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

RE: Richard Roberts Group, Inc., Tamarack Associates, Brown Farm Associates, and William Legrow by James H. Gray, Jr., Esq. Hershenson, Carter, Scott & McGee P.O. Box 909 Norwich, VT 05055-0909

Findings of Fact, Conclusions of Law, and Order Declaratory Ruling #225 (Reconsidered)

This decision pertains to a petition for declaratory ruling filed by Richard Roberts Group, Inc., Tamarack Associates, Brown Farm Associates, and William Legrow (the Petitioners) concerning whether they are entitled to a refund of an application fee pursuant to Board Rule 11. As is explained below, the Board concludes that Rule 11 does not allow the Petitioners to receive a refund.

## I. SUMMARY OF PROCEEDINGS

On February 1, 1990, Chief Coordinator Michael Zahner issued Advisory Opinion #2-52, pertaining to a request for a refund to the Petitioners of $89,563 of a $96,450 application fee. The Petitioners paid the fee in 1988 for a project to be located in the Towns of Jamaica and Stratton known as "Salmon Hole." In that opinion, the Chief Coordinator concluded that Board Rule 11(D) provides for a refund only in the event that an application is withdrawn prior to convening a hearing on the merits. The Chief Coordinator concluded that the Petitioners had not withdrawn their application and thattherefore the fee cannot be refunded.

On February 27, 1990, the Petitioners filed a petition with the Board for a declaratory ruling which included detailed legal argument as to why they believed they were entitled to a refund.

On April 27, 1990, Environmental Board Chairman Stephen Reynes convened a prehearing conference in the Town of Jamaica with the Petitioners participating. At the prehearing, the Petitioners agreed to provide a statement of the relevant facts. The Petitioners were advised that the Board might conduct its own factual investigation pursuant to Rule 20 with regard to two areas: (1) the scope of the work performed by the State of Vermont in reviewing its application; and (2) the State's use of the fee funds paid by the Petitioners and reliance on the availability of those funds, if any. The Petitioners stated that they did not believe these areas of factual investigation were relevant.

On May 15, 1990, the Petitioners filed a proposed stipulation of facts. On May 16, the Chairman issued a prehearing conference report. On June 13, the Board convened oral argument in Montpelier, with the Petitioner participating.

The Board deliberated on September 5, 1990 in Weybridge and on November 7 in Berlin. On January 30, 1991, the Board issued findings of fact, conclusions of law, and order, denying the Petitioners' refund request.

On February 14, 1991, the Petitioners filed a motion for reconsideration pursuant to Rule 31(A). On March 13, the Board issued a memorandum of decision granting the reconsideration request and offering an opportunity for oral argument. On March 18, the Petitioners requested oral argument. On April 24, the Petitioners filed a supplemental memorandum of law. The Board convened oral argument on May 28 in Montpelier. The Board deliberated on June 13 in Montpelier, and following reconsideration, determined to affirm its prior decision with modifications. This matter is now ready for decision. To the extent that findings of fact and conclusions of law requested by the Petitioners are included below, they are granted; otherwise, they are denied.

II. ISSUES

The overall issue in this matter is whether, pursuant to Rule 11, the Petitioners are entitled to the requested refund. The Petitioners have raised the following questions in connection with their refund request:

1. Whether the Petitioners withdrew their application within the meaning of Rule 11(D) by requesting a recess of the hearings prior to a hearing on the merits and by redesigning their project. Related to this issue is whether a hearing on the merits was actually convened.

2. Whether Rule 11(A) should be interpreted to require a refund because it states that the purpose of a fee is to compensate the State of Vermont for a portion of the cost of evaluating and reviewing applications.

3. Whether Rule 11(F) should be interpreted to imply that an applicant is entitled to a refund when an applicant overestimates a project's construction cost because that rule authorizes the Board and District Commissions to

require applicants to pay a supplemental fee in the event that an application underestimates a project's construction cost.

4. Whether, under the Supreme Court's decision in Araast v. State Environmental Board, 143 Vt. 84 (1983), failure to grant the Petitioners a refund would constitute the imposition of an impermissible tax rather th'an a fee.

5. Whether, if the Petitioners are entitled to a refund, the Petitioners are also entitled to interest.

In addition, the following question has arisen during the course of this matter:

6. Whether, pursuant to Rule 20, the Board should perform additional factual investigation or whether the Petitioners' proposed statement of facts is adequate.

