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

RE: Green Mountain Railroad
Land Use Permit Application #2W0038-3B-EB
Docket # 797

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding concerns an appeal of Land Use Permit #2W0038-3B.

I. PROCEDURAL SUMMARY

On October 14, 1999 Green Mountain Railroad (Applicant or Green Mountain) filed Land Use Permit Amendment Application # 2W0038-3B (Application) with the District #2 Environmental Commission (Commission) seeking authorization to modify the size, type and location of a previously permitted salt and storage building located on 62+- acres off Steamtown Road in the Town of Rockingham, Vermont (Project) pursuant to 10 V.S.A. §§ 6001 - 6092 (Act 250).

At the February 29, 2000 hearing and in subsequent written filings, the Applicant requested that the Commission find itself without jurisdiction to adjudicate the Application. The Applicant contended that the project was not subject to Act 250, Vermont's land use regulations, as federal laws governing railroads pre-empted the state requirements.

On August 23, 2001, the Commission issued Land Use Permit #2W0038-3B (Permit) and Findings of Fact, Conclusions of Law, and Order #2W0038-3B (Decision) which in part denied the Applicant's request to withdraw the Application.

On September 21, 2001, Green Mountain filed a Motion to Reconsider the Commission's Decision pursuant to Environmental Board Rule (EBR) 31(A). The Commission denied Green Mountain's Motion to Reconsider on October 19, 2001.

On November 7, 2001, the Applicant filed an appeal with the Environmental Board (Board) from the Permit and Decision alleging that the Commission erred in its conclusions with respect to Act 250 jurisdiction and the Commission's refusal to allow the Applicant to withdraw its Application. The appeal was filed pursuant to 10 V.S.A.§ 6089(a) and EBR 6 and 40.

On December 13, 2001, Board Chair Marcy Harding convened a prehearing conference. The sole participant was the Applicant, represented by

Eric Poehlman, Esq. During the prehearing conference, Applicant waived its right to an evidentiary hearing.

On March 6, 2002, the Board heard oral argument. Again the sole party arguing before the Board was the Applicant represented by Eric Poehlman, Esq.

The Board deliberated on March 6 and 20, 2002. Based upon a thorough review of the record, filings, including the Applicant's Proposed Findings of Fact, Conclusions of Law, and Order, and oral argument, the Board declared the record complete and adjourned. The matter is now ready for final decision.

II. ISSUE ON APPEAL

Does an applicant have the right to voluntarily withdraw its application for a permit amendment without Commission approval?[1]

III. OFFICIAL NOTICE

Under 3 V.S.A. § 810(4), notice may be taken of judicially cognizable facts in contested cases. An Act 250 appeal is a contested case under the Administrative Procedures Act. 3 V.S.A. § 801(b)(2); see also, 10 V.S.A. § 6007(c). Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); *see also*, 3 V.S.A. § 810(1) (rules of evidence apply in contested cases); *In re Handy*, 144 Vt. 610, 612 (1984). Official notice may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. § 810(4); V.R.E. 201(c) and (f).

As the Prehearing Conference Report and Order notes, the Board has taken official notice of the entire Commission file relative to this matter.

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[1] The Prehearing Conference Report and Order set the issue in this proceeding as follows: Does an applicant have the right, pursuant to 10 V.S.A. Section 6083a, to voluntarily withdraw its application for a permit amendment without Commission approval? This was based on Green Mountain's filings and the discussion during the prehearing conference. Subsequent to the prehearing conference it has become clear, based on Green Mountain's filings and oral argument, that the issue should not be limited by the language "pursuant to 10 V.S.A. Section 6083a." Accordingly, the issue is now framed more broadly as stated in this decision.

V. FINDINGS OF FACT

To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. *See, Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

1. The first Land Use Permit (LUP) issued for the property that is the subject of this appeal (subject parcel) was issued on January 24, 1972. That LUP, #2W0038, was for the construction of a 60-foot by 200-foot maintenance building for locomotives belonging to the Steamtown Foundation, a nonprofit educational organization and museum. The applicant, landowner and permittee was Mrs. Ruth Blount. The tract of land was 65 acres.

