

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

**RE:** Robert and Margaret North Declaratory Ruling Request #199  
by A. Jay Kenlan, Esq. Dismissal Order  
**Abell, Kenlan, Schwiebert**  
**& Hall**  
P.O. Box 578  
**Rutland, VT 05701-0578**

On August 27, 1987, Robert and Margaret North filed a request for a declaratory ruling with the Environmental Board (Board) regarding Land Use Permit #2W0559-6 issued on November 26, 1985 by the District #2 Environmental Commission (Commission) for the construction of commercial buildings in Dover, Vermont.

I. ISSUES IN THE PETITION

The Petitioner contends that 1) a district commission must make final findings and may not retain jurisdiction over specific criteria; 2) the filing of a plan (e.g., landscape plan) in conformance with a condition of a permit constitutes an "application" and triggers the time requirements of 10 V.S.A. § 6085; 3) the Commission's practice of receiving, reviewing and deciding upon evidence in the form of written materials and reports submitted outside of the hearing process constitutes *ex parte* consultations expressly prohibited by 3 V.S.A. § 813; and 4) a district coordinator's communication of alleged violations to a third party violates due process rights.

II. BACKGROUND

On November 25, 1985, the Commission issued Land Use Permit #2W0559-5 to the Norths and on August 8, 1986, the Commission issued Land Use Permit #2W0559-6 to the Norths. These permits authorize the construction of certain commercial buildings, parking areas and related improvements on land southwesterly of U. S. Route 100 in the Town of Dover, Vermont. These permits were never appealed. Certain conditions included in the permits required the Norths to submit additional information to the Commission. Other conditions required the Norths to take various actions relative to a certain stream bank.

The Norths argue that the Commission had no authority to retain jurisdiction over landscaping issues, and that the plan filed on September 12, 1986, is automatically approved because no action was taken by the Commission within 60 days. In addition, they argue that the procedures followed by the Commission and its staff in this case violate their due process rights.

III. DECISION

The Board has the authority to issue declaratory rulings by virtue of 3 V.S.A. § 808 and Board Rule 3(D). 3 V.S.A. § 808 states in pertinent part: "Each agency shall provide for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency, and may so provide by procedure or rule."

The issues raised by the Petitioner are not appropriate for declaratory ruling review because no statutory **provision, rule or general** order of the Board has been **identified**. Consequently, there is no issue of **applicability for the Board** to review.

The issues raised relate to the **Commission's** Land Use Permit Amendments and would have been subject to timely filed motions to alter or reconsider under Rule 31 or an appeal under 10 V.S.A. § 6089 and Rule 40. The filing of this Petition for a Declaratory Ruling after the time to file an appeal has expired constitutes a collateral attack upon a commission permit and may not be used as a route of appeal. In re: State Aid Highway No. 1, Peru, Vermont, 133 Vt. 4 (1974). A declaratory ruling petition is not the appropriate mechanism for contesting a commission permit decision. Unifirst Corporation, Declaratory Ruling 166, February 20, 1986.

In this case, having failed to appeal the Commission's decision, the Petitioner must comply with the terms and conditions of the permit amendment unless amended through the proper review process.

The Board encourages the Norths to contact the Commission to request approval or denial of any landscaping plan or to seek an amendment of the permits to the extent that there have been sufficient changes so that an amendment is warranted.

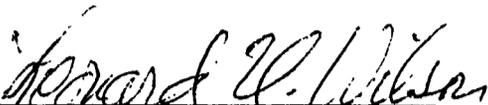
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**IV. ORDER**

1. This Petition for a Declaratory Ruling is dismissed.

Dated at Montpelier, Vermont this 8th day of March,  
1988.

ENVIRONMENTAL BOARD

  
Leonard U. Wilson, Chair  
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