

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

Re:   The Stratton Corporation and Intrawest                   Land Use Permit  
      Stratton Development Corporation                   #2W0519-17(Revised)-EB  
      RR1, Box 145  
      Stratton Mountain, Vermont 05155

**DISMISSAL ORDER**

Stratton Corporation ("Stratton") seeks to withdraw its appeal of a ruling by the District #2 Environmental Commission ("Commission") that installation of certain fireplaces in certain residential condominium units would violate Condition #8 of Land Use Permit #2W0519-17 (Revised) ("Permit"). As discussed herein, the Vermont Environmental Board ("Board") grants Stratton's Motion to Withdraw, and dismisses this appeal.

**I.     FINDINGS OF FACT**

Based on the record, the Board finds the following facts:

1.     The Commission issued the Permit on April 17, 2000, to Stratton and Intrawest Stratton Development Corporation ("Permittees"), authorizing the construction and operation of 80 residential condominium units, a pool and cabana building, and a stormwater management system, all to be located off the Stratton Mountain Road in the Town of Stratton, Vermont ("Project"). Condition #8 of the Permit provides that: "All residential units may be equipped with EPA approved wood stoves or gas-fired fireplaces or stoves. There shall be no uncontrolled wood-burning fireplaces." No appeal was taken from the Permit.
2.     On August 30, 2000, Permittees applied to amend the Permit to allow installation of certain "Rumford Buckley" fireplaces in the residential condominium units located in the "Valley View" area of the Project, and to extend the construction completion date.
3.     On September 13, 2000, the Commission ruled that it intended to apply the *Stowe Club Highlands* analysis in deciding the amendment application. The Commission also proposed to grant the request to extend the construction completion date without hearing unless a party requested a hearing by September 27, 2000.
4.     On September 28, 2000, Permittees requested to withdraw the amendment application with respect to Condition #8, and requested a ruling whether installation of the Rumford Buckley fireplaces would comply with Condition #8 of the Permit.

5. On October 3, 2000, the Commission issued a Memorandum of Decision canceling the evidentiary hearing that had been set for October 4, 2000. It also requested additional information on emissions levels and the type of fireplace proposed for use in the Valley View units from Permittees and the Vermont Agency of Natural Resources ("ANR").

6. On November 14, 2000, the Commission issued a Memorandum of Decision ("Decision") ruling, in relevant part, that installation of the Rumford Buckley fireplaces would not comply with Condition #8 of the Permit. In its Decision, the Commission also found that the proposed use of the Rumford Buckley fireplaces would constitute a material change requiring an amendment to the Permit. Alternatively, the Commission granted Permittees' request to withdraw the amendment application "with the proviso that the Applicants will comply with Condition #8 which allows for equipping units with either EPA approved wood stoves or gas-fired fireplaces or stoves and will not equip units with wood-burning fireplaces." (Decision, at 2.) In addition, the Decision granted Permittees' request to amend the Permit to extend the construction completion date. (*Id.* at 1.)

7. On December 6, 2000, Stratton filed an appeal with the Board alleging that the Commission erred in its Decision that installation of the Rumford Buckley fireplaces would not comply with Condition #8 of the Permit. ("Appeal"). The Appeal was filed pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rules ("EBR") 6 and 40.

8. Stratton appealed only the Commission's ruling that installation of the Rumford Buckley fireplaces would not comply with Condition #8 of the Permit.

9. On January 5, 2001, Board Chair Marcy Harding convened a Prehearing Conference with the following participants:

Stratton, by Stephen Reynes, Esq.

Ken Hoepfner of Stratton.

Windham Regional Planning Commission, by James Matteau.

10. No other party expressed interest in participating in the Appeal.

11. At the Prehearing Conference, Chair Harding informed the participants that the following preliminary issue required resolution before the Board could consider the merits of this Appeal:

Whether the District Commission had authority to issue the Decision, and, if not, whether the Board has jurisdiction to hear this appeal under 10 V.S.A. § 6089(a), EBR 6 and EBR 40.

Chair Harding offered the parties an opportunity to brief this preliminary issue.

