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

Re: *Central Vermont Public Service Corporation* Declaratory Ruling #401

Findings of Fact, Conclusions of Law, and Order

This proceeding involves an appeal to the Vermont Environmental Board (Board) by the Central Vermont Public Service Corporation (CVPS) from a decision of the District 2 Environmental Commission (Commission) Coordinator (Coordinator) concerning jurisdiction over the partition of a one-acre parcel of land located in the Town of Dummerston, Vermont (Project).

For the reasons stated below, pursuant to Environmental Board Rule (EBR) 18(D), the Board dismisses this matter.

I. Procedural History

On January 24, 2002, CVPS filed an interlocutory appeal to the Board from a decision of the Coordinator. The basis for the appeal was that the Coordinator had refused to reconsider an earlier Jurisdictional Opinion issued by the Assistant Coordinator for the Commission concerning jurisdiction over the Project.

On February 26, 2002, the Chair determined that, regardless of how CVPS has styled it, this case concerns a claim by CVPS that there is no jurisdiction over the Project. The Chair therefore considered this matter to be a Petition for a Declaratory Ruling and treated it accordingly. Also on February 26, the Chair issued a Proposed Dismissal Order, proposing that the Petition be dismissed.

On March 13, 2002, CVPS objected to the Chair's decision and requested oral argument.

The Board heard oral argument on March 20, 2002 and deliberated that same day. This matter is now ready for final decision.

II. Findings of Fact

The following Findings of Fact are made based solely upon the factual statements[1] alleged in CVPS's *Memorandum in Support of a Motion for Interlocutory Appeal,* the Exhibits attached to the said *Memorandum*, which, for the purposes of this dismissal decision, the Board accepts as true. *See, Aranoff v. Bryan*, 153 Vt. 59, 62 (1989); *Winney v. Ransom & Hastings, Inc.*, 149 Vt. 213, 214 (1988); *Ass'n of Haystack Property Owners, Inc. v. Sprague,* 145 Vt. 443 (1985). The Board further takes official notice of the official file maintained by the Board in this matter, pursuant to 3 V.S.A. §810(4). [2]

1. On February 1, 1999 CVPS filed Land Use Permit Application #2W1091 (Application) with the Commission pursuant to 10 V.S.A. Ch. 151 (Act 250). The Application sought a permit to annex one acre of land to the Town of Dummerston (Town).

2. The one-acre parcel was to be taken from an existing 21.85-acre lot owned by CVPS and added to an adjacent lot owned by the Town and known as Taft Cemetery.

3. The property is located at the intersection of Vermont Route 30 and Old Route 30 in Dummerston.

4. The Town intended to use the additional property for expansion of the cemetery.

5. A plan showing the property to be annexed was created for CVPS on December 28, 1999.

6. A zoning permit for the annexation was issued January 12, 1999.

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[1] CVPS's statements have been edited to omit information unnecessary to this decision and to conform to the style used by the Board. The substance of CVPS's statements, however, has not been altered.

[2] The Chair also accepted the statements in CVPS's *Memorandum* and took official notice of the Board's file. CVPS did not object to the Chair's doing so.

The Findings of Fact made here are identical to those found by the Chair. In objecting to the Chair's proposed Order, CVPS does not contest any of the facts which the Chair found.

7. CVPS filed the Application for the proposed conveyance of property under the assumption that it amounted to the creation of the tenth lot within the jurisdictional area of the Commission within the previous five years.

8. CVPS did not request a Jurisdictional Opinion upon or before submission of the Application.

9. On February 2, 1999 the Assistant Coordinator issued a Project Review Sheet (PRS). The PRS states that an Act 250 permit is required for the Project because "more than 9 lots [have been] created in a 5 year continuous period. 10 V.S.A. §6001(19)."

10. The PRS contains the following statement:

> ACT 250: THIS IS A JURISDICTIONAL OPINION BASED UPON AVAILABLE INFORMATION. ANY NOTIFIED PARTY OR INTERESTED PERSON AFFECTED BY THE OUTCOME MAY APPEAL TO THE ENVIRONMENTAL BOARD (ACT 250) WITHIN 30 DAYS OF THE ISSUANCE OF THIS OPINION (10 V.S.A. SEC. 6007(C)).

