

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

RE: H.A. Manosh, Inc. and
Vermont RSA Limited Partnership d/b/a Bell Atlantic Mobile
Land Use Permit Application #5L 133 1 -EB (Interlocutory)

District #7

MEMORANDUM OF DECISION

This proceeding concerns a proposal to construct and operate a **160'** telecommunications tower, two equipment buildings, and related improvements on a site known as Carpenter Hill, which is located to the south of the intersection of Cleveland Corners Road with Davis Hill Road in the Town of Hyde Park, Vermont ("Project").

I. PROCEDURAL SUMMARY

On April 27, 1999, H.A. Manosh, Inc. and Vermont RSA Limited Partnership d/b/a Bell Atlantic Mobile filed a land use permit application ("Application") for the Project with the District #5 Environmental Commission ("District Commission") pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250").

On May 27, 1999, the Garfield/Hyde Park Neighbors Alliance ("GHNA") filed a motion requesting the District Commission to dismiss or deny the Application. On June 7, 1999, Applicants filed a reply to the motion.

On June 11, 1999, the District Commission issued Pre-Hearing Conference Rulings and Order ("June 11 Order") which, among other things; denied GHNA's May 27 motion, scheduled hearings on the Application for July 1 and 8, 1999, and granted GHNA party status in the District Commission proceeding.

On June 18, 1999, GHNA filed a Motion for Interlocutory Appeal and Dismissal of Application #5L 133 1 ("Motion for Interlocutory Appeal") with the Vermont Environmental Board pursuant to Environmental Board Rule ("EBR") 43.

On June 21, 1999, GHNA filed a Motion to Stay pursuant to EBR 43(E).

On June 23, 1999, H.A. Manosh, Inc. filed its (i) Opposition to the Motion for Interlocutory Appeal and (ii) Opposition to Motion for Stay.

On June 28, 1999, Board Chair Marcy Harding issued a Chair's Order Denying Motion for Stay, which is incorporated herein by reference and which the Board specifically affirms in the within Order.

RE: H.A. Manosh, Inc. and
Vermont RSA Limited Partnership d/b/a Bell Atlantic Mobile
Land Use Permit Application #5L 133 1 -EB (Interlocutory)
Memorandum of Decision
Page 2

On June 30, 1999, the Board deliberated concerning the Motion for Interlocutory Appeal and the response of H.A. Manosh, Inc.

II. MOTION FOR INTERLOCUTORY APPEAL

By order issued February 3, 1999, the Board revoked a permit then held by H.A. Manosh, Inc. in connection with the Project for, among other things, violating Board notice provisions and submitting, with gross negligence, inaccurate, erroneous, and materially incomplete information concerning the location of the Project. Re: H.A. Manosh, Inc., #5L 1290-EI (Revocation), Findings of Fact, Conclusions of Law, and Order (Feb. 3, 1999) [EB # OS]. The Board denied H.A. Manosh, Inc. the opportunity to cure the violations, by publishing and posting an accurate and complete notice of the Project application, because of the severity and number of previous violations by H.A. Manosh, Inc. Id. at 30-31. In footnote 4 of the revocation decision, the Board stated:

Nothing in this decision precludes Respondent from withdrawing the pending Amendment Application and filing a new application for the project it currently proposes. The Board notes that the practical result of denying Respondent the opportunity to cure its violations is the same as the result that would have been attained by granting Respondent an opportunity to cure: the publishing and posting of an accurate and complete notice of Respondent's proposal so that all interested parties are able to participate in a hearing on the application.

Id. at 31.

On April 27, 1999, H.A. Manosh, Inc. and Vermont RSA Limited Partnership d/b/a Bell Atlantic Mobile filed the Application for the Project. GHNA filed a motion requesting the District Commission to dismiss or deny the Application. The District Commission denied GHNA's motion. GHNA has filed the Motion for Interlocutory Appeal from the Commission's denial arguing, in essence, that allowing the Application to proceed would "contradict" the Board's decision to revoke the prior permit without an opportunity to cure.

Upon receipt of a motion for interlocutory appeal, the Board must first examine the appeal and determine whether it is suitable for interlocutory appeal under the standards of EBR 43. E.g. Re: Sunarbush Resort Holdings, Inc., #5 W1045-15-EB (Interlocutory), Memorandum of Decision at 2 (Aug. 12, 1997) [EB #679]. If the Board grants the request for appeal, then the appeal shall be determined upon the motion and any response thereto, unless otherwise ordered. EBR 43(D).

RE: H.A. Manosh, Inc. and
Vermont RSA Limited Partnership d/b/a Bell Atlantic Mobile
Land Use Permit Application #5L 133 1 -EB (Interlocutory)

Memorandum of Decision

Page 3

The Board considers three factors when deciding whether to grant permission for interlocutory appeal: (i) does the district commission's ruling involve a "controlling question of law" (ii) about which there is a substantial ground for difference of opinion and (iii) an immediate appeal may materially advance the application process. **EBR 43(A)**.