III. FINDINGS OF FACT

1. On May 16, 1988, the Petitioners filed an application for a project known as "Salmon Hole,," which was to consist of the phased construction of a planned unit development located on 1,400 acres of land in the Towns of Jamaica and Stratton, Vermont. The original proposed residential project was to consist of 235 single family house lots, 200 multi-family units, a golf course and a club house, tennis courts, and a cross-country ski trail network. An application fee of $96,450 was assessed for the project based on an estimated construction cost of $37,640,000 and the creation of 235 single family house lots.

2. The District #2 Environmental Commission held two hearings on June 14 and 28, 1988. One of the hearings included a site visit. Following these hearings, the Petitioners requested a recess of the hearings which was granted.

3. On December 22, 1989, the Petitioners filed an amended application with the District Commission for a redesigned project to consist of 180 single family house lots with associated roadways and sewage treatment facilities. In the amended application, the Petitioners requested a refund of most of the original fee for the project. The amount requested was $89,563,

based on a revised estimated construction cost of $2,035,000 and the creation of 180 single family house lots.

IV. CONCLUSIONS OF LAW

Fees for Act 250 applications are currently placed into the State's Act 250 Permit Fund, money from which may be used for the Act 250 program and related Agency of Natural Resources programs. 10 V.S.A. § 6029.

Prior to July 1, 1990, during the time when the Petitioners paid their fee, Act 250 fees were placed with fees from other programs into a fund known as "the environmental and public building permit fund" which expired on June 30, 1990. 1987 Vt. Laws No. 76 § 19a. Money from that fund could be used to support the Agency of Natural Resources, the Act 250 program, and the Department of Labor and Industry. Id.

Payment of the refund would require a disbursement from the state treasury. The power to draw money out of the State treasury rests with the General Assembly. Vt. Const. art. II, § 27. Disbursements from the Act 250 permit fund are to be made annually through the legislative appropriations process. 10 V.S.A. § 6029.

The Board is an administrative agency with those powers granted to it by statute or necessarily implied as may be needed to achieve its assigned tasks. In re DeCato Brothers, Inc., 149 Vt. 493, 495 (1988). The Board is authorized to set fees and procedures by rule. 10 V.S.A. §§ 6025(a), 6083(a)(3). The Board has promulgated Rule 11 concerning fees which provides a procedure for refund in the event an application is withdrawn. Thus, the Board's authority to grant a refund is limited to the procedure specified in Rule 11.

The Board has concluded that the Petitioners are not entitled to a refund pursuant to Rule 11 because they never withdrew their application. The Board addresses the issues enumerated in Section II, above, as follows:

1. The Petitioners did not withdraw their application within the meaning of Rule 11(D), which provides:

> In the event that an application is withdrawn prior to a hearing on the merits, the environmental board shall, upon request, refund 50 percent of the fee paid between

$50 and $1,000, and all of that portion of the fee paid in excess of $1,000. An application for a refund must be submitted to the board within 90 days of the date of the withdrawal of the application.

The Petitioners requested and received a recess. Over a year later, they submitted a revised application. Nowhere in the record is there any letter to the District Commission requesting withdrawal of the application'. Accordingly, no withdrawal occurred, and the Board does not address the issue of whether a hearing on the merits was convened.

In reaching this conclusion, the Board is cognizant of the Petitioners' contention that they "constructively" withdrew their application. A withdrawal and a recess, however, are legally different. A withdrawal means that an application is no longer pending, and any rights which vested at the time of application may be lost. Cf. Smith v. Winhall Planning Commission, 140 Vt. 178, 181 (1980) (rights may vest on the date an application was filed). In contrast, a recess means an application is still pending, and vested rights may still accrue. Thus, the Board cannot equate a recess with a withdrawal.

The Petitioners argue that they are not equating a recess with a withdrawal. Instead, they claim that they constructively withdrew the original application by filing a revised application. However, nowhere in the revised application is there an express statement of withdrawal. The Board also is reluctant to imply a withdrawal on the basis of revision to a project during the application process. As the Petitioners conceded at oral argument, projects typically undergo numerous revisions during the application process in order to meet the Act 250 criteria set forth at 10 V.S.A. § 6086(a), or concerns expressed by other parties, or both. Were the Board to adopt the Petitioners' position, each change to an application would have to be considered a withdrawal, or at least each significant revision (with possible litigation as to what constitutes a "significant" revision for a particular application), with a corresponding fee recalculation. In view of the numerous changes which projects'go through, the complexity, uncertainty and inefficiency of such a system are obvious.