11. CVPS received a copy of the PRS, and it has been on file at CVPS since February 3, 1999.

12. No Declaratory Ruling Petition was filed within 30 days of the date the PRS was issued.

13. CVPS later came to believe that the Project did not constitute a "subdivision" requiring an Act 250 permit under EBR 2(B). On August 5, 1999, Bill Jakubowski submitted to the Coordinator a request for a Jurisdictional Opinion on whether an Act 250 permit was in fact required for the project. No Jurisdictional Opinion was issued.

14. CVPS and the Town decided to abandon their plans for the property transfer, and no further action was taken on the Application.

15. In October 2001 the Town contacted CVPS, stating that the need for more cemetery space still existed and that it wished to revisit the possibility of acquiring the land in question.

16. By letter dated October 30, 2001, CVPS renewed its request to the Coordinator for a Jurisdictional Opinion concerning the Project.

17. On January 17, 2002, the Coordinator responded to CVPS's request, stating, *inter alia,* that the February 2, 1999 PRS constituted a Jurisdictional Opinion that was not appealed within 30 days of its issuance and that jurisdiction over the Project was therefore final.

III. Conclusions of Law

CVPS raises several arguments as to why the Board should not dismiss this matter. None has merit.

A. When the question of jurisdiction can be raised

As a general rule, principles of finality dictate that valid judgments remain undisturbed. *Town of Putney*, *Town of Putney v. Town of Brookline*, 126 Vt. 194, 200 (1967). "To hold otherwise would severely undermine the orderly governance of development and would upset reasonable reliance on the process." *Re: David Enman*, Declaratory Ruling #326, Findings of Fact, Conclusions of Law, and Order at 19 (Dec. 23, 1996) (*quoting In re Taft Corners Associates, Inc.*, 160 Vt. 583, 593 (1993)).

CVPS contends, however, that "regardless of whether a Jurisdictional Opinion was issued, the question of original jurisdiction can be raised at any time prior to final action on the Application and exhaustion of all appeals before the Environmental Board."

To analyze CVPS's argument concerning challenges to jurisdiction, it is necessary to understand the difference between the two kinds of "jurisdiction" involved here.

1. whether the decision-maker has the authority, or jurisdiction, to decide the matter before it

"Subject matter" jurisdiction involves the question of whether the decision-maker has the *authority* to rule on the question presented. In other words, under what circumstances does a Coordinator have jurisdiction to issue a Jurisdictional Opinion?

As the Board wrote in *Re: P&H Senesac, Inc*., Declaratory Ruling #376 Dismissal Order at 5 (June 22, 2000):

> Subject matter jurisdiction concerns the authority of a tribunal to review the issues raised (*e.g*., a traffic court has no jurisdiction to issue a divorce decree, even if the parties seeking a divorce "concede" to the jurisdiction of the traffic court). *See, e.g., Shute v. Shute*, 158 Vt. 242, 248 (1992);

> *Gerdel v. Gerdel*, 132 Vt. 58, 65 (1973). The Board and the district commissions are not exceeding their jurisdiction, however, because they are precisely the administrative bodies empowered with jurisdiction to review a project for compliance with Act 250.

Id., quoting, Re: Killington, Ltd., et al., #1R0835-EB (Master Plan), Memorandum of Decision at 6 (Oct. 22, 1999).

Subject matter jurisdiction – a tribunal's authority to decide the question presented - can be reviewed at any time that a matter is alive and pending. *Petition of Mattison and Bentley*, 120 Vt. 459, 463 (1958).

