

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

Re: New England Container Company and Roland Devost
Declaratory Ruling Request #393

CHAIR'S PROPOSED DISMISSAL ORDER

This matter comes before the Vermont Environmental Board (Board) on a Petition for Declaratory Ruling filed by New England Container Company and Roland Devost (Petitioners) relating to buildings and land in the Swanton Industrial Park in Swanton, Vermont.

As set forth below, Environmental Board Chair Marcy Harding proposes dismissal of this matter pursuant to Environmental Board Rule (EBR)18(D) as Petitioners have applied for and have been granted a permit.

I. FINDINGS OF FACT

Based upon a review of the Record, the Chair Harding finds the following facts:

1. On December 21, 2000, and January 4, 2001, respectively, the District #6 Environmental Commission Coordinator (Coordinator) issued Jurisdictional Opinion #6-12-20-00 (JO) and a Project Review Sheet (PRS) in which he determined that the following three changes occurring on Lots 3 and 4 of land in the Swanton Industrial Park in Swanton, Vermont are material changes to Land Use Permits (LUP) 6F0134¹ and 6F0362 and, as such, an Act 250 permit amendment is required pursuant to 10 V.S.A. §§ 6001-6092 (Act 250). Change #1: The clearing, stumping, and filling of land north of the existing building and the construction of a commercial building on lot #3; Change #2: The clearing, stumping, and partial filling of land south of the existing building on lot #3; and Change #3: The clearing, stumping, and filling of lot #4.
2. On January 19, 2001, Petitioners filed a Petition for Declaratory Ruling (Petition) with the Board, appealing the JO and PRS. The Petition challenges whether there is Act 250 jurisdiction over the activities

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LUP 6F0134 is the permit for the Swanton Industrial Park and is not specifically at issue in this proceeding.

described in the JO and PRS.

3. On February 27, 2001, Chair Harding convened a prehearing conference and on March 23, 2001, she issued a Prehearing Conference Report and Order (PHCR&O).
4. From April through October of 2001, Petitioners sought three 90-day postponements of all filing deadlines established in the PHCR&O. The basis for the need for additional time was that Petitioners were applying for a permit amendment as required by the JO and PRS.
5. Chair Harding granted the first two 90-day extensions and then granted a third extension of 45 days.
6. Petitioners subsequently filed a complete amendment application and the Commission granted an amended permit LUP #6F0362-2 on March 13, 2002.
7. LUP #6F0362-2 asserts Act 250 jurisdiction over the three changes described above.
8. Neither Petitioners nor any other party challenged or otherwise appealed LUP #6F0362-2.

II. CONCLUSIONS OF LAW

The purpose of a declaratory ruling is to test the applicability of any statutory provision, rule or order of the Board to a given set of circumstances or facts. *Re: Black River Valley Rod & Gun Club, Inc., #2S1019-EB*, Memorandum of Decision at 5 (July 12, 1996) (citing *In re Petition of D.A. Associates*, 150 Vt. 18, 19 (1988)); EBR 3(D); 3 V.S.A. § 808. A declaratory ruling is conducted *de novo* on the issue of whether specific activities are subject to Act 250 jurisdiction. *Re: Spring Brook Farm Foundation, Inc., Declaratory Ruling #290*, Prehearing Conference Report and Order and Memorandum of Decision at 7 (Jan. 6, 1994). Although the petition may come to the Board as an appeal of a jurisdictional opinion or project review sheet, the issue in a declaratory ruling proceeding is not whether the opinion, or any part thereof, is correct. *Re: Vermont Institute of Natural Science, Declaratory Ruling #352*, Supplemental Prehearing Order and Chair's Preliminary Ruling on Party Status at 3 (Jan. 30, 1998). Thus, facts stated or conclusions drawn in a jurisdictional opinion are not

considered by the Board. *Id.* Provided a petition is timely filed, the only issue in a declaratory ruling proceeding is whether there is Act 250 jurisdiction over a project or activity described in the jurisdictional opinion under appeal. *Id.*; *Re Spring Brook Farm Foundation, Inc., supra* at 7.

What Petitioners contest in this Declaratory Ruling proceeding is the determination in the JO and PRS that material changes have occurred to Land Use Permit 6F0362 such that Petitioner must obtain an amendment to the permit under EBR 34. Petitioners have availed themselves to Act 250 jurisdiction and have obtained the necessary permit amendment. Because LUP #6F0362-2 is now a final decision, the issue of whether or not the activities in the JO and PRS are subject to Act 250 jurisdiction is moot.

EBR 18(D) authorizes the Board to dismiss a matter *sua sponte* for reasons consistent with the rules, statute or law. As the jurisdictional issue in this Petition is moot, dismissal of this proceeding is appropriate.

Accordingly, the Petition is dismissed.

III. ORDER

1. The Petition is dismissed with prejudice.
2. This Order is issued pursuant to Environmental Board Rule 16(B) and is binding on all parties unless a written objection to it, in whole or in part, is filed on or before **Tuesday, May 7, 2002 at 4:30 p.m.**
3. Any party who objects to this Order shall file a written objection and supporting memorandum with the Board. A request for oral argument, pursuant to EBR 18(D), shall be filed with such objection, or oral argument shall be deemed to be waived.
4. Replies to an objection to this Order may be filed on or before **Tuesday, May 14, 2002 at 12:00 noon.**

5. On **Wednesday, May 15, 2002**, if any objection to this Order is filed, the Board will deliberate on such objection. Also on **Wednesday, May 15, 2002, at 1:00 p.m.**, the Board will hear oral argument (limited to 10 minutes from each party), if such is timely requested, **at the Board's Office at the National Life Records Center Building, Montpelier, Vermont.** (Take Exit 8 off I-89 onto Memorial Drive, then right at the first set of lights onto National Life Drive. The Records Center Building is at the extreme easterly end of the parking lot, separate from the main National Life buildings.)
6. No Board hearing, oral argument or deliberations will occur, and a final Dismissal Order will be issued, if no objection to this Order is filed by **May 7, 2002.**

Dated at Montpelier, Vermont this 30th day of April, 2002.

ENVIRONMENTAL BOARD

____/s/Marcy Harding_____
Marcy Harding, Chair