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

RE: Marietta Palmer
Application #4C0561-5-EB

MEMORANDUM OF DECISION

This decision pertains to the timeliness of an appeal tiled by Merrie Lynn V. Palmer ("Palmer"), successor in interest to Marietta Palmer. For the reasons explained below, the Environmental Board dismisses the appeal.

I. BACKGROUND

On August 5, 1998, the District #4 Environmental Commission ("Commission") issued Re: Marietta Palmer, #4C0561-5, Memorandum of Decision and Order (Aug. 5, 1998) ("Commission Decision"). The Commission Decision denied a request by Daniel and Lynn Palmer to extend a construction completion date concerning a 1993 permit amendment which authorizes the construction of a 4,550 square foot building for a bank and convenience store/gas station, a gas pump island and parking, landscaping, and site improvements on Lot #1 of a previously approved eight lot commercial/light industrial/ residential development located on Route 7 at the intersection of Thompson's Point Road in Charlotte, Vermont ("Project").

On September 8, 1998, Palmer filed an appeal from the Commission Decision with the Board ("Appeal").

On September 18, 1998, the Chair of the Board issued Re: Marietta Palmer, Application #4C0561-5-EB, Chair's Proposed Dismissal Order (Sept. 18, 1998) ("Order"). The Order dismissed the Appeal as untimely filed.

On October 5, 1998, Palmer tiled a timely objection to the Order ("Objection").

On October 28 and November 24, 1998, the Board deliberated regarding the Objection.

II. DECISION

Environmental Board Rule ("EBR") 16(B) allows the Chair of the Board to make preliminary rulings without convening a prehearing conference. If any party objects to the ruling, then the ruling shall be reviewed and the matter resolved by the Board. Palmer timely filed its Objection to the Order. Accordingly, the Board must decide whether to dismiss the Appeal as untimely filed pursuant to 10 V.S.A. § 6089 and EBR 40.

The following facts are not in dispute. Palmer was not late in mailing the Appeal. Palmer sent the Appeal to the Board on September 3, 1998 via UPS Overnight Mail Service, For some unknown reason. UPS did not deliver the Appeal on September 4. 1998. Rather, UPS delivered the appeal on September 8. 1998. that is, the first business

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day after the three-day Labor Day holiday weekend. However, on September 3, 1998, Palmer also mailed a copy of her Appeal to the parties and the Commission. The Commission received its copy of the Appeal on September 4. 1998.

Since the Commission issued the Commission Decision on August 5, 1998, the appeal deadline was September 4, 1998. While the Commission received its copy of the Appeal on the 30th day of the 30-day appeal period, the Board did not receive the original Appeal until September 8, 1998. Therefore, Palmer tiled the Appeal with the Board after the 30-day deadline had expired.

Filing deadlines are jurisdictional and the Board has no discretion to waive a deadline established by statute. In re Town of Putney Interim Solid Waste Certification, No. 93-185, slip. op. (Vt. Sept. 22, 1993); Allen v. Vermont Employment Security Board, 133 Vt. 166 (1975). The Board has dismissed appeals where such appeals were filed after the 30-day deadline. See, e.g., Re: Havstack Group, #700002-10-EB, Memorandum of Decision (March 29, 1989); Re Club 107, #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 Board has also dismissed a petition for a declaratory ruling where the petition was tiled after the 30-day deadline. Re: Earth Construction Company, Declaratory Ruling Request #278 at 2 (March 16, 1993).

The Objection does not dispute that the 30-day deadline in 10 V.S.A. § 6089 and EBR 40 is a jurisdictional deadline. Palmer does not argue that the Board should waive or extend the deadline and accept the Appeal as having been timely filed with the Board. Rather, Palmer argues that she met the deadline by filing a copy of the Appeal with the Commission.

Under 10 V.S.A. $6089(a)(4), a "[n]otice of appeal shall be filed with the board within 30 days." A document is considered "filed" with the Board on the date it is received at the Board's office. EBR 12(A). Under EBR 40(A):

> An appeal shall be tiled with the board within 30 days after the date of the decision of the commission. The appeal shall consist of the original and 10 copies of the appeal and of the decision of the commission, and a statement of the reasons why the appellant believes the commission was in error, the issues to be addressed in the appeal, a summary of the evidence that will be presented, and a preliminary list of witnesses who will testify on behalf of the appellant. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the

> appeal, but is grounds only for such action as the Board deems appropriate, which may include dismissal of the appeal. A filing fee in the amount established in Rule 1 1 of these rules payable to the State of Vermont shall accompany the appeal.