Further, the Vermont Supreme Court has long held that a judgment may be attacked collaterally[3] if the authority which renders it does not have jurisdiction over the subject matter or the parties. [4]

> It is firmly established that judgments that appear to have been regularly obtained are conclusive upon parties and privies, and cannot be collaterally attacked. *Santerre v. Sylvester*, 108 Vt. 435, 439, 189 A. 159, 161 (1937); *Mussey v. White*, 58 Vt. 45, 49, 3 A. 319, 321 (1886). An exception to this rule is that a judgment may be collaterally attacked if the court rendering it lacks jurisdiction over the subject matter or parties. *State v. Putnam*, 137 Vt. 410, 413, 407 A.2d 161, 162 (1979); *Town of Putney v. Town of Brookline*, 126 Vt. 194, 200, 225 A.2d 388, 392 (1967). We have

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[3] A "collateral attack" is "one questioning the validity of a judgment in a proceeding which is not brought for the purpose of modifying, setting aside, vacating or enjoining the judgment." *Bennett Estate v. Travelers Ins. Co.,* 140 Vt. 339, 342 (1981), *quoting Burlington Data Processing, Inc. v. Automated Medical Systems, Inc.*, 492 F. Supp. 821, 822 (D.Vt. 1980). *See, generally, Alpine Stone Corporation, ADA Chester Corporation, and Ugo Quazzo*, #2S1103-EB, Memorandum of Decision at 8 (Feb. 9, 2001): "The instant appeal is a collateral attack on the JOs because Permittees did not appeal the JOs, but now seek to invalidate them in this appeal." *And see, State of Vermont Agency of Transportation (Williston Area Improvements),* Declaratory Ruling Request #311, Findings of Fact, Conclusions of Law, and Dismissal at 8 – 10 (Jan. 31, 1996) ("Judge [a party to the proceedings] did not appeal the denial of the motion to intervene and remand in the prior proceedings. Judge cannot now raise its claim in another guise. …") *Citing, In re Alpen Associates*, 147 Vt. 647 (1986) (mem.).

[4] Jurisdiction over the parties is known as "personal" jurisdiction. *See, Brown v. Cal Dykstra Equipment Co., Inc.,* 169 Vt. 636 (1999); *Schwartz v. Frankenhoff*, 169 Vt. 287 (1999); *Godino v. Cleanthes*, 163 Vt. 237 (1995). Personal jurisdiction is not at issue here.

> also permitted collateral attack of judgments issued by courts in excess of their statutory authority. *In re Estate of Woolley*, 96 Vt. 60, 63, 117 A. 370, 371 (1922). Parties or their privies may not, however, collaterally attack mere errors or irregularities in the exercise of jurisdiction. *Town of Putney v. Town of Brookline, supra*, 126 Vt. at 200, 225 A.2d at 392. *See also Kingsbury v. Kingsbury*, 137 Vt. 448, 453, 407 A.2d 512, 515 (1979).

Bennett Estate, 140 Vt. at 343; *and see*, *State v. Mott*, 166 Vt. 188, 192 (1997).

More recently, however, the Vermont Supreme Court evidenced an inclination to restrict collateral attacks grounded on claims that there has been a failure of subject matter jurisdiction:

> There are important policy reasons for voiding judgments under Rule 60(b)(4) only in the narrowest of circumstances. See Restatement (Second) of Judgments § 11 cmt. e (1982) (different considerations require defining subject matter jurisdiction narrowly for purposes of according finality to judgment in proceeding that has already run its course). Automatically voiding prior judgments stemming from an erroneous exercise of jurisdiction under the UCCJA not only would undermine the principle of finality, but would permit litigants to contest the merits of a controversy in a convenient forum while reserving the "jurisdictional card" in the event of an unfavorable decision. See *B.J.P* [*v. R.W.P.*,] 637 A.2d. [74,] 79 [(D.C. 1994)]; *In re Denio*, 158 Vt. 230, 235, 608 A.2d 1166, 1169 (1992).
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> …. Unless a court has *usurped power not accorded to it*, its exercise of subject matter jurisdiction is binding in subsequent proceedings as long as the jurisdictional question was litigated and decided or the parties had an opportunity to contest subject-matter jurisdiction but failed to do so. See 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2862, at 331 (2d ed. 1995); see also *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986) (absent clear usurpation of power, collateral attack on court's exercise of subject matter jurisdiction is barred by principles of res judicata); Restatement (Second) of Judgments § 12 cmt. d (even if issue of subject matter jurisdiction has not been raised and determined, final judgment ordinarily should be treated as wholly valid if controversy has been litigated in any other respect). This approach is consistent with the modern trend "to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction." Restatement (Second) of Judgments § 11 cmt. e; cf. *Springfield Teachers Ass'n v. Springfield Sch. Dirs*., 167 Vt. 180, 189-90, 705 A.2d 541, 547 (1997) (jurisdictional challenges to arbitration awards

> are not exempt from statute limiting time for motions to vacate such awards); *Denio*, 158 Vt. at 234-35, 608 A.2d at 1169 (requiring preservation of jurisdictional issues in administrative forum).