12. At the Prehearing Conference, Chair Harding also made clear that, should the Board reach the merits of this Appeal, the issue would be whether installation of the Rumford Buckley fireplaces in the Valley View condominium units would comply with Condition #8 of the Permit. Chair Harding also explained that the Board would not consider evidence on Criterion 1, undue air pollution, because this Appeal concerns only the applicability of Condition #8.

13. At the Prehearing Conference, Stratton moved to withdraw its Appeal. Stratton conceded that the Commission lacked authority to issue the Decision and that the Board has no jurisdiction to hear this appeal. Counsel for Stratton informed the Chair that Stratton would return to the District level soon, to request either a jurisdictional opinion from the Coordinator, or a permit amendment from the Commission.

14. No participant at the Prehearing Conference objected to immediate withdrawal and dismissal of the Appeal.

15. On January 10, 2001, the Board deliberated on Stratton's motion.

## **II. CONCLUSIONS OF LAW**

### **A. SUMMARY**

Stratton seeks to withdraw its Appeal on the grounds that the Board lacks jurisdiction to consider it. Stratton concedes that the question of applicability of Condition #8 initially should have been addressed to the Coordinator, who is authorized to rule on such issues in a jurisdictional opinion, and that the Commission did not have the authority to issue the part of the Decision which Stratton appealed. The Board agrees.

### **B. BACKGROUND**

Permittees initially sought to amend Condition #8 of the Permit, to allow installation of the Rumford Buckley fireplaces in the Project's Valley View residential condominium units. Condition #8 of the Permit provides that:

All residential units may be equipped with EPA approved wood stoves or gas-fired fireplaces or stoves. There shall be no uncontrolled wood-burning fireplaces.

After the Commission ruled that it would apply the *Stowe Club Highlands* analysis to the amendment application, Permittees sought to withdraw the amendment application and requested a ruling on whether installation of Rumford Buckley fireplaces would comply with Condition #8 of the Permit. The Commission ruled, in relevant part, that such installation would not comply with Condition #8 of the Permit, and would constitute a material change requiring a permit amendment. Alternatively, the Commission granted Stratton's motion to withdraw its amendment application "with the proviso that the applicants will comply with Condition #8." Stratton appealed the Decision, but only on the question of compliance with Condition #8. The rest of the Decision remains in force.

### **C. DISCUSSION**

While the Decision covered other issues, Stratton appealed only the Commission's ruling on the applicability of a permit condition. Such rulings are authorized by Vermont's Administrative Procedure Act, 3 V.S.A. §808 ("APA"), which requires every agency to "provide for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency . . . ." <sup>1</sup> The Board has complied with the APA by establishing such a declaratory ruling procedure in its rules.

Under the Board's rules, declaratory ruling proceedings begin as "jurisdictional opinion" requests addressed to and issued by a District Coordinator. EBR 3(C) provides, in relevant part, that "a district coordinator in the appropriate district" may rule on "the applicability of 10 V.S.A. Chapter 151 (Act 250), these rules, or [an] order of the board."<sup>2</sup> Appeals from such

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<sup>1</sup>

Presumably, a permit condition constitutes an order of the Board, since District Commissions are agencies of the Board.

<sup>2</sup>

Act 250's provision for jurisdictional opinions is more limited. It provides, in relevant part, that:

With respect to . . . an activity which might or might not constitute development [or subdivision], any person . . . may request a

jurisdictional opinions are heard by the Board as declaratory ruling requests. EBR 3(D).

The Decision, however, was issued by the Commission, not the Coordinator. District Commissions are authorized to consider applications for Act 250 permits and permit amendments. See, 10 V.S.A. §§6083-6087; EBR 30; EBR 34. Nothing in the statute or rules indicates that District Commissions are authorized to issue jurisdictional opinions. Permittees' question about the application of Condition #8 should have been addressed to the District Coordinator. The Commission had no authority to issue the part of the Decision that is the subject of this Appeal.<sup>3</sup>

