

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

Re: West River Acres, Inc.
Declaratory Ruling Request #351

CHAIR'S PROPOSED DISMISSAL ORDER

I. BACKGROUND

On September 18, 1997 the District #2 Coordinator issued an Act 250 Notice of Application and Hearing regarding Land Use Permit Application #2W1053 ("Application"). The Application was filed by West River Acres, Inc. ("Applicant"). The Application seeks approval for a project described as the alteration of a cattle barn into 50 horse stalls, reconstruction of a demolished barn into an indoor riding area 100 feet by 175 feet, tack room, feed room, bedding bin, office and bathroom ("Project") The Project is located on River Road in the Town of Newfane.

On October 7, 1997, the District #2 Environmental Commission ("Commission") convened a hearing regarding the Application.

On October 9, 1997, the Commission issued Re: West River Acres, Inc., Application #2W1053, Hearing Recess Memorandum ("Recess Memo").

On November 10, 1997, the Applicant filed a Petition for Declaratory Ruling ("Petition").

II. PRELIMINARY RULING

Pursuant to Environmental Board Rule ("EBR") 3(D) and 16(B), the Chair may issue a preliminary ruling regarding procedural matters as are necessary to expedite and facilitate the hearing process. Any such ruling may be objected to by any interested party, in which case the ruling shall be reviewed and the matter resolved by the Board. As explained below, the Petition should be dismissed since the Board is without jurisdiction to adjudicate the Petition. In addition, even if the Petition was construed to be an interlocutory appeal under EBR 43, it was untimely filed such that it should be dismissed.

A. Petition for Declaratory Ruling

The Petition states that it is brought pursuant to 10 V.S.A. § 6007(c) and that it is an appeal from the Recess Memo. The Recess Memo is a Commission decision and order regarding two preliminary matters. The Recess Memo is not a jurisdictional opinion issued by the District #2 Coordinator. In Re: Rock of Ages (Bethel White Quarry), Declaratory Ruling Request #291, Memorandum of Decision and Dismissal

Order at 6 (March 28, 1994), the Environmental Board stated that it no longer has independent jurisdiction to hear a declaratory ruling request that is not filed within 30 days of the issuance of an advisory (now called jurisdictional) opinion. Accordingly, the Petition should be dismissed since it is not an appeal from a jurisdictional opinion.

Even if the Board did have the authority to adjudicate a declaratory ruling separate from an appeal from a jurisdictional opinion, the Petition should still be dismissed because the Petition raises issues that are still pending before the Commission. The Commission continues to exercise exclusive jurisdiction over the Application, including the issue of co-applicancy and whether the construction on River Road is part of the Project. Cf. 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). When the Commission has completed its review of the Application, the Applicant may appeal to the Board on the issue of co-applicancy and whether the construction on River Road is part of the Project. See In re State Aid Highway No. 1, Peru, Vt., 133 Vt. 4, 7 (1974), accord Petition of D.A. Associates, 150 Vt. 18, 19 (declaratory rulings are not appellate in nature, and cannot be resorted to as a substitute for, or in lieu of, proper appellate remedies); In re State of Vermont Agency of Transportation (Williston Area Improvements), No. 96-109, slip op. at 1-2 (Vt.Sct. Oct. 31, 1996)(unpublished entry order); Re: Roger Loomis d/b/a Green Mountain Archery Range, Declaratory Ruling Request #344, Memorandum of Decision (August 8, 1997).

Thus, the Board is without jurisdiction to adjudicate the Petition. Instead, the Applicant's remedy is to await the Commission's decision on the Application and, if not satisfied, appeal from the Commission's decision pursuant to 10 V.S.A. § 6089 and EBR 40.

B. Petition as Interlocutory Appeal

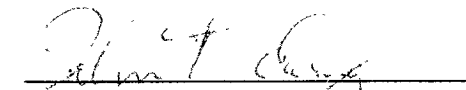
Under EBR 43, upon motion of any party the Board may permit an appeal to be taken from any interlocutory order or ruling of a district commission. Any motion for interlocutory appeal must be made to the Board within 10 days after entry of the order or ruling appealed from. Re: Maple Tree Place Associates, #4C0775-EB, Memorandum of Decision at 7 (Dec. 22, 1988). The Commission issued the Recess Memo on October 9, 1997, and the Petitioner filed the Petition on November 10, 1997. Accordingly, even if the Petition was deemed to be an interlocutory appeal, it still must be dismissed as untimely.

III. ORDER

1. The Petition is dismissed.
2. The Applicant may appeal from the Commission's decision regarding the Application, including the rulings made in the Recess Memo, pursuant to 10 V.S.A. § 6089 and EBR 40 once the Commission issues its final decision on the merits of the Application.
3. Pursuant to EBR 3(D) and 16, any interested person who objects to this Order, in whole or part, shall file an objection with supporting memorandum of law on or before **Thursday, December 11, 1997**. If no objection is filed, then this Order shall become final.
4. If an objection is filed, then the Environmental Board will deliberate regarding any such objection on Wednesday, December 17, 1997, and issue a decision thereafter.

Dated at Montpelier, Vermont this 25th day of November, 1997.

VERMONT ENVIRONMENTAL BOARD



John T. Ewing, Chair