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

Re: Mt. Mansfield Co., Inc. d/b/a/ Stowe Mountain Resort
Application #5L1125- 10 and 1 OR-EB (Base Lodge)

MEMORANDUM OF DECISION

This Memorandum of Decision pertains to a Motion to Alter filed by RIPPLE in response to Re: Mt. Mansfield Co., Inc. d/b/a Stowe Mountain Resort, #5L1125 and 10R-EB (Base Lodge), Memorandum of Decision and Order (Dec. 18, 1996). As explained below, the. Board grants the motion.

I. BACKGROUND

On November 5, 1993, the Mt. Mansfield Company, Inc., d\b\a Stowe Mountain Resort ("Appellant") and the State of Vermont filed with the District #5 Environmental Commission land use permit amendment application #5L 1125-l 0 for Phase II of the 'Appellant's current master plan ("Application").

On July 7, 1994, the Commission determined that findings of fact and conclusions of law under Criteria 1 (A) (headwaters) and 1 (B) (waste disposal) would be held in abeyance until the Appellant obtained certain permit approvals from other State of Vermont agencies.

On July 12, 1994, the Commission issued Re: Mt. Mansfield Company. Inc.. d/b/a Stowe Mountain Resort, #5L 1125-10, Partial Findings of Fact and Conclusions of Law #5L1125- 10 (July 12, 1994) ("Partial Findings"). The Appellant moved to alter the Partial Findings and requested the opportunity to submit additional evidence.

On June 8, 1995, the Commission issued Re: Mt. Mansfield Company, Inc.. d/b/a Stowe Mountain Resort, #5L1125-10, Partial Findings of Fact and Conclusions of Law #5L1125-10 (Revised) (June 8, 1995) ("Revised Partial Findings").

On July 10, 1995, the Appellant filed an appeal with the Board from the Revised Partial Findings.

On December 28, 1995, the Board issued Re: Mt. Mansfield Co.. Inc. d/b/a. Stowe Mountain Resort, #5L1125- 10 and 1 OR-EB, Findings of Fact, Conclusions of Law, and Order (Dec. 28, 1996) ("Decision")..

On January 29, 1996, the Appellant filed a Motion to Alter and for Clarification in response to the Decision.

On February 21, 1996, RIPPLE became a party to the Application.

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On March 27, 1996, the Board issued Re: Mt. Mansfield Co.. Inc. d/b/a Stowe Mountain Resort, #5L1125-10 and 10R-EB, Findings of Fact, Conclusions of Law, and Order (Altered) (Mar. 27, 1996) ("Altered Decision").

On June 28, 1996, the Commission issued Re: Mt. Mansfield Company, Inc., d/b/a Stowe Mountain Resort, #5L1125-10, Memorandum of Decision and Order (June 28, 1996).

On June 28, 1996, the Appellant filed with the Commission its first Request to Amend with respect to the expiration date of certain findings of fact made in the Altered Decision ("First Request").

On July 2, 1996, the Appellant filed the First Request with the Board,

On July 17 and 23, 1996, memoranda were issued to the parties regarding the filing of written responses to the First Request and the convening of oral argument.

On July 31, 1996, the Board convened an oral argument concerning the First Request.

On September 25, 1996, the Board issued Re: Mt. Mansfield Co.. Inc. d/b/a Stowe Mountain Resort, #5L 1125 and 1 OR-EB (Base Lodge), Memorandum of Decision and Order (Sept. 25, 1996) ("First Extension Order").

On December 4, 1996, the Appellant filed its second Request to Amend ("Second Request") with the Board with respect to the expiration date of certain findings of fact made in the Altered Decision and extended by the First Extension Order.

On December 5, 1996, a memorandum was issued to parties regarding the filing of written responses to the Second Request and the convening of oral argument_

On December 18, 1996, the Board issued Re: Mt. Mansfield Co.. Inc. d/b/a Stowe Mountain Resort, #5L1125 and 1 OR-EB (Base Lodge), Memorandum of Decision and Order (Sept. 25, 1996). ("Second Extension Order").

On January 17, 1997, RIPPLE filed **a** Motion to Alter with respect to the Second Extension Order ("RIPPLE's Motion").

On March 19 and April 7, 1997, memoranda to parties were issued regarding the filing of memoranda of law by the parties and the convening of oral argument.

On May 28, 1997, the Board convened an oral argument regarding RIPPLE's Motion. On May 28 and July 23, 1997, the Board deliberated regarding RIPPLE's Motion.

II. DECISION

A.. RIPPLE'S right to receive copies of documents filed with and issued by the Board

On February 21, 1996, RIPPLE became a party to the Application based upon its appearance at a hearing convened by the Commission with regard to the Application. On February 23, 1996, the Commission's coordinator issued a memorandum to the Appellant and all other parties which stated, in part:

> The District Commission granted RIPPLE provisional party status for purposes of the February 2 1 st hearing. The Commission indicated it would revisit the party status determination at the close of its proceedings in accordance with 10 V.S.A. [§] 6085(c)(2) and Board Rule 14(F).. In the interim, RIPPLE may file positions consistent with. rulings made at the hearing and in this recess memorandum.

The memorandum was sent to the parties to the Application, including RIPPLE. Thereafter, on June 28, 1996, the Commission issued Re: Mt. Mansfield Company. Inc., d/b/a Stowe- Mountain Resort, #5L1125-10, Memorandum of Decision and Order (June 28, 1996) wherein it stated, in part, that on March 11, 1996, RIPPLE filed a memorandum regarding preliminary issues arising out of the February 21, 1996 hearing, including RIPPLE's party status. The Commission mailed RIPPLE a copy of its June 28, 1996 Memorandum of Decision and Order.

