

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

Re: Ruby Iantosca, by
T. Darrah Moore, Esq.
Birmingham & Moore, P.C.
Attorneys at Law
71 Main Street
Ludlow, Vermont 05149-0247

Land Use Permit
#2S1085-EB

Memorandum of Decision and Dismissal Order

This proceeding involves an appeal to the Vermont Environmental Board ("Board") of Land Use Permit #2S1085 ("Permit") issued to Ruby Iantosca ("Permittee"). For the reasons stated below, pursuant to Environmental Board Rule ("EBR") 18(D), the Board dismisses the appeal as untimely.

I. Findings of Facts [1]

1. On July 5, 2000, the District #2 Environmental Commission ("Commission") issued the Permit and supporting Findings of Fact, Conclusions of Law, and Order ("Decision") to Permittee.
2. The Permit and Decision were mailed to the Permittee and other interested parties by first class mail on July 5, 2000.
3. The Permit authorizes the creation of an eight-lot residential subdivision with two pieces of remaining land. The Permit also authorizes construction of 915 feet of additional roadway and replacement of existing culverts, extraction and reclamation of gravel and construction of a bus shelter located on Route 100 in the Town of Ludlow, located on seventy-five acres of land on Route 100 in the Town of Ludlow, Vermont ("Project").
4. **Permittee's** Notice of Appeal is dated August 3, 2000. The appeal alleges that the Commission erred in its conclusions concerning 10 V.S.A. §6086(a)(1)(F), (4), (5) and the inclusion of Lots #6 and #8 in the narrative.
5. A US Postal Service Certified Mail Receipt for the Permittee's Notice of Appeal is date-stamped August 3, 2000.
6. The postmark on the envelope in which the Notice of Appeal was mailed is dated August 4, 2000.
7. The green Certified Mail postal card, which was returned to the

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Permittee's attorney, indicates that the Notice of Appeal was received **by the** State of Vermont on August 7, 2000.

8. Permittee's appeal of the Permit and Decision was received at the Board's office in Montpelier on August 9, 2000.

II. **Conclusions of Law**

10 V.S.A. § 6089(a) states, in pertinent part:

An appeal from the district commission shall be to the Board. ...
Notice of the appeal shall be filed with the Board within 30
d a y s .

EBR 40(A), pertaining to appeals, provides, in part, that "[a]n appeal shall be filed with the board within 30 days after the date of the decision of the commission." The first day of the thirty-day period begins on the day after the date of the Commission's decision. EBR 6. A document is considered "**filed**" **with the Board** on the date it is received in the Board's offices. EBR 12(A).

In this case, the Commission issued the Permit and Decision on July 5, 2000. Counting July 6, 2000, as "day one," the thirty-day period expired on August 4, 2000. Permittee's Notice of Appeal, although dated August 3 and mailed on August 4, was not received by the State of Vermont until August 7. [2]

Permittee notes that EBR 6 states that whenever a person is required to file a document within a prescribed period and the paper which initiates the response is mailed, the time for response is extended for a period of three days. However, the **full** text of EBR 6's "three-day" provision reads as follows:

Whenever a person has the right or is required to file a document within a prescribed period after the service of paper on the person and the paper is served on the person by mail, the period shall begin to run three days after the date on which the paper was postmarked, *unless the board or district commission served the paper* or set a specific date by which the person must file.

EBR 6 (emphasis added). [3] Therefore, where the Commission's decision is the **initiating** paper, the three-day grace period allowed for mailing under EBR 6 is not triggered. Thus, in this matter, the time for filing is not extended from August 4 to August 7.

Filing deadlines are jurisdictional, and the Board has no discretion to waive a deadline established by statute -- in this case, 10 V.S.A. §6089(a). See *Trask v. Department of Employment & Training*, No. 77-1205, slip op. (Entry Order, Vt. Supreme Court, January 25, 2000); *In re Stevens*, 149 Vt. 199, 200-01 (1987); *In re Guardianship of L.B.*, 147 Vt. 82 (1986); *A/en v. Vermont Employment Security Board*, 133 Vt. 166 (1975); *Re: Central Vermont Public Service Corporation and New England Telephone and Telegraph d/b/a Bell Atlantic Telephone Company*, #2W1074-EB, Memorandum of Decision at 6 (June 29, 2000); *Re: Marietta Palmer*, #4C0561-5 EB, Memorandum of Decision (November 24, 1998). The Board has dismissed appeals where such appeals were filed after the 30-day deadline. See, e.g., *Central Vermont Public Service Corporation; supra; Palmer, supra; North Country Animal League*, #5L0487-4-EB, Dismissal Order (March 29, 2000); *Re: Haystack Group*, #700002-10-EB, Memorandum of Decision (March 29, 1989); *Re Club 707*, #3W0196-3-EB, Memorandum of Decision (Feb. 2, 1987); *Re: Puppy Acres Boarding Kennel*, #2W0568-2-EB, Memorandum of Decision (Oct. 11, 1985), *aff'd, In re Puppy Acres Boarding Kennel*, No. 85-490 (Vt. 1986).

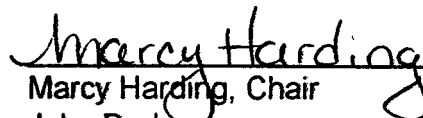
The appeal in this matter is untimely, and the Board lacks the jurisdiction to hear it. Accordingly, this appeal must be dismissed.

III. Order

1. Pursuant to 3 V.S.A. §810(4), the Board takes official notice of the official file maintained by the Board in this matter.
2. Permittee's appeal is dismissed.

Dated at Montpelier, Vermont this **23rd** day of October 2000.

ENVIRONMENTAL BOARD



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ENDNOTES

[1] These Findings of Fact are made based upon facts alleged in the Permittee's *Memorandum in Opposition to the Chair's Proposed Dismissal Order* and the official file maintained by the Board in this matter, of which the Board takes official notice, pursuant to 3 V.S.A. §81 O(4).

[2] The Board notes that the date that a Notice of Appeal is mailed nor the date that the Post Office post-marks a Certified Mail receipt is relevant to the question of whether an appeal is timely filed. See *City Bank & Trust v. Lyndonville Savings Bank and Trust Co.*, 157 Vt. 666 (1991). The only question is whether the Board receives a Notice of Appeal within the 30-day prescribed time period.

Although the Notice of Appeal was not received in the Board offices until August 9, 2000, and therefore, under EBR 12(A) was not "filed" until that date, see *City Bank & Trust, supra*, for purposes of this matter, the Board will consider that its receipt by its agent on August 7, 2000 constitutes its filing as of that date.

[3] Permittee argues also that she understood the word "served" in EBR 6 to mean "hand served." While EBR 12(B) requires personal service or service by certified mail for initial documents by parties, there is no similar provision or requirement in the Board rules for service of any document by a Commission. The Board also notes that service of documents subsequent to the initial document may be made by parties by mail. EBR 12(J).

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