In re B.C., 169 Vt. 1, 8 (1999) (emphasis added).

***a. whether Coordinators have the authority to issue jurisdictional opinions* sua sponte**

EBR 3(C) expressly allows a Coordinator to issue a Jurisdictional Opinion *sua sponte*: "In addition, district coordinators may issue jurisdictional opinions when, in their judgment, the applicability of Act 250, these rules or an order of the Board needs to be determined." [5]

The Vermont Supreme Court has held on numerous occasions that duly adopted regulations have the force and effect of law. *Christie v. Dalmig, Inc.,* 136 Vt. 597 (1979); *Green Mountain Realty v. Fish*, 133 Vt. 296 (1975). Further, in reviewing an agency's administrative regulations, the Court has also considered itself bound to find that "'so long as the substantive requirements of the enabling statute are not compromised, the regulations are valid...,' and we will defer to the (agency's) expertise." *In re H. A. Manosh Corporation*, 147 Vt. 367, 370 (1986), *quoting In re Orzel*, 145 Vt. 355, 361 (1985). *See, In re Agency of Administration*, 141 Vt. 68, 74 (1982); *Combs v. United States*, 98 F. Supp. 749 (D. Vt. 1951) (if regulations are not arbitrary, capricious or unreasonable, court will not superimpose its wisdom on that of the agency).

While CVPS notes that EBR 3(C) is "more expansive" than 10 V.S.A. §6007(c) in that the Rule allows Coordinators to issue Jurisdictional Opinions *sua sponte*,[6] CVPS does not argue that the Rule is beyond the Board's authority or otherwise

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[5] Prior to the 1996 amendment to the Rules, which added this sentence to EBR 3(C) to expressly authorize Coordinators to issue Jurisdictional Opinions *sua sponte*, the Board had twice upheld this authority in the Coordinators, based on enforcement considerations. *Norwich Associates, Inc. (Farrell Gravel Pit)*, Declaratory Ruling #275, Findings of Fact, Conclusions of Law, and Order at 9 (Apr. 3, 1996); *BHL Corporation*, Declaratory Ruling #267, Findings of Fact, Conclusions of Law, and Order at 10 – 12 (Feb. 11, 1993), *aff'd on other grounds, In re BHL Corp.,* 161 Vt. 472 (1994).

[6] To the extent that CVPS might ask the Board to hear a challenge to its rules, the Board cannot do so. In *Vermont Verde Antique International*, Declaratory Ruling #387, Memorandum of Decision (Sept. 15, 2000), the Petitioner similarly argued that 10 V.S.A. §6007(c) "does not authorize *sua sponte* jurisdictional opinions and that EBR 3(C) is invalid to the extent that it does." Addressing these claims, the Board wrote:

compromises the substantive requirements of §6007(c). [7]

There is no indication that the Assistant Coordinator "usurped power not accorded to" her when she issued the PRS after receipt of the application. The statute specifically and exclusively grants Coordinators the power to issue jurisdictional opinions. 10 V.S.A. §6007(c). Board Rule 3(C) specifically grants Coordinators the authority to issue jurisdictional opinions *sua sponte.* More explicit investitures of authority are difficult to imagine. There is no jurisdictional defect in the *sua sponte* issuance of the 1999 PRS by the Assistant Coordinator.

Further, CVPS had the "opportunity to contest subject-matter jurisdiction" at the time that the PRS was issued, but it failed to do so. *In re B.C., supra,* at 8. It therefore appears that this is one of those circumstances imagined by the *B.C.* Court in which a collateral attack must be foreclosed as a matter of law.