Environmental Board Rule ("EBR") 12(J) requires, in part, that every document filed by any party subsequent to the initial document filed in a case shall be served upon the attorneys or other representatives of record for all other parties and upon all parties who **have** appeared for themselves..

In 1985 the Legislature ratified the Board's rules, including then EBR. 12(D) which is now codified at EBR 12(J),. such that the Board's rules have "effectively become part of the. Act 250 legislative scheme codified at chapter 15 1 of Title 10." In re Barlow, 160 Vt.. 513, 521 (1993); In re Spencer, 152 Vt.. 330, 336 (1989).

EBR 12(J) uses the word "parties" and does not distinguish between parties for the purposes of specific criteria or any other reason. The reason for this is that only a party can determine whether its interest may be affected by the information disclosed during the hearing process or an amendment application. Without the receipt of such information in the first instance, a party has no way 'of determining whether its interests may be affected under the Act 250 criteria, and whether such affected interest warrants a request for party status.'

The Board is under a similar obligation as are parties to provide copies of all documents to all parties. Under EBR 14(D), the Board must enter on its certificate of service the name of any representative who has appeared for a party or who has countersigned a party's pleadings.' The Board is then obligated to send a copy of all documents it issues to all parties. By complying with EBR 14(D), all parties are aware of what actions the Board is taking, and parties can then respond according to their own determination of their own interests. The Board's obligation to provide copies to all parties is absolute and does not depend upon the criteria for which a party has received party status.

Since RIPPLE became a party to the Application as of February 21, 1996, it should have. received a copy of the Appellant's First Request and Second Request_ Moreover, RIPPLE should have been mailed a copy of the Board memoranda issued on July 17 and 23, and.December 5, 1996, with regard to written responses and oral argument relative to the First and Second Requests. Under EBR 14(D), it was improper for the Board to have failed to add RIPPLE to the Board's certificate of service. See In re Conway, 152 Vt.. 526, 529 (1989) (Administrative agencies must follow their own rules and procedures).[3]

The Board concludes that RIPPLE should have received copies of all documents

'Requests for party status are normally made prior to or at the first hearing or prehearing conference; However, under EBR 14(B)(3)(c), even after a hearing has commenced, a person may petition for party status subject to the finding that the petitioner has demonstrated good cause for failure to appear on time, and that its late appearance will not unfairly delay the proceedings or place an unfair burden on the applicant or other parties.

[2]EBR 14(D) was ratified by the Legislature in 1985.

[3]RIPPLE was added to the Board's certificate of service as of January 15, 1997.

filed by any party with, and issued by, the Board as of February 21, 1996 pursuant to EBR 12(J) and 14(D). Since RIPPLE did not receive such copies, it has been improperly denied the opportunity to respond to the First and Second Requests. Accordingly, the First and Second Extension Orders are void.

B. Jurisdiction over the First and Second Requests

RIPPLE raises a second issue with regard to the First and Second Requests. RIPPLE contends that the Board lacks jurisdiction over the First and Second Requests. After a careful review of the applicable Board rules as well as the very language contained in the Altered Decision, the Board agrees that it was and is without jurisdiction over the First and Second Requests.

The Altered Decision states at paragraph 1 of Section V, Order, that "[j]urisdiction over this matter will be referred back to the District Commission for further proceedings in accordance with 10 V.S.A. $6086(b) and EBR 21 ." EBR 34(A) provides; in part, that "[c]ontinuing jurisdiction over all development and subdivision permits is vested in the district commissions unless the board, in acting on an appeal, has specifically reserved the right to maintain jurisdiction over a development or subdivision in part or in its entirety."[4] Pursuant to the Altered Decision and EBR 34(A), the Board was without jurisdiction over the First and Second Requests_ Rather, jurisdiction was and is with the Commission. C.f. Kotz v. Kotz, 134 Vt. 36, 38 (1975)(properly filed notice of appeal with Supreme Court divests trial court of all jurisdiction absent any remand order). It was improper for the Board to have issued the First and Second Extension Orders. Accordingly, the First and Second Extension Orders are void.

C. Summary

The First and Second Extension Orders are void due. to the independent procedural errors of lack of notice to RIPPLE and lack of jurisdiction by the Board, The Board has not voided the orders due to any consideration of the merits of the First and Second Requests. Rather, it is strictly these two independent procedural errors which render the First and Second Extension Orders void.

The-Board notes that on June 28, 1996,. the Appellant properly filed the First Request with the Commission_ Because of the Board's subsequent issuance- of the First and Second Extension Orders, the Commission reasonably never acted on the First

[4]EBR 34(A) was ratified by the Legislature in 1985.

Request. Nevertheless, based on the Board's conclusion that it lacks jurisdiction, the First Request is still validly pending before the Commission. The Commission must now rule on the First Extension Request as filed on June 28, 1996.

III_ ORDER

1. RIPPLE's Motion to Alter is granted.

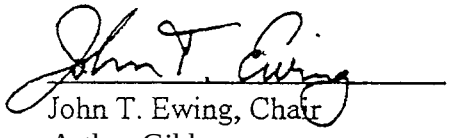
2. RIPPLE shall be listed on the Board's certificate of service as a party.

3. The First and Second Extension Orders are void for two independent reasons: (a) RIPPLE did not receive copies of documents filed with or issued by the Board as of February 2 1, 1996; and (b) the Board was and is without jurisdiction over the First and Second Requests pursuant to its own remand order in the Altered Decision and EBR 34(A).

4. Jurisdiction over the First Request was and is with the Commission and the Commission must now rule on the First Request.

Dated at Montpelier, Vermont, this 29th day of July, 1997.

ENVIRONMENTAL BOARD



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