4; *Re: Maple Tree Place Associates*, # 4C0775-EB, Memorandum of Decision at 10 (Dec. 22, 1988).

Referencing EBR 43, the Applicant's first claim raises the issue of whether the PA system and cannon are subject to Act 250 jurisdiction. Before the Board could resolve this issue - which would involve an inquiry into whether the PA system and/or cannon constitute substantial or material changes from the Original Permit - certain facts would need to be determined; for example, does the use of the PA system and/or cannon create a physical or cognizable change from the Original Permit, and does such change, if any, have an impact on any term or condition of the Original Permit or the criteria specified in 10 V.S.A. §6086(a)? *See* EBR 2(G) and 2(P).

At best, the determination which the Board would have to make involves a question of mixed law and fact. Because the Applicant's interlocutory appeal raises an issue concerning a question that requires a factual determination, the issue cannot involve solely a question of law, and thus is not appropriate for interlocutory review. EBR 43(A) and cases cited, *infra.* [2]

*C. Board's authority to hear the Applicant's first (jurisdictional) argument within the context of an interlocutory appeal*

There is another compelling reason why the Board cannot address the Applicant's first argument - - that the PA system and cannon are not subject to Act 250 jurisdiction. Although Applicant's jurisdictional argument has been presented to the Board within the context of an interlocutory appeal, it cannot be accepted as such.

A challenge to the jurisdiction of Act 250 over an activity must be pursued through the proper administrative route, which the legislature has established in 10 V.S.A. §6007(c). This statute provides that questions of jurisdiction must first be presented to the Coordinator for the district in which the activity will occur. Only after the Coordinator has ruled, may the matter be brought to the Board through a Petition for a Declaratory Ruling. [3]

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[2] Since the Applicant's first argument cannot meet the first interlocutory appeal element, the Board need not discuss whether it would meet the second and third elements.

[3] The Board recognizes that it has recently treated an interlocutory appeal as a Declaratory Ruling Petition. *Central Vermont Public Service Corporation,* Declaratory Ruling #401, Findings of Fact, Conclusions of Law, and Order at 1 (Apr. 2, 2002).

As the proper statutory course has not been followed - because no jurisdictional opinion has been issued from which a Petition may be brought - the Board is without authority to hear the present claim that the use of the PA system and cannon should not require an amendment to the Original Permit. 10 V.S.A. §6007(c); *see, Okemo Mountain, Inc.*, #2S0351-12A-EB, Memorandum of Decision at 1 (July 23, 1992) (while the Board conducts hearings on a *de novo* basis, it is an appellate body, and to allow a request for reconsideration to be heard initially by the Board would subvert its function as such).

Because the Board will not accept the Applicant's first argument for interlocutory review, it cannot address the Applicant's second argument. *See*, footnote 1, *infra.* [4]

*D. Interlocutory appeal of Applicant's third argument*

The Applicant's third argument contests the Commission's grant of party status to three people. Unlike interlocutory appeals of other issues, interlocutory appeals of the grant or denial of party status need only satisfy the "materially advance" element. EBR 43(B) reads:

> Upon motion of any party, or person denied party status, the board in its sole discretion may review an appeal from any interlocutory (preliminary) order or ruling of a district commission if the order or ruling grants or denies party status and the board determines that such review may materially advance the application process.

*1. "Materially Advance the Application Process"*

"An interlocutory appeal is proper only if it may advance the ultimate termination of a case." *Pyramid*, 141 Vt. at 305. In deciding whether to grant an interlocutory appeal, the trial court "must consider not only the time saved at trial, but also the time expended on appeal." *State v. Lafayette*, 148 Vt. 288, 290 (1987), *quoting Pyramid*, 141 Vt. at 305. This includes "both the appeal time expended in the interlocutory appeal and the appeal of the final order." See, *Re: Catamount Slate, supra,* at 7.

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However, in *Central Vermont Public Service,* the Coordinator had ruled on the jurisdictional issue, and the appeal had simply been mischaracterized.

[4] Even if the Board were to examine the Applicant's argument that the Commission's Order is overbroad and not in compliance with EBR 20, the Board would find that this claim would not satisfy the "controlling question of law" element of the interlocutory appeal inquiry. *See, Disposal Specialists, Inc.*, #2W0161-1-EB, Memorandum of Decision at 2 (Aug. 21, 1989).

The Appellant contests the inclusion of three parties to the proceeding, arguing that the Commission should not have granted them party status. For at least two reasons, the Board cannot conclude that denying party status to the persons in question will "materially advance the application process."

First, the Applicant's own motion states that the three parties "offered no testimony, written or oral . . ." Given this, it is hard to imagine that any time will be saved at the Commission level by denying the three party status. [5]

Second, unlike appeals on the merits, *City of Burlington v. State of Vermont Environmental Board*, 164 Vt. 607 (1995) (Entry Order); *In re Cabot Creamery Cooperative, Inc.,* 164 Vt. 26, 28-29 (1995); *In re George F. Adams & Co., Inc.,* 134 Vt. 172, 174-75, (1976); a person who is denied party status by the Board may appeal this denial to the Supreme Court. *In re Maple Tree Place Associates*, 151 Vt. 331, 332 (1989), ("[A]t the conclusion of the Board's review of the application, the Board's decision on party status may be reviewed here"); *Re Chittenden Recycling Services*, 162 Vt. 84, 89-90, 1994); *In re Great Waters of America, Inc*., 140 Vt. 105 (1981); *In re Lunde Construction Company*, 139 Vt. 376, 378, (1981) ("We have held that one denied party status by the Environmental Board has standing to appeal the decision to this Court under [3 V.S.A. §815]"); *In re Great Eastern Building Co., Inc*., 132 Vt. 610 (1974); *In re Preseault*, 130 Vt. 343 (1972). While there may be instances in which denial of party status might bring about a matter's swift conclusion, a decision by the Board to deny party status in this matter could have the effect of *delaying* the termination of the process, not advancing it.

For these reasons, the Board denies the Applicant's motion for interlocutory appeal on its party status argument. [6]

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[5] Further, it is not at all evident that a party's mere failure to offer testimony is grounds for denial of party status. Parties often participate only by conducting cross-examination and offering argument. In any event, at the end of the Commission process, the Applicant is free to argue that the three challenged persons fail to adequately participate in the Commission process, and that the Commission should therefore deny them final party status pursuant to the provisions of 10 V.S.A. §6085(c)(2) and EBR 14(F).

[6] The Board notes also that preventing the three challenged parties from participating before the Commission does not necessarily mean that the Commission's inquiry into the environmental impacts of the PA system and cannon will be lessened. The Commission is charged with ensuring that projects subject to Act 250 comply with the criteria listed in 10 V.S.A. §6086(a), whether or not those who are most interested in those criteria participate in the case. *Hannaford Brothers Co. and Southland Enterprises, Inc*., #4C0238-5-EB, Memorandum of Decision at 2 (July 2, 2002).

*E. Applicant's request for a stay*

Because the Board does not accept the Applicant's request for interlocutory review in this matter, the request for stay is moot. The Board also notes that, while the Order required the filings of certain information from the Applicant no later than June 19, 2002, the request for a stay was not filed with the Board until June 17, 2002, giving the Board an inadequate time to address the request under even the best of circumstances.

## III. Order

1. The Applicant's Motion for Interlocutory Appeal is denied.

2. The Applicant's request for a stay of the Commission's Order is denied.

3. Jurisdiction is returned to the District 1 Environmental Commission.

Dated at Montpelier, Vermont this 17th day of July 2002.

ENVIRONMENTAL BOARD

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Marcy Harding, Chair
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