

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

RE: Stratton Corporation and Intrawest Stratton Development Corp.,
Master Plan Application #2W1149-EB (Interlocutory Appeal)

MEMORANDUM OF DECISION

This proceeding concerns an interlocutory appeal by Stratton Corporation and Intrawest Stratton Development Corp., (Applicants) from a Memorandum of Decision and Order issued by the District #2 Environmental Commission (Commission) on September 18, 2002. For the reasons below, the Environmental Board (Board) denies the appeal.

I. Procedural History

On April 15, 2002, the Applicants filed Land Use Permit Application #2W1142 for the proposed construction of twenty-five three-unit town home buildings (Treetops Project) as part of the Applicants' Master Plan.

On May 17, 2002, the Applicants filed Land Use Permit Application #2W1149 for the proposed construction of a three-story building with 66 units of employee housing (Birches Project), also a part of its Master Plan.

On September 18, 2002, the Commission issued a Memorandum of Decision and Order requiring the Applicants to "provide a full and complete accounting of all residential/sales construction of units/lots within the Town of Stratton made by the Stratton Corporation which are covered by Act 250 Permits." The Commission stated that "there is sufficient density for at least one of these two pending projects" and allowed the Applicants to choose the one they want to proceed on first.

On September 27, 2002, the Applicants chose the proposed construction of the Treetops Project. Thus, the Applicants were required to provide the information concerning density of prior residential units for the Birches Project.

On November 22, 2002, the Applicants filed an interlocutory appeal challenging the Commission's request for information for the Birches Project.

On December 18, 2002, the Board deliberated on the Applicants' interlocutory appeal.

II. Discussion

The Applicants filed an interlocutory appeal with the Board alleging that the Commission exceeded its jurisdiction by ordering the Applicants to submit information concerning the density of all prior Act 250 developments in order to determine whether the Applicants' application for the Birches Project is in conformance with the Stratton Town Plan.

When the Board receives a motion for an interlocutory appeal it must first determine whether to accept the appeal pursuant to EBR 43. *Re: Rutland Public Schools*, #1R0038-8-EB Memorandum of Decision at 2 (Jul. 17, 2002); *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 decision making 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.

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

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

A. *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; *Re: State v. Wheel*, 148 Vt. 439

(1987); VRAP 5(b); *Re: Catamount Slate, Inc. et al.*, Declaratory Ruling #389, Memorandum of Decision at 12 (Jul. 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.

1. *Controlling question of law*

The Vermont Supreme Court has held that “[i]nterlocutory 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; *Re: Catamount Slate, supra*, at 6.

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).

The Applicants’ framed their interlocutory appeal as follows:

The question is whether the District Commission has exceeded its jurisdiction by ordering the Applicant to develop and file extensive information pertaining to density of all its prior Act 250 developments under the Town Plans and Zoning provisions which are no longer in effect, in order to determine whether the Applicant’s Act 250 application in 2002 for 66 units of proposed employee housing, is in conformance with the Stratton Town Plan under 10 V.S.A. Section 6086(a)(10)?

If the Applicants’ 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).

In *Re: Disposal Specialists, Inc., #2W0161-1-EB*, Memorandum of Decision (Aug. 21, 1989) the Board denied an interlocutory appeal based on a District Commission’s request for additional information. The Board held that “[T]he question

presented is not a question of law. To decide whether the District Commission's decision is proper, the Board would have to engage in the factual determination of whether the items requested are relevant to the District Commission's review of the application." *Disposal* at 2.

The Applicants' interlocutory appeal raises identical factual issues. The Board is asked, as in *Disposal*, to determine whether the information which the Commission has requested relative to the density requirements of the Stratton Town Plan is relevant to its review of the Applicants' application. Further, in order to decide the appeal, the Board would have to make factual determinations concerning what provisions are included in the Town Plan with respect to density and when those provisions became effective.

Because the instant motion does not raise strictly legal questions, the Board therefore denies the Applicants' request for an interlocutory appeal. As a result, the Board need not consider the other two elements of the tripartite test.

To the extent the Board could strip the Applicants' interlocutory appeal of all its intertwined factual issues, the Board notes that the Commission has the authority to order the production of evidence with respect to a proposed project's compliance with Criterion 10. Pursuant to 10 V.S.A. §6027(a) the Board and District Commissions have the "power to compel the attendance of witnesses and to require the production of evidence." This authority is also included in EBR 20(A) which states that "[t]he board or district commission may require any applicant to submit relevant supplementary data for use in resolving issues raised in a proceeding, and in determining whether or not to issue a permit." Therefore, the District Commission has the authority to order production of the evidence it seeks in this matter.

III. Order

1. The Applicants' Motion for Interlocutory Appeal is denied.
2. Jurisdiction is returned to the District #2 Environmental Commission.

Dated at Montpelier, Vermont this 3rd day of January 2003.

ENVIRONMENTAL BOARD

/s/ Marcy Harding
Marcy Harding, Chair
John Drake
Bernie Henault
George Holland*
Samuel Lloyd
William Martinez
Alice Olenick
Jean Richardson
Donald Sargent

*Board member George Holland dissents from the decision.