2. The first amendment to the LUP, #2W0038-1, was issued on October 28, 1993, to the then new subject parcel owner and permittee Anthony Cersosimo. The permit was for the subdivision of the subject parcel and to extend the permit expiration date.

3. On June 24, 1997, The subject parcel of land was conveyed from Cersosimo to Green Mountain.

4. On August 18, 1997, the Assistant District #2 Coordinator issued a Project Review Sheet (PRS) concluding that Act 250 jurisdiction applied to a proposed forest products transfer facility, including a 20 foot by 630 foot office building at the subject parcel because these activities were a material change to the previously permitted project.

5. The August 18, 1997 PRS was never challenged.

6. The next LUP amendment, #2W0038-2, was issued on November 12, 1997. The permit amendment was issued to both Green Mountain and PMI Lumber Transfer, Inc. (holder of a lease with the Green Mountain) for a portion of the subject parcel.

7. The #2W0038-2 permit amendment was for construction of a 20-foot by 630-foot office building for five employees and the operation of a forest

products distribution yard using rails and trucks, the same activities at issue in the August 18, 1997 PRS.

8. The next LUP amendment, #2W0038-3, was issued to Green Mountain on January 13, 1999, for construction and operation of a 100-foot by 300-foot salt storage shed, conveyer pit, rail siding and truck scale.

9. Subsequent to issuance of LUP #2W0038-3, Green Mountain constructed a salt storage shed different than and in a different location from that authorized by LUP #2W0038-3.

10. The salt storage shed constructed by Green Mountain was built without an Act 250 Land Use Permit.

11. On October 14, 1999, Green Mountain filed another permit amendment application, #2W0038-3B (the Application as defined above), for the as-built salt storage shed.

12. On February 8, 2000, the Commission issued a Notice of Hearing for the project addressing the fact that the salt shed constructed by Green Mountain was built without a permit.

13. At the hearing held on February 29, 2000, Green Mountain challenged the Commission's jurisdiction to adjudicate the pending Application, and moved that the Commission find that it lacked jurisdiction. In particular, Green Mountain contended the project was not subject to state land use regulations, as federal laws governing railroads preempt Act 250 requirements. Green Mountain made this motion verbally and also gave the Commission a written filing dated February 18, 2000, directed to Ms. Linda Matteson, Assistant District #2 Coordinator.

14. The Commission denied the Applicant's motion at the February 29, 2000, hearing, concluding that it did have jurisdiction over the matter.

15. On March 6, 2000, the Coordinator issued a PRS concluding that the pending Application was a material change to the previously permitted project and therefore the new activities were subject to Act 250 jurisdiction pursuant to EBR 2(A)(5) and 2P.

16. The March 6, 2000 PRS was never challenged through Act 250's declaratory ruling process.

17. Green Mountain repeated the preemption argument in a filing dated April 28, 2000, and requested the Commission withdraw the Application.

18. In a filing dated June 4, 2001, Green Mountain repeated its previous jurisdictional arguments and included a request for the Commission to remove or withdraw from consideration "all pending application(s) and/or amendment(s) and provide written notification of such to the Applicant."

19. On August 23, 2001, the Commission issued its Permit and Decision, which concluded that Act 250 jurisdiction did apply, and therefore, the Commission denied Green Mountain's request to withdraw the Application.

20. On September 21, 2001, Green Mountain filed a Motion to Reconsider the Commission's August 23, 2001, Decision pursuant to EBR 31(A).

21. The District Commission denied Green Mountain's Motion to Reconsider on October 19, 2001.

22. Green Mountain filed the present appeal with the Environmental Board on November 7, 2001.

V. CONCLUSIONS OF LAW

In support of its claim that it has the right to withdraw its Application, Green Mountain puts forth two arguments. First, Green Mountain argues that the Application was never subject to Act 250 jurisdiction as federal laws governing railroads preempt Vermont State land use laws. Second, Green Mountain argues that pursuant to common law principles, an applicant has the right to voluntarily withdraw its application.