A. "Controlling Question of Law"

An issue is 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. Sugarbush, supra at 4; Re: Maple Tree Place Associates, #4C0775-EB, Memorandum of Decision at 10 (Dec. 22, 1988) [EB #413M]. The Board concludes that the issue raised in the Motion for Interlocutory Appeal is a question of law because no facts are required for its resolution.

With regard to whether a question of law is "controlling," the Vermont Supreme Court has stated:

Whether a question of law is controlling is not defined by whether the question governs the outcome of the litigation. This factor requires a practical application that focuses upon the potential consequences of the order at issue. "Since the core purpose of interlocutory appeal is to avoid unnecessary proceedings in the trial courts, the criterion that an order raise a controlling question of law would seem, at a minimum, to require that reversal result in an immediate effect on the course of litigation-and in some savings of resources either to the court system or to the litigants."

In re Pyramid Comnanv of Burlington, 141 Vt. 294,302 (1982) (citations omitted).

If the Board were to grant the Motion for Interlocutory Appeal, then there would be no hearing on the Application. Such a result clearly has an "immediate effect on the course of litigation and [results in a] savings of resources." Accordingly, the Board concludes that the Motion for Interlocutory Appeal raises a question of law that is "controlling."

RE: H.A. Manosh, Inc. and
Vermont RSA Limited Partnership d/b/a Bell Atlantic Mobile
Land Use Permit Application #5L 133 1 -EB (Interlocutory)
Memorandum of Decision
Page 4

B. Difference of Opinion

In its Sugarbush decision, the Board stated:

In considering this second factor, the Board “should place little stock in the vehemence of disagreeing counsel.” Pyramid, 141 Vt. at 306. Nor should the Board “be swayed by the unique character of a particular issue” since interlocutory appeals are “not intended merely to provide review of difficult rulings in hard cases.” Id. Rather, a standard consistent with the policy underlying this factor requires that there be a chance of a reversal of the challenged order. Id. at 307. Where there is little or no precedent relative to the order or ruling being appealed from, there is likely to be substantial ground for difference of opinion.

Sugarbush, *supra* at 5.

While GHNA relies upon the fourth sentence of the quoted passage in support of its Motion for Interlocutory Appeal, the Board concludes that it is the third sentence of that passage that is controlling here. Despite the “vehemence” of GHNA’s arguments, there is simply no “chance that the District Commission’s determination would be reversed. In fact, there is little or no precedent relative to the order being appealed from” precisely because GHNA’s position is so untenable. The Board’s revocation decision is clear that it would not provide H.A. Manosh, Inc. with an opportunity to cure its violations, and thereby create the revocation, because H.A. Manosh, Inc. has a history of violations. Nothing in the Act 250 statute or otherwise, however, authorizes the Board to prohibit H.A. Manosh, Inc. from filing a new administratively complete application for the Project.’

Accordingly, the Board concludes that there are no substantial grounds for a difference of opinion with regard to whether the Application may proceed before the District Commission. As a result, GHNA’s Motion for Interlocutory Appeal must be denied.

¹ The Board notes that GHNA’s position would result in preventing H.A. Manosh, Inc. from filing an application for the same proposal that had been the subject of the revoked permit, while permitting it to file a proposal that differed only slightly.

RE: H.A. Manosh, Inc. and
Vermont RSA Limited Partnership d/b/a Bell Atlantic Mobile
Land Use Permit Application #5L 133 1 -EB (Interlocutory)

Memorandum of Decision

Page 5

C. **Materially Advance the Application Process**

Fundamental to whether an interlocutory appeal will materially advance an application is the potential for a substantial delay in the issuance of a district commission's final decision, and the potential for a substantial increase in the amount of time it may take to reach a final decision with respect to a land use permit application in the event of a series of appeals to the Board.

Sugarbush, Supra at 6. Pyramid, 141 at 305 (an interlocutory appeal should advance the *ultimate* termination of a case such that it is proper to consider the time saved at trial versus the time expended on appeal).

The District Commission has just begun the hearing process on the Application. If the Board granted the Motion for Interlocutory Appeal (which it will not do because of its conclusions in Section II.B. above), the hearing process would be terminated. Accordingly, the Board concludes that an interlocutory appeal, if it had been allowed, would have materially advanced the application process.

III. **MERITS**

Because the Board denies the Motion for Interlocutory Appeal under the second part of the three-prong test, the Board does not reach the merits of GHNA's appeal.

IV. **ORDER**

1. The Board denies the Motion for Interlocutory Appeal.
2. Jurisdiction is hereby returned to the District #5 Environmental Commission.

RE: H.A. Manosh, Inc. and
Vermont RSA Limited Partnership d/b/a Bell Atlantic Mobile
Land Use Permit Application #5L 133 1 -EB (Interlocutory)

Memorandum of Decision

Page 6

Dated at Montpelier, Vermont this 30th day of June, 1999.

ENVIRONMENTAL BOARD


Marcy Harding, Chair

Jill Broderick, Alternate Member

John Drake

George Holland

Samuel Lloyd

W. William Martinez

Rebecca M. Nawrath

Alice Olenick

Board Members John T. Ewing and Robert H. Opel did not participate in the June 30, 1999 deliberation concerning the Motion for Interlocutory Appeal.