10 V.S.A. § 6089 and EBR 40 do not require the Board to accept a copy of a notice of appeal filed with a district commission as a timely filed appeal. While nothing in 10 V.S.A. § 6089 or EBR 40 prohibits the Board from so allowing, the issue is not what ***isprohibifed*** by 10 V.S.A. § 6089 and EBR 40, but rather, what is ***required*** by 10 V.S.A. § 6089 and EBR 40.

The Objection relies on Vermont Supreme Court precedent that interprets specific statutory appeal provisions and the Vermont Rules of Appellate Procedure ("V.R.A.P."). The Board has reviewed a number of cases which it finds instructive with regard to the issue before it.

In Essex Storage Electric Company, Inc. v. Victory Lumber Co., 93 Vt. 437 (1919), the defendant, Victory Lumber Company, appealed to the Vermont Supreme Court from an order of the Public Service Commission (the predecessor to the Public Service Board). The statute required that the notice of appeal be filed with the Public Service Commission on or before twenty days from the date of the order being appealed from. On the twentieth day, Victory Lumber filed its notice of appeal with the clerk of the Essex County Court. On day twenty-one, Victory Lumber filed its notice of appeal with the clerk of the Public Service Commission. The Vermont Supreme Court dismissed Victory Lumber's appeal since the requirement of filing with the Public Service Commission was statutory and neither the Public Service Commission nor the Court had any authority to extend the time or ***modify the requirements.*** Id. ***433.*** (Emphasis added.) The notice of appeal erroneously filed with the Essex County Court could not function as the legal equivalent of a timely appeal filed with the Public Service Commission.

In State v. Brown, 121 Vt. 459 (1960), the defendant, Mr. Brown, appealed from a criminal conviction to the Vermont Supreme Court. The statute required that the notice of appeal be filed within 30 days with two different court clerks: the clerk of the court being appealed from and the clerk of the court being appealed to. In an unusual set of circumstances, one person served as the clerk of both courts. Mr. Brown's attorney filed the appeal with yet another court clerk, albeit within the thirty day deadline. The attorney had also, prior to the expiration of the thirty day deadline, corresponded with the correct clerk and stated an intention to appeal from the lower court's decision. One day after the expiration of the thirty day deadline, Mr. Brown's attorney filed the appeal with the correct court clerk. Nevertheless, the Vermont Supreme Court dismissed the appeal.

> The design of the appeal procedure set up by the statute is clear. [Mr. Brown] is required to show where he is going and where he came from. In keeping with this end, a notice of appeal must be given both to the court appealed to and to the court or tribunal appealed from.

Id. 464.

The erroneously filed notice of appeal could not function as the legal equivalent of a timely appeal filed with the appropriate court clerks, nor could the correspondence which stated an intention to appeal but which itself was not a notice of appeal.

In Badger v. Rice, 124 Vt. 82 (1963), Mr. Badger appealed from a zoning administrator's issuance of a permit to the zoning board of adjustment. The statute required that the appeal be taken "by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof." Mr. Badger timely filed his notice of appeal with the zoning administrator who, in turn, gave it to the zoning board of adjustment prior to the expiration of the time for appeal. The Supreme Court denied a motion to dismiss the appeal.

> What was done in the present case is not at variance with the jurisdictional precept of the Brown decision. [Mr. Badger] notified the administrative agencies concerned of "where he is going and where he came from." And this was accomplished before the building permit had become final and within the time prescribed for obtaining review.

Id. 85.

Mr. Badger's appeal was not dismissed, even though he only filed a single document with the zoning administrator, because that document was received by the zoning board within the applicable time period.

In Harvey v. Town of Waitsfield, 137 Vt. 80 (1979), Mr. and Mrs. Harvey applied for a zoning permit for a business. The zoning administrator denied the application. Mr. and Mrs. Harvey properly brought the issue before the board of adjustment. The board of adjustment denied the application. Substantially after the expiration of the thirty day appeal period, Mr. and Mrs. Harvey initiated an action in superior court. The superior court dismissed the action due to Mr. and Mrs. Harvey's failure to timely appeal to superior court from the decision by the board of adjustment.

