

**VERMONT ENVIRONMENTAL BOARD**  
**10 V.S.A. Ch. 151**

*Re: Dexter and Susan Merritt* Land Use Permit Application  
*and co-applicants:* #5W1395-EB  
*David Rogers, Douglas and Corrine Nicholson,*  
*Nathan and Joann Phillips, Real Ouimet,*  
*and Richard and Tina Desmaris*

**CHAIR'S PRELIMINARY RULING**

This Chair's Preliminary Ruling addresses the status of this appeal in light of a Motion to Alter filed with the District 5 Environmental Commission (Commission).

**I. History**

On October 29, 2001, Dexter and Susan Merritt (Merritts) filed Land Use Permit Application # 5W1395 with the Commission seeking authorization for an "as-built" project described as the sale by auction of five parcels for residential development involving 38 contiguous acres of land located off Factory Street and Gray Road in the Towns of East Montpelier and Calais, Vermont (Project).

On June 19, 2002, the Commission issued Land Use Permit #5W1395 (Permit), and accompanying Findings of Fact, Conclusions of Law, and Order (Decision), for the Project.

On July 17, 2002, Douglas Nicholson filed with the Commission a Motion to Alter, seeking minor changes to the Permit as to lot #5 of the Project.<sup>1</sup>

On July 18, 2002, the Merritts filed an appeal with the Environmental Board (Board) from the Decision, alleging that the Commission erred in its conclusions concerning 10 V.S.A. §§6086(a)(1)(G), (8)(A) and (9)(B).

**III. Discussion**

Pursuant to Environmental Board Rule (EBR) 16(B), the Chair may make preliminary rulings as to party status and other procedural matters as are necessary to expedite and facilitate the hearing process. Any party may object to such a preliminary ruling, in which case the matter is referred to the Board for resolution.

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<sup>1</sup> Pursuant to 3 V.S.A. §810(4), the Chair takes official notice of the official files maintained by the Board and Commission in this matter.

The Vermont Rules of Appellate Procedure (VRAP) provide that a notice of appeal filed before the making or disposition of a motion to alter "shall have no effect when filed. It shall be effective when the motion is decided unless thereafter withdrawn." VRAP 4. Under this rule, an appeal becomes ineffective upon the timely filing of a motion to alter with the lower tribunal, but it is revived when the motion is decided. The Reporter's Notes to the 1985 Amendment to VRAP 4 state that: "The notice is ineffective when filed but becomes effective when the motion is decided as long as the decision does not obviate the need for the appeal or the appeal is not withdrawn."

While the VRAP do not govern Board proceedings, see VRAP 1 (the VRAP apply only to proceedings in the Vermont Supreme Court), VRAP 4 provides a sensible approach in this situation. See, *Wright/Morrissey Realty Corp. and New Enterprises, Inc., et al.*, #4C1070-EB, Chair's Preliminary Ruling at 2 -3 (Apr. 19, 2001). Accordingly, this appeal shall not become effective until the Commission issues a decision on the Motion to Alter. At that point Merritts may seek to withdraw or amend their appeal.

### III. Order

1. The Chair takes official notice of the official files maintained by the Board and Commission in this matter.
2. The Merritts' Notice of Appeal is ineffective until the Commission issues a decision on the Motion to Alter.
3. The Commission retains jurisdiction to rule on the Motion to Alter.
4. This order is issued pursuant to EBR 16(B) and is binding on all parties unless an objection is filed on or before **Wednesday, July 31, 2002**.

Dated at Montpelier, Vermont this 23<sup>rd</sup> day of July 2002.

ENVIRONMENTAL BOARD

/s/Marcy Harding  
Marcy Harding, Chair