> Petitioner's assertion that an agency should not be able to determine whether activities it regulates are in compliance with the law has no support. The JO is an analysis of whether Petitioner is in compliance with Act 250. Petitioner is limited to challenging the results of the JO by appealing it to the Board.
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> Petitioner's challenge of EBR 3(C) fails for similar reasons as its constitutional challenge. Act 250 does not authorize the Board to hear challenges to its rules. An administrative agency's review is limited to undertakings assigned to it by the legislature. *Trybulski v. B.F. Hydro-Electric Corp.,* 112 Vt. 1 (1941).

Id. at 4.

[7] That the statute states that "any person*… may request* a jurisdictional opinion" is not as conclusive as it might first appear; it does not require that such opinions may only be issued in response to a request. Coordinators are people. Nothing in the statute implies that a Coordinator cannot request a jurisdictional opinion of herself. Further, even if the Board were to interpret the statute to prevent the *sua sponte* issuance of a jurisdiction by a Coordinator, nothing would prevent a Coordinator from asking another person to request a jurisdictional opinion. EBR 3(C) recognizes the absurdity of such a constrained reading of the law by allowing a Coordinator to issue a jurisdictional opinion on her own motion.

b. whether the Coordinator's issuance of the PRS at issue in this case conflicts with EBR 3(C)

CVPS concedes that EBR 3(C) authorizes Coordinators to issue PRSs and jurisdictional opinions, *sua sponte.* However, while not directly challenging the validity of EBR 3(C), CVPS challenges the authority of the Coordinator to issue the particular PRS at issue here. CVPS asserts that "the universal issuance of PR Sheets with applications processed by District 2 invalidates their validity as Jurisdictional Opinions." Apparently, CVPS believes that because the Coordinators for the District 2 Environmental Commission issue PRSs or jurisdictional opinions as a matter of course whenever an application is filed (and, to CVPS's belief, this does not happen in other districts), this somehow conflicts with the language in EBR 3(C) that such opinions should only be issued "when, in their judgment, the applicability of Act 250, these rules or an order of the Board needs to be determined." In effect, CVPS claims that if jurisdictional opinions are issued in response to every application, the Coordinators in District 2 are never exercising the judgment apparently required of them under Rule 3(C).

The Board understands that it is, indeed, the practice of the Coordinators in Districts 2 to issue a PRS with every application, whether there is a contest as to the question of jurisdiction or not. The Board also understands, however, that Coordinators in other Districts also issue PRSs with almost every application which is filed seeking a state permit. This is because most applications presented to Commissions in all districts are for subdivisions or commercial or industrial developments which require water and wastewater permits issued by the Agency of Natural Resources (ANR). Because of this, a PRS for those projects will be completed both by ANR staff and the Coordinators in practically every instance.

Granted, CVPS's experience is different. Because of the nature of its projects, it will be only the rare instance in which an activity to be undertaken by CVPS will trigger review by ANR, as ANR's concerns are generally limited to water and wasterwater-related matters. Thus, while most other developments or subdivisions will be subject to ANR review (and therefore the initiation of a PRS by ANR) this does not occur for the vast majority of actions taken by CVPS. It is therefore not surprising that CVPS might believe that, in District 2, PRSs are issued for its projects with universal frequency, whereas it does not have the same experience in other Districts.

The Board is concerned that it present a consistent process to the public. The Board believes that the issuance of a PRS or a jurisdictional opinion with every application (whether or not one is requested and whether or not the question of jurisdiction is contested) serves a useful purpose of determining jurisdiction at the

outset. The Board will therefore develop a policy that will instruct Coordinators in every District to issue such opinions in every instance.

The question presented by this case, however, is whether the routine issuance of PRSs or jurisdictional opinions by the District 2 Coordinators somehow vitiates their legitimacy. The Board concludes that it does not.

There is no indication that the Assistant Coordinator failed to exercise her judgment in the issuance of the PRS. Further, the Board does not interpret EBR 3(C) as literally as CVPS advocates. Nothing prevents the Coordinator from providing an opinion as to jurisdiction in conjunction with the processing of an application;[8] indeed, it makes sense from the standpoint of administrative economy that jurisdiction be determined as early in the process as possible. After all, why should the process proceed if jurisdiction is lacking?

The Board thus finds no grounds to challenge the validity of the PRS issued to CVPS in February 1999 and therefore reopen the question of jurisdiction over CVPS's proposed transfer of land to the Town of Dummerston.