The Board instead interprets Rule 11(D) to require a written letter of withdrawal prior to hearing on the merits and a cessation of application processing. Such an

interpretation is supported by the plain meaning of withdrawal, which is "to remove." Black's Law Dictionary. The word "remove" connotes a cessation of processing. Such an interpretation is also supported by the statute and rules, which clearly contemplate that applications are to be filed in writing. 10 V.S.A. § 6083(a); Rule 10. Where an act is to be done in writing, it makes sense to require that the act be undone in writing. The Board's interpretation is further supported by the avoidance of administrative inefficiency and uncertainty of the type identified above.

2. Rule 11(A) cannot be interpreted to require a refund simply because the rule provides that fees are in part "for the purpose of compensating the state for a portion of the cost of reviewing applications ...." Rule 11 must be understood first and foremost based on its plain language. Cf. Wetterau, Inc. v. Dept. of Taxes, 141 Vt. 324, 327 (1982) (plain meaning of statutes is presumed intended). Rule 11(A) does not refer to refunds. Refunds are addressed in Rule 11(D).

Further, as noted above, it is the General Assembly which has the appropriations power, and the Board has only that authority granted to it or necessarily implied. Accordingly, the Board's power to grant a refund is limited to that which expressly arises or can be necessarily implied from the rule which it has promulgated pursuant to its authority to set fees and procedures. Rule 11(A) cannot be said to expressly authorize a refund on the basis of a statement that part of the purpose of fees is to defray the cost of reviewing applications.

The Board also does not interpret Rule 11(A) to imply a power to grant a refund because of the existence and purpose of Rule 11(D). Rule 11(D) requires that a withdrawal be made, and a request for refund be made within ninety days of the withdrawal. These requirements provide those making disbursements from the fund with some certainty that money will be in the fund. In view of this purpose, the Board does not believe Rule 11(A) can or should be interpreted to support issuing refunds.

3. The Petitioners argue that in "fairness" Rule 11(F) should be interpreted to imply that applicants are entitled to refunds if their construction costs prove lower than anticipated at the time of application. Rule 11(F) states:

> A commission or the board may require any permittee to file a certification of actual construction cost and may direct the payment of a supplemental fee in the event an application understated a project's construction cost.

Rule 11(F) does not expressly address refunds. Rule 11(F) only addresses situations in which construction costs prove higher than estimated at application time. It does not address the situation in which an applicant seeks a refund. Refunds are made pursuant to Rule 11(D).

Further, Rule 11(F) also does not necessarily imply a power to grant a refund, since it addresses only the requirement to file a supplemental fee where construction costs are higher than estimated. Further, for the same reasons as given above with respect to Rule 11(A), the Board does not interpret Rule 11(F) to imply a power to grant a refund because of the existence and purpose of Rule 11(D).

4. The Petitioners' contention that a refund is required by the case of Araast v. State Environmental Board, supra, is not meritorious. In that case, the Court ruled that a lower court had not made sufficient findings of fact to support its conclusion that an Act 250 fee was a fee rather than a tax, and reversed and remanded the case. 143 Vt. at 86. The lower court's conclusions were that:

> "[T]he cost of processing an Act 250 permit increases with the size and complexity of the project"; the "proposed project has necessitated a great deal of time and expense"; and a "reasonable relationship existed between the charges assessed and the services rendered by the commission."

Id. at 86.

The Araast case does not hold that the Board must or can grant a refund where the evidence suggests that a tax rather than a fee is being imposed. The Araast case stands for the proposition that the conclusions of a lower court must be supported by findings of fact, and it was on that basis that the Supreme Court reversed and remanded to the lower court. Id.

Moreover. the Petitioners have argued to this Board that it should not investigate those facts relevant to the very conclusions made by the lower court in the Araast case.

Specifically, the Petitioners have argued that the time and expense of the State of Vermont in reviewing its application is irrelevant. The Board is at a loss to understand how, in light of the Court's remand in Araast, the Petitioners can argue that the case applies while at the same arguing that the inquiry for which the Court remanded the case is irrelevant.

5. Since the Petitioners are not entitled to a refund, the Board does not reach the question of whether they are entitled to interest.

6. Since the Board has determined that the requested refund is not within its authority under the facts of this case, the Board need not engage in further factual investigation at this time.

V. ORDER

1. The Petitioners are not entitled to a refund pursuant to Rule 11.

2. Findings of Fact, Conclusions of Law and Order (Reconsidered) are hereby issued with respect to this declaratory ruling request. These findings, conclusions, and order shall supersede those issued with regard to this matter on January 30, 1991.

Dated at Montpelier, Vermont, this 5th day of July, 1991.

ENVIRONMENTAL BOARD

Stephen Reynes, Chairman
Ferdinand Bongartz
Rebecca Day
Arthur Gibb
Samuel Lloyd
Steve E. Wright

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