First, the Board addresses the federal preemption argument. The Board has no evidence of and is not aware of any order holding that federal laws governing railroads preempt Vermont State land use laws, including Act 250. Furthermore, on March 6, 2000, the District #2 Assistant Coordinator issued a

PRS[2] concluding that the pending Application was a material change to the previously permitted project, and therefore, the new activities were subject to Act 250 jurisdiction pursuant to EBR 2(A)(5) and 2P. The Board has no evidence that the March 6, 2000 PRS was ever challenged by an appeal of the PRS through Act 250's declaratory ruling process. Both the Act 250 statute and EBRs expressly provide a process for challenging a PRS issued by coordinators. See 10 V.S.A. § 6007(c) and EBR 3. Absent a timely challenge of the PRS through an appeal to the Board, that opinion becomes final and binding. *Alpine Stone Corporation, ADA Chester Corporation, and Ugo Quazzo*, Land Use Permit Application #2S1103-EB, Memorandum of Decision at 5 (Feb. 9, 2001) (*citing* 10 V.S.A. §6007(c))(A properly-served, unappealed jurisdictional opinion is a final determination.).

Deadlines established by statute for the filing of appeals – in this case the filing of an appeal of the PRS[3] - are jurisdictional, and the Board has no discretion to waive such deadlines. *See, Trask v. Department of Employment & Training*, 170 Vt. 589, 590 (2000); *In re Stevens*, 149 Vt. 199, 200-01 (1987); *In re Guardianship of L.B.*, 147 Vt. 82 (1986); *Allen v. Vermont Employment Security Board*, 133 Vt. 166 (1975); *see also 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); *Re: Rock of Ages (Bethel White Quarry)*, Declaratory Ruling #291, Memorandum of Decision and Dismissal Order at 5 (Mar. 28, 1994).

The Board concludes therefore that the March 6, 2000 PRS is final and binding on Green Mountain, and accordingly, Green Mountain's argument that it has a right to withdrawal of an application covering the activity at issue in the PRS for lack of jurisdiction is without merit.[4]

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2 A PRS is the equivalent of a jurisdictional opinion.

3 An appeal of a PRS could also be entitled a Petition for Declaratory Ruling and the substance of either proceeding is the same.

4 If Green Mountain believed Act 250 jurisdiction did not apply, their proper approach would have been to take an appeal of the PRS to the Board within 30 days of its issuance.

Next, the Board addresses Green Mountain's argument that it has a right to withdraw its Application pursuant to common law principles. Neither the Act 250 statute nor the EBR's contain any provisions expressly addressing an applicant's right to withdraw an application.[5] In the absence of a statutory provision or rule addressing the issue, resort must be made to common law principles. *See Jones v. Securities Exchange Commission*, 298 U.S. 1, 21 (1936). The Board finds that the general common law principle is that an applicant is presumed to have an unqualified right to withdraw an application unless palpable prejudice to an adversary or the general public would result. *Id*.

Prior Board decisions involving both appeals and petitions for declaratory ruling have upheld this principle. *See, Re: Rockwell Park Associates and Bruce J. Levinsky*, #5W0772-5-EB, Dismissal Order at 1 (Feb. 17, 1994); *Re: Geoffrey Wilcock and Judith Burns*, Declaratory Ruling #224, Memorandum of Decision at 1 (Sep. 17, 1990). In Rockwell the Board expressly stated:

> The Board has authority to disallow withdrawal if it concludes that withdrawal will prejudice the values Act 250 is designed to protect.

Re: Rockwell Park Associates, *supra* at 1. In that case the Board granted the withdrawal request finding that "the values embodied in Act 250" will be protected because the permit under appeal will be binding on the applicants if the appeal is withdrawn. In other words, if the permit becomes final, then compliance with its conditions is required.

In *Geoffrey Wilcock*, the Board expressly stated:

> Administrative agencies have discretion to reject a withdrawal if allowing it would prejudice the public interests they are charged to protect.

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5 Green Mountain argues that 10 V.S.A. § 6083(a) implies a right to withdraw an application. The Board finds that this statutory section addresses fee refunds but does not address when and under what circumstances withdrawal is or is not allowed.