In affirming the superior court's decision, the Vermont Supreme Court ruled that the statute required the notice of appeal to be "filed with the clerk or other appropriate

officer of the agency in the manner, and within the time. required by V.R.A.P. 3 and V.R.A.P. 4." Id. 82. At the time of the Harvey case, V.R.A.P. 4 provided, in part, as follows:

> In any civil or criminal case in which an appeal is permitted by law as of right, the notice of appeal required by [V.R.A.P. 3] shall be filed with the clerk of the superior or district court within 30 days of the date of the entry of the judgment or order appealed from.

Accordingly, since Mr. and Mrs. Harvey failed to file the required V.R.A.P. 4 notice of appeal, the Court ruled "many times [we have] held that failure to tile the notice of appeal within the prescribed time period deprives the tribunal appealed to of jurisdiction over the appeal, [and] it goes without saying that an entire failure to file a notice of appeal must also foreclose such review." Id. 82. (Citation omitted.)

In 1985, six years after the Harvey decision, V.R.A.P. 4 was amended to provide, in part:

> In any civil or criminal case in which an appeal is permitted by law as of right, the notice of appeal required by [V.R.A.P. 3] shall be filed with the clerk of the superior *or* district court within 30 days of the date of the entry of the judgment or order appealed from. *If a notice of appeal is mistakenly filed in the Supreme Court, the clerk of the Supreme Court shall note thereon the date on which it was received and transmit it to the clerk of the superior or district court, and it shall be deemed filed in the superior or district court on the date so noted.*

The 1985 Amendment Reporter's Notes explain that the amendment "responds to the common error of a notice of appeal filed in the Supreme Court rather than in the trial court." Currently, V.R.A.P. 4 operates such that if a notice of appeal is mistakenly filed in the Supreme Court, it is the legal equivalent of having properly tiled the notice of appeal with the clerk of the court being appealed from provided the appeal is filed within the 30 day appeal period.

In City Bank & Trust v, Lvndonville Savings Bank and Trust Co any, 157 Vt. 666 (1991), City Bank *mailed* a notice of appeal on the 30th day of the thirty day appeal period, The Vermont Supreme Court dismissed the appeal as untimely tiled. V.R.A.P. 4 requires that an appeal shall bejiled on or before the 30th day. The Court ruled:

> Timely filing means tiling at the designated place within the designated time," and "to deposit in the custody or among the records of a court."

Id. (Citations omitted).

In response, City Bank argued that, under other procedural rules, three extra days are added where a party mails a document and, accordingly, the Court should read into V.R.A.P. 4 the same three extra days. While the Court acknowledged that other rules allow for an extra three days under certain instances, "they do not apply to the filing of a notice of appeal." Id. Accordingly, the Court dismissed City Bank's appeal as having been untimely filed.

In Mohr v. Village of Manchester, 16 1 Vt. 562 (1993), the Manchester Village Planning Commission approved a commercial structure proposed by Mr. and Mrs. Mohr. Mr. and Mrs. Mohr were not satisfied with the terms of the approval and, therefore, they appealed the permit to the superior court. Mr. and Mrs. Mohr filed their notice of appeal with the superior court before the expiration of the 30 day appeal period. However, under V.R.A.P. 4, they were suppose to file their notice of appeal with the Manchester Village Planning Commission, not the superior court. The Court did not dismiss their appeal. Rather, the Court ruled that this was the same kind of "common error" that was the basis for the 1985 amendment to V.R.A.P. 4. Therefore, the Court concluded:

> Harvey is overruled to the extent that it conflicts with the amended V.R.A.P. 4. The notice of appeal filed by [Mr. and Mrs. Mohrs] in the superior court is deemed tiled with the Planning Commission *on the* date on which it was received in the superior court.

Id. 563.

Although Mr. and Mrs. Mohr timely filed their appeal in the wrong court, it was not dismissed because V.R.A.P. 4 expressly provides that this mistake does not result in a defective appeal.

If V.R.A.P. 4 had controlled back when Essex and Brown were decided, the appeals would not have been dismissed. Both cases involved appeals that were timely filed. but in the wrong court. Presumably, the clerk of the erroneous court would have date stamped the appeal and forwarded it to the correct court. However, because V.R.A.P. 4 did not yet exist, the Vermont Supreme Court dismissed the appeals. While understanding of the mistakes made, the Court gave effect to the law as written.

