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

RE: William and Maryjean Kalanges (Interlocutory Appeal) Land Use Permit #4C0593-6-EB

MEMORANDUM OF DECISION

This proceeding concerns an interlocutory appeal of a Prehearing Conference Report and Order and Memorandum of Decision (Decision) issued by the District #4 Environmental Commission (Commission) on June 12, 2003. For the reasons below, the Environmental Board (Board) denies the appeal.

I. Procedural History

On July 12, 2003, Denise Noble, Chris Wasser, Gail Connors, Melinda Cobb, Douglas Cobb, Martha Trendle, Ken Mitchell, Suzanne Braunegg, Deana Dahlgren, and Sean Jordan (Appellants) filed an appeal of the Commission's Prehearing Decision concerning Land Use Permit Application #4C0593-6 (Dash 6 Application).

On July 24, 2003, William and Maryjean Kalanges (Applicants) filed a response to the notice of appeal.

On August 6, 2003, the Appellants filed a reply to the Applicants' response.

On August 27, 2003, the Board deliberated on the Appellants' interlocutory appeal.

II. Discussion

The Appellants filed an appeal with the Board challenging the Commission's application of the Stowe Club Highlands test pursuant to Environmental Board Rule (EBR) 34(E). Although the Appellants did not label their appeal as an interlocutory appeal, the appeal concerned a preliminary ruling of the Commission.

The Appellants argue that the appeal is not interlocutory in nature because although there is no final ruling on the Dash 6 Application, the appeal involves a final decision of the Commission on an issue. The Appellants assert that allowing the Commission to review the merits of the application would not provide an adequate remedy and would waste quasi-judicial resources. In *Re: Central Vermont Public Service Corp*., 142 Vt. 138, 140 (1982). The Appellants also rely upon In *Re: Taft Corners* 160 Vt. 583 (1993) where the Supreme Court heard an interlocutory appeal that was not timely filed because it treated the interlocutory appeal as an appeal of a final decision. *Id*. at 589.

A. Appellants' Appeal Is An Interlocutory Appeal

In their reply memoranda, Appellants readily admit that their appeal does not meet the standards set forth in EBR 43 for interlocutory appeals. Not surprisingly, Appellants argue that the Board should not consider their appeal as an interlocutory appeal. However, when an appeal concerns a preliminary decision rather than a final decision, it is an interlocutory appeal governed by EBR 43. *Burlington Broadcasters*, *Inc*., #4C10004-EB Chair's Preliminary Ruling (April 23, 1997). Appellants' appeal involves a non-dispositive preliminary ruling by the Commission on the applicability of the *Stowe Club Highlands* test, not the Commission's final ruling on the application for an Act 250 Permit. Therefore, Appellants' appeal is an interlocutory appeal.

Moreover, the cases Appellants cite are not applicable. First, *Central Vermont Public Service Corp*., concerns 3 V.S.A. 815(a) which applies to appeals of administrative rulings to the Supreme Court, not the Board. Second, even if the Board was bound by 3 V.S.A. 815(a), it requires exhaustion of available administrative remedies which the Appellants have not done. Third, while 3 V.S.A. 815(a) authorizes limited appeals of preliminary agency action, such interlocutory appeals are only allowable "if review of the final decision would not provide an adequate remedy..." *Id*. In the instant case, the Appellants could wait, without suffering any prejudice, until the Commission's final decision and at that time determine whether they want to appeal any part or all of the Commission's final decision to the Board.

In *Taft Corners*, the Supreme Court stated that "it must at least be shown that appeal of the ultimate order will not provide an adequate remedy or that the nature of the claimed defect in the order is such that the harm is greatly aggravated by delay". *Id*. at 589. In *Taft Corners*, the Supreme Court held that the delay and expense caused to the applicant by the Board's ruling justified the Court's consideration of the interlocutory appeal.

In the instant case, the Appellants are not harmed by any delay since the Appellants are opposed to the Project and the Project can not be built until the Commission issues a permit. In addition, the Applicants argue that the Board should not consider the appeal and do not claim any harm due to delay. Neither party argued that the Board's refusal to hear the appeal would cause extra expense.