2. whether a parcel is subject to Act 250 jurisdiction

The other type of "jurisdiction" at issue in this case does not involve the authority of the decision-maker over the subject matter or the parties. Rather, its inquiry goes to the *merits* of the question presented and concerns whether a parcel of land is subject to, or falls within, the "jurisdiction" of Act 250. A PRS or Jurisdictional Opinion renders this "jurisdictional" determination, and such decision may be reviewed by the Board by a timely filing of a Petition for a Declaratory Ruling:

> With respect to the partition or division of land …, any person …. may request a jurisdictional opinion from the district coordinator concerning the applicability of this chapter. …. An appeal from a jurisdictional opinion must be filed within 30 days of the mailing of the opinion to the person appealing. *Failure to appeal within the prescribed period shall render the jurisdictional opinion the final determination with respect to jurisdiction under this chapter unless the opinion has not been properly served*…. Any appeal shall be by means of a petition for declaratory ruling…. The

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[8] While a PRS or a jurisdictional opinion may not be issued by Coordinators in every instance, the opening sentence to the attachment which is issued by the Permit Specialist (and which accompanies the PRS) notes that this should be done as a matter of routine: "When an application is submitted into this office for a permit, we complete a Project Review (PR) Sheet."

> chair may issue preliminary rulings subject to timely objection of any party in interest, in which event the matter shall be considered by the board.

10 V.S.A. §6007(c) (Emphasis added).

A properly-served, unappealed Jurisdictional Opinion is a final determination. *Alpine Stone Corporation, supra,* at 5, *citing* 10 V.S.A. §6007(c).

Deadlines established by statute for the filing of appeals – in this case the filing of a Declaratory Ruling Petition - are jurisdictional, and the Board has no discretion to waive such deadlines. *See, Trask v. Department of Employment & Training*, 170 Vt. 589, 590 (2000); *In re Stevens*, 149 Vt. 199, 200-01 (1987); *In re Guardianship of L.B.*, 147 Vt. 82 (1986); *Allen v. Vermont Employment Security Board*, 133 Vt. 166 (1975); *see also Re: Central Vermont Public Service Corporation and New England Telephone and Telegraph d/b/a Bell Atlantic Telephone Company,* #2W1074-EB, Memorandum of Decision at 6 (June 29, 2000); *Re: Marietta Palmer*, #4C0561-5 EB, Memorandum of Decision (November 24, 1998); *Re: Rock of Ages (Bethel White Quarry)*, Declaratory Ruling #291, Memorandum of Decision and Dismissal Order at 5 (Mar. 28, 1994).

The Board has dismissed Declaratory Ruling Petitions where such Petitions were filed after the 30-day statutory deadline. *Rock of Ages (Bethel White Quarry)*, *supra*; *Algiers Fire District #1,* Declaratory Ruling #297, Proposal for Dismissal (Oct. 18, 1994); *Earth Construction Company*, Declaratory Ruling #278, Memorandum of Decision (Mar. 16, 1993).[9]

Here, on February 2, 1999, the Assistant Coordinator issued the PRS which held that the Project was subject to Act 250 jurisdiction. No Declaratory Ruling Petition was filed with the Board within 30 days of such issuance. The question of jurisdiction over the Project was decided, and the matter is now closed and *not* subject to collateral attack. "The principle of *res judicata,* or claim preclusion, bars litigation of claims or causes of action which were or might properly have been litigated in a previous action." *Agway, Inc. v. Gray,* 167 Vt. 313, 316 (1997) (internal quotation marks omitted) *(quoting State v. Dunn*, 167 Vt. 119, 125 (1997) (*quoting, Old Springs Farm Dev. Inc. v. Ball*, 163

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[9] Likewise, the Board has dismissed untimely appeals from Commission decisions on permit applications. *Re: Okemo Mountain, Inc.,* #2S0351-32-EB, Memorandum Of Decision and Dismissal Order (Altered) (June 28, 2001); *Central Vermont Public Service Corporation, supra; Palmer, supra; North Country Animal* League, #5L0487-4-EB, Dismissal Order (March 29, 2000); *Re: Haystack Group*, #700002-10-EB, Memorandum of Decision (March 29, 1989); *Re Club 107*, #3W0196-3-EB, Memorandum of Decision (Feb. 2, 1987); *Re: Puppy Acres Boarding Kennel*, #2W0568-2-EB, Memorandum of Decision (Oct. 11, 1985), *aff'd, In re Puppy Acres Boarding Kennel*, No. 85-490 (Vt. Nov. 21, 1986) (unpublished).