Re: Geoffrey Wilcock, *supra* at 1, *citing to Jones, supra*.[6] *See also*, *Ronald L. Saldi*, #5W1088-1-EB, Memorandum of Decision at 3 (Oct. 1, 1996); *H.A. Manosh Corp.*, Declaratory Ruling #247 (Dec. 13, 1991).

The Board therefore concludes that as an Administrative agency, the Board, or a district commission, has discretion to reject a withdrawal request if the withdrawal would result in prejudice to an adversary or the public interest that the Board or district commission is charged to protect.

In this proceeding no party other than Green Mountain has appeared. Consequently, there is no potential prejudice to an adversary in this proceeding if the withdrawal is granted.

The Board and district commissions are charged to protect and conserve the lands and environment of the state. 1969 Vt. Laws, No. 250 § 1 (Adj. Sess.). Potential prejudice to the general public's interest includes infractions against the protection and conservation of the lands and environment of the state. The Board finds that where Act 250 enforcement powers can be used to correct or remedy violations of the law thereby protecting Act 250 values, then there is no prejudice to the public by allowing an applicant to withdraw an application for an already constructed project having no permit. Said another way, the interests of the general public are adequately protected through enforcement proceedings where violations of Act 250 have occurred.

Although Green Mountain's salt storage shed project is subject to Act 250 jurisdiction because the unchallenged March 6, 2000 PRS is final and binding, the Board concludes that Green Mountain does have the right to withdraw its Application. Having concluded this, however, the Board does not automatically grant the withdrawal, but rather provides Green Mountain the following two

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6 In Geoffrey Wilcock, the Board erroneously denied the withdrawal request finding that the public interest protected by Act 250 would be prejudiced because a 17 lot subdivision potentially subject to Act 250 jurisdiction would evade state review if the withdrawal was granted. The present Board finds this conclusion erroneous because the underlying jurisdictional opinion concluded that the subdivision was subject to jurisdiction, and therefore, if the appeal of that opinion was withdrawn, then the underlying jurisdictional opinion would stand and jurisdiction would attach and Act 250 review would be required.

options. As set forth more specifically in the Order section below, Green Mountain may either:

A. Confirm its interest in withdrawing its Application. The Board will grant withdrawal and will then be required to vacate the Commission's Permit and Decision. Green Mountain would then have an as-built project without a permit and would be subject to enforcement remedies for any violation(s) commencing on the first day of construction of the salt storage shed project.

B. No longer seek withdrawal and retain its Permit and Decision. Any enforcement would then be limited to a period from the first day of construction of the salt storage shed project until the date that the Commission issued its Permit and Decision. Additionally, if Green Mountain is in violation of the Permit and Decision, enforcement could be taken in that respect as well.

VI. ORDER

1. An applicant has the right to voluntarily withdraw its application for a permit without commission or Board approval unless palpable prejudice to an adversary or the general public would result.

2. Green Mountain may withdraw its Application as the Board finds that no palpable prejudice to an adversary or the general public would result in doing so.

3. On or before April 9, 2002, Green Mountain shall file with the Board a request that: 1) seeks withdrawal of its Application, or 2) advises the Board that it no longer seeks withdrawal, but rather wishes to dismiss this appeal.

Dated at Montpelier, Vermont this 22nd day of March, 2002.

ENVIRONMENTAL BOARD

_/s/Marcy Harding_____
Marcy Harding, Chair
John Drake*
Samuel Lloyd**
W. William Martinez
Alice Olenick
Jean Richardson
Donald Sargent**
A. Gregory Rainville

* Member Drake was absent for the March 20, 2002 Board deliberations, but he has reviewed and he concurs with the majority decision.

** DISSENT:

Members Lloyd and Sargent dissent from the majority decision as follows:

The Commission made the correct decision in refusing to allow withdrawal of the Application, as Green Mountain had agreed to jurisdiction when it filed the Application. Thereafter, a PRS was issued concluding that the amended salt storage shed project, which was already built, was subject to jurisdiction. Since Green Mountain built something that differed from what they were permitted to do, this withdrawal prejudices the values Act 250 is designed to protect.

If Green Mountain believed Act 250 jurisdiction did not apply, their proper approach would have been to take an appeal of the PRS to the Board within 30 days of its issuance.

The Permit and Decision should not be vacated.