

*Clayton*

VERMONT ENVIRONMENTAL BOARD  
10 V.S.A. Chapter 151

**RE:** Leo A. and Theresa A. Gauthier  
and Robert Miller by  
**Phillip C. Linton, Esq.**  
P.O. Box 906  
Burlington, VT 05402

Memorandum of  
Decision and  
Order,  
**#4C0842-EB**

This decision pertains to a Motion for Limitation of Scope of Appeal and Partial Remand filed by the Applicants on October 1, 1990. On October 31, 1990, the Agency of Natural Resources filed an opposition to the motion. On November 7, 1990, the Applicants and the Agency filed a stipulation for a preliminary order. The Board deliberated on November 29 and determined to deny the motion.

BACKGROUND

The appeal involves an umbrella permit issued by the District #4 Environmental Commission for an industrial park located on Kellogg Road in the Town of Essex. The appeal concerns the proposed project's compliance with Criteria 8 (rare and irreplaceable natural areas) and 8(A) (necessary wildlife habitat).

The Applicants seek to file permit amendment applications with the District Commission to be processed concurrently with this appeal. They have requested that the Board remand jurisdiction to the District Commission over some of the lots at the industrial park. They have obtained a stipulation with the Agency that only some of the lots at the park contain rare or threatened plant species. Based on this stipulation, they are asking the Board to allow the District Commission to process permit amendment requests with respect to those lots which the parties have stipulated do not contain rare or threatened plant species.

DECISION

When an appeal from a lower tribunal is taken, jurisdiction is transferred to the appellate body, and in the absence of remand, the lower tribunal is divested of jurisdiction as to all matters within the scope of the appeal. Kotz v. Kotz, 134 Vt. 35, 38 (1975).

Rule 18(D) provides that the Board may consider the dismissal, in whole or part, of any matter before the Board. This authority is discretionary.

This appeal involves the compliance of a proposed project with Criteria 8 and 8(A). The specific permit under appeal is an umbrella permit for an industrial park. An analysis of the stipulated facts reveals that the alleged

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rare and threatened species exist on lots which are spread throughout the **project** site. The lots on which the species are found are adjacent to the lots concerning which remand is sought.

Under these circumstances, it would not be appropriate for the Board to limit the scope of appeal or to remand jurisdiction over some lots at the park to the District Commission. The Board has no information on the nature of the projects which would be the subject of permit amendment requests except that they are likely to be industrial. It is entirely possible that an industrial enterprise on one lot could have effects on natural conditions at an adjacent lot.

The Board also believes that, without a final decision on appeal, the District Commission cannot properly evaluate amendment applications under Criteria 8 and 8(A). The Board could deny or revise the umbrella permit. If the District Commission has already issued a permit amendment, inconsistencies could result, such as a denied umbrella permit and an approved amendment to that permit, or a revised umbrella permit issued by the Board which conflicts with a permit amendment issued by the District Commission.

Further, economy of public resources favors denying the motion. The Applicants' request involves two Act 250 tribunals reviewing the same project at the same time. Because both the Board and the District Commission have limited resources, other applicants would be delayed. Moreover, since the District Commission decision on an amendment application will be appealable to the Board, the Board could be faced with the concurrent processing of two appeals regarding the same project.

Finally, limiting the scope of appeal in this matter would diminish the Board's ability to conduct an independent evaluation of the compliance of the project with Criteria 8 and 8(A). The Board may wish to question witnesses concerning the alleged facts contained in the stipulation and the analysis of the site which led to the presentation of those facts.

Accordingly, the Applicants' motion is denied. Due to the Board's heavy caseload, the date of the hearing is changed from that set out in the prehearing conference

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report dated October 30, 1990. The dates for filing testimony, lists of witnesses and exhibits, and objections are also changed. The new dates are included in the attached order.

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ORDER

1. The Applicants' motion for limitation of scope of appeal and partial remand is denied.

2. On or before January 16, 1991, parties shall file final lists of witnesses and exhibits and prefiled testimony for all witnesses they intend to present.


3. On or before January 30, 1991, parties shall file final lists of rebuttal witnesses and exhibits and prefiled rebuttal testimony.

4. On or before February 6, 1991, parties shall file in writing all objections to the admission of the prefiled testimony and exhibits previously identified, or such objections shall be deemed waived.

5. An administrative hearing panel of the Board will convene a hearing in this matter on February 12, 1991, to be confirmed by subsequent notice with location.

Dated at Montpelier, Vermont this 10th day of December, 1990.

ENVIRONMENTAL BOARD

  
Stephen Reynes, Chairman  
Ferdinand Bonqartz  
Rebecca J. Day  
Arthur Gibb  
Samuel Lloyd  
Charles F. Storrow  
Steve E. Wright

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