In Badger, the appeal was not dismissed because the zoning administrator timely forwarded the appeal to the board of adjustment. However, if the zoning administrator had not done so, then the Brown decision would have controlled the outcome and the appeal would have been dismissed.

In Harvey, V.R.A.P. 4 as amended in 198.5 would have been no help to Mr. and Mrs. Harvey. Because Mr. and Mrs. Harvey failed to file any notice of appeal, their law suit was dismissed since it could not substitute for a timely filed notice of appeal.

In City Bank, the Court reaffirmed the longstanding principle that an appeal filed after the 30 day deadline must be dismissed. Moreover, the Court refused to read into V.R.A.P. 4 the three extra days allowed for filing other court documents. This makes clear that the 1985 amendment to V.R.A.P. 4 was done solely to address the common mistake of a timely filing in the wrong court. It also illustrates how the Court will not amend V.R.A.P. 4 by decision; rather, if there is to be an exception to what V.R.A.P. 4 requires, then V.R.A.P. 4 must be amended pursuant to the statutorily authorized amendment process.

In the Mohr case, the Vermont Supreme Court gives effect to the 1985 V.R.A.P. 4 amendment. Mr. and Mrs. Mohr's only mistake was that they filed their appeal in the wrong place. Their appeal was filed in the court being appealed to instead of the court being appealed from. The facts in Mohr are no different than the facts in Essex and Brown. While in the past Mr. and Mrs. Mohr's mistake would have been fatal, under the 1985 amendment to V.R.A.P. 4, it is nothing more than a common mistake the remedy for which is itself spelled out in V.R.A.P. 4.

Palmer does not contend that 10 V.S.A. § 6089 or EBR 40 incorporate V.R.A.P. 4's provision that a timely appeal tiled in the wrong location is a valid appeal. Rather, Palm& would have the Board read into 10 V.S.A. § 6089 and EBR 40 such a provision by our decision in this case. This would be tantamount to amending 10 V.S.A. § 6089 and EBR 40 without going through the legislative and rulemaking processes.

The Vermont Supreme Court defers to the Board's interpretations of Act 250 and the Board's rules, and to the Board's specialized knowledge in the environmental field. In re Wal*Mart Stores, Inc., Vt. __, 702 A.2d 397,400 (1997), citing to Secretary v. Earth Construction, Inc., 165 Vt. 160, 163 (1996). Absent compelling indications of error, on appeal the Vermont Supreme Court will sustain the Board's own interpretation of Act 250 and the Board's rules. Wal*Mart, 702 A.2d at 400 citing to In Re Chittenden Recycling Servs., 162 Vt. 84, 90 (1994). When the Board interprets Act 250 and its rules. the Board is bound by the normal set of rules which apply to statutory and regulatory construction.

When the meaning of a statute (or rule) is plain on its face, the statute is given its plain meaning and enforced according to its plain terms. E.g., Braun v. Board of Dental Examiners, No. 96- 105, slip op. at 5 (Vt. Sept. 5, 1997); Russell v. Armitage, 166 Vt. 392,403 (1997); Re: Vermont Egg Farms, Inc., Declaratory Ruling #317 at 8 (June 14, 1996). It is assumed that the plain meaning of the words reflects the legislative intent. Braun, supra at 5. "If the meaning of a statute is plain on its face, [the Board has] *no* need for construction, but rather must enforce it according to its terms." Russell, 166 Vt. at 403.

Under 10 V.S.A. § 6089 and EBR 40, an appeal must be timely filed with the Board. The Board has no discretionary latitude for hardship cases. See Brown, 12 1 Vt. at 464. Because the 30-day deadline is established by statute with no provision for extensions, neither the Board Chair nor the Board has the discretion to extend the deadline for the filing of an appeal. Palmer filed the Appeal with the Board after the expiration of the 30-day appeal period. Accordingly, the Appeal must be dismissed.

III. ORDER

1. The Appeal is dismissed.

2. Jurisdiction is returned to the District #4 Environmental Commission.

Dated at Montpelier, Vermont, this 24th day of November, 1998

ENVIRONMENTAL BOARD

/ Marcy Harding

Marcy Hardin, Chair
John T. Ewing
Arthur Gibb
Samuel Lloyd
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