The Board only has those adjudicatory powers granted by statute. *Re: Putney Paper Company, Inc.*, Findings, Conclusions and Order at 6 (Nov. 3, 1995)(citing *In re Taft Corners Assocs.*, 160 Vt. 583, 590, 632 A.2d 649 (1993); *In re Lake Sadawga Dam*, 121 Vt. 367, 370, 159 A.2d 337 (1960)). Act 250 authorizes the Board to hear appeals from Commission decisions, 10 V.S.A. §6089(a)(1), and to hear, de novo, "all findings requested by any party that files an appeal . . . according to the rules of the board," 10 V.S.A. §6089(a)(3). The Board rules make clear that the Board is only authorized to hear appeals from "findings, conclusions and permit conditions issued by the district commission." EBR 40(A). The statute and rules do not authorize the Board to hear appeals from District Commission decisions that are, in effect, jurisdictional opinions. See, *Re: Roger Loomis d/b/a Green Mountain Archery Range*, Memorandum of Decision, at 3 (Aug. 8, 1997)(holding that the Board may not exercise appellate jurisdiction pursuant to the APA over Commission decisions, and citing *In re State Aid Highway No. 1, Peru, Vermont*, 133 Vt. 4, 7-8 (1974)); cf., *Re: Developers Diversified Realty Corporation (Berlin Mall Wal\*Mart)*, Declaratory Ruling Request #364, Memorandum of Decision, at 6-7 (Sept. 10, 1998)(holding that coordinator lacked authority to order commission to convene hearing to determine compliance with permit condition).

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jurisdictional opinion from the district coordinator concerning the applicability of this chapter.

10 V.S.A. §6007(c).

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The Board notes that, insofar as the Appeal may be interlocutory in nature, other preliminary issues may have been dispositive of this Appeal, however, it was not filed as such and none of these issues was raised.

Chair Harding raised the question of Board jurisdiction during the Prehearing Conference, and offered the parties the opportunity to brief the following preliminary issue:

Whether the Commission had authority to issue the Decision, and, if not, whether the Board has jurisdiction to hear this appeal under 10 V.S.A. § 6089(a), EBR 6 and EBR 40.

Chair Harding also made clear at the Prehearing Conference that, should the Board reach the merits of this case, it would not hear evidence on Criterion 1 (undue air pollution) as Stratton stated it intended to submit in its Notice of Appeal, but would consider only:

Whether installation of the Rumford Buckley fireplaces in the Valley View condominium units would comply with Condition #8 of the Permit.

At the Prehearing Conference, counsel for Stratton agreed that the Board has no jurisdiction to hear this Appeal, and moved to withdraw the Appeal. The only other party at the Prehearing Conference did not object to Stratton's withdrawal of the appeal.<sup>4</sup>

The Board may deny a request to withdraw an appeal if dismissal would prejudice the public interest that the Board is charged to protect. *Re: Taft Corners Assocs., Inc.*, Dismissal Order at 1 (citing, *c.f.*, *Re: Rockwell Park Associates and Bruce J. Levinsky*, #5W0772-5-EB, Dismissal Order (Feb. 17, 1994); *Re: H.A. Manosh Corp.*, Declaratory Ruling #247 (Dec. 13, 1991)). Under Act 250, the Board is charged with protecting and conserving Vermont's lands and environment. 1969 Vt. Laws, No. 250 §1 (Adj. Sess.). The Board concludes that allowing Stratton to withdraw its Appeal will not prejudice the public interest that the Board is charged to protect, since the rest of the Commission's Decision remains undisturbed.

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EBR 18(D) does provide for an opportunity for oral argument prior to dismissal. However, in this matter, only two parties have expressed an interest in participating by appearing at the Prehearing Conference, and both agreed to withdrawal of the Appeal. In addition, prompt dismissal of this Appeal will allow Stratton to seek a jurisdictional opinion from the Coordinator, or a permit amendment from the Commission, in a more expeditious manner.

Should Stratton want a valid jurisdictional opinion as to whether installation of the fireplaces would comply with Condition #8, it can file its request with the Coordinator. Otherwise, it can proceed with the amendment application at the Commission.

Appellant's Motion to Withdraw is granted, and this Appeal is dismissed pursuant to EBR 18(D).

**III. ORDER**

1. Stratton's Motion to Withdraw this Appeal is GRANTED.
2. This Appeal is DISMISSED without prejudice.
3. Jurisdiction is returned to the District #2 Environmental Commission.
4. The portion of the Commission's November 14, 2000 Memorandum of Decision holding that installation of the Rumford fireplaces would not comply with Condition #8 is VACATED.

Dated at Montpelier, Vermont this 10th day of January, 2001.

ENVIRONMENTAL BOARD

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