Vt. 466, 472 (1995))); *and see Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) (a party to an action who has had a full and fair opportunity to litigate an issue determined by the judgment is estopped from relitigating the same issue in a subsequent action). And whether or not the Board might have answered the question differently is not relevant.

To adopt CVPS's argument that jurisdiction may be raised at any time would allow a Coordinator's decision that a particular action is a "development" or "subdivision" for purposes of Act 250 jurisdiction to be challenged months or years after it was issued, contrary to the express words of §6007(c). Moreover, the fact that the present challenge comes collaterally makes it all the more improper. *Bennett Estate,* 140 Vt. at 343.

As found above, the Assistant Coordinator had the authority to issue the PRS. The PRS was final 30 days after its issuance, and its merits cannot be relitigated through the present action.

The appeal in this matter is untimely, and the Board lacks the jurisdiction to hear it. Accordingly, this matter must be dismissed.

B. CVPS's remaining arguments

CVPS argues next that it is "unfair to expect an applicant to appeal a PR Sheet, which it did not request, when the applicant obviously believes – however erroneously – at the time of its issuance that an Act 250 permit is required for its project." In effect, CVPS's claim is that, because it mistakenly believed that a permit for the Project was necessary – and therefore did not appeal the identical findings in the Jurisdictional Opinion – that the matter should be reopened as a matter of equity. But finality has its virtues as well. It is equally unfair to allow CVPS to reopen a matter that has been closed for three years, merely because of its own mistaken beliefs.

CVPS argues also that a PRS should be seen to be only a "useful tool" for an applicant who might be unaware of the permits it must obtain, and that even the Coordinators do not intend PRSs to serve as jurisdictional opinions. Not only is there no basis for an assumption concerning the intent of the Coordinators, the PRS clearly states that it is a jurisdictional opinion and provides a direct reference to the statute.[10] This argument is without merit.

[10] The Board likewise finds no merit to CVPS's claim that the attachment which is issued by the Permit Specialist and which accompanies the PRS somehow invalidates it effectiveness as a Jurisdictional Opinion. Indeed, the attachment states, "The PR sheet identifies other permits that may be required for your project." A clearer indication of its use and meaning is difficult to comprehend.

The remainder of CVPS's arguments - the August 1999 phone conversation between the Assistant Coordinator and Mr. Jakubowski, the zoning and ANR approval obtained by CVPS, and, indeed, CVPS's ultimate claim that, on its merits, the partitioning of the Project is not a "subdivision" under Act 250 because it is merely an annexation or a boundary line adjustment - all have no bearing on the heart of this decision -- namely, that the present matter is an untimely appeal of the 1999 PRS.

The Board does note, however, that three years have passed since the time that the February 1999 PRS was issued. Circumstances may have changed since that date, and lots that CVPS created prior to April 1997 would no longer be counted toward those which would trigger jurisdiction under 10 V.S.A. §6081. *See* 10 V.S.A. §6001(19) and EBR 2(B). Assuming that CVPS has not transferred the one-acre subject parcel to the Town or otherwise acted to irretrievably trigger jurisdiction over the parcel, CVPS may well be able to seek a new jurisdictional opinion concerning the parcel, with the result that jurisdiction might not be found, depending on the facts as they presently exist.

IV. Order

1. The Board takes official notice of the official file maintained by the Board in this matter.

2. CVPS's Petition for Declaratory Ruling is dismissed.

Dated at Montpelier, Vermont this 2nd day of April 2002.

ENVIRONMENTAL BOARD

__/s/Marcy Harding_____
Marcy Harding, Chair
Samuel Lloyd
W. William Martinez
Alice Olenick
Gregory Rainville
Jean Richardson
Donald Sargent