In sum, Appellants' appeal is interlocutory in nature and is governed by EBR 43. Section 815(a) of Title 3 is inapplicable on its face and even if it was applicable, the Appellants have not met its requirements.

B. Timeliness of Appellants' Interlocutory Appeal

In the instant case, Appellants' interlocutory appeal concerns the

Commission's Decision issued on June 12, 2003. The Appellants did not file their appeal until July 12, 2003. Pursuant to EBR 43(D):

"Any motion for interlocutory appeal under this rule must be made to the board within 10 days after entry of the order or ruling appealed from and shall include a copy of that order or ruling." Therefore, Appellants' interlocutory appeal was not timely filed.

Filing deadlines established by statute are jurisdictional and the Board has no discretion to waive such deadlines. *Central Vermont Public Service Corporation* Declaratory Ruling #401, Findings of Fact, Conclusions of Law, and Order at 11 (Apr, 2, 2002), *Okemo Mountain Inc*. #2S0351-32-EB Memorandum of Decision and Dismissal Order (May 18, 2001). However, the deadline for filing an interlocutory appeal is only found in the Board's rules. Since the deadline is not statutory, an untimely filed appeal is not a jurisdictional defect that requires automatic dismissal. See *Flyes v. Schmidt* 141 Vt. 419, 422 (1982).

A party seeking to expand a non-jurisdictional deadline bears the burden of demonstrating mistake, failure of notice, excusable neglect, or similar ground for extension. *Stanmar, Inc*. #5L0558-EB, Findings of Fact, Conclusions of Law, and Order at 4 (Dec. 12, 1979). Appellants have not provided any justification for filing their interlocutory appeal outside the 10 day deadline apart from their argument that the appeal is not an interlocutory appeal. Therefore, the Board will not consider Appellants' interlocutory appeal.

Even if the Board waived the ten day time period for filing an interlocutory appeal, the Board would not hear Appellants' interlocutory appeal because it does not meet the requirements set forth in EBR 43.

C. Analysis Pursuant to EBR 43 for Interlocutory Appeals

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.
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> 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).

1. 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.

a. 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).

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: Agency of Transportation/Circumferential Highway* #4C0718-EB Memorandum of Decision (Jul. 22, 1988), the Board denied an appellant's motion for an interlocutory appeal because it would have required the Board to make factual determinations about secondary impacts of the highway. *Id*. at 2. The Board held that "since the outcome would depend upon factual determinations, the issues are not questions of law and therefore are not appropriate for interlocutory appeal." *Id*.

In the instant case, the Appellants interlocutory appeal raises factual issues that would determine the outcome of the issue. The nature of a *Stowe Club Highlands* analysis requires factual determinations as well as legal conclusions. For example, pursuant to EBR 34(E), the Board must determine first whether the permit conditions were included to resolve issues critical to the issuance of the prior permit, then if so, balance factors weighing in favor of flexibility versus those weighing in favor of finality. Such an analysis is factual in nature and inappropriate for interlocutory appeal.

Therefore, even if the Board waived the 10 day deadline, the interlocutory appeal does not raise strictly legal questions and is inappropriate for review by the Board at this stage. As a result, the Board need not consider the other two elements of the tripartite test.

In addition, because the Board will not hear the Appellants' interlocutory appeal, the Board does not need to consider Appellants' request for a stay.

III. Order

1. The Appellants' Motion for Interlocutory Appeal is denied.

2. The Appellants' request for a stay is moot.

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

Dated at Montpelier, Vermont this 28th day of August, 2003.

ENVIRONMENTAL BOARD

_/s/Patricia Moulton Powden_____
Pat Moulton Powden
George Holland*
Sam Lloyd
Alice Olenick
Richard C. Pembroke Sr.
Jean Richardson
Christopher Roy

Board member George Holland concurs with the decision and adds the following.

I concur with the Board that the appeal is an interlocutory appeal that was not timely filed. In addition, the appeal raises factual issues and is therefore, not appropriate for interlocutory review. However, I am concerned that the Commission made factual determinations in its Stowe Club Highlands analysis without the benefit of an evidentiary hearing and I write this concurring opinion to highlight those concerns.