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

Re: Alexander D. McEwing and McEwing Services, LLC — Declaratory Ruling #417

Memorandum of Decision

This proceeding involves a November 20, 2002 Petition (Petition) for Declaratory Ruling to the Environmental Board (Board) filed by Alexander D. McEwing and McEwing Services, LLC (McEwing) from a jurisdictional opinion which concludes that the construction of a telecommunications tower requires a permit pursuant to 10 V.S.A. Ch. 151 (Act 250).

I. History

On February 3, 2003, former Board Chair Marcy Harding issued a Prehearing Conference Report and Order (Prehearing Order) which determined that a Preliminary Issue raised by McEwing would need to be addressed before a hearing on the merits could be held. The Prehearing Order states the Preliminary Issue to be:

> Does the Vermont Supreme Court decision in *In re: Vermont Verde International, Inc.,* No. 2001-116 (Sept. 6, 2002), invalidate all or part of the final sentence of Environmental Board Rule 3(C)(3), which states, "A district coordinator may reconsider, or accept a request for reconsideration of, a jurisdictional opinion at any time upon an adequate showing of a failure to disclose material facts or fraud"? [1]

On February 21, 2003, McEwing filed its brief on the Preliminary Issue. No other party has filed a brief on this issue.

This Memorandum of Decision addresses the Preliminary Issue.

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[1] If the Board finds that Vermont Verde does not invalidate part of EBR 3(C)(3), the Board will then decide the Merits Issue: "Is the Project subject to Act 250 (10 V.S.A. Ch. 151) jurisdiction as a substantial change to a pre-existing development pursuant to 10 V.S.A. §6081(m) and Environmental Board Rule 2(G)? "

II. Findings of Fact

1. On August 17, 2002, in response to an August 9, 2002 request from Brian Sullivan, Esq. on behalf of McEwing, the District # 4 Environmental Commission Coordinator (Coordinator) issued a Project Review Sheet (PRS)[2] regarding McEwing's proposed replacement telecommunications tower and related improvements on Robbins Mountain in Bolton, Vermont (Project). Based on information that Mr. Sullivan presented to the Coordinator, the PRS concluded that the Project was not subject to Act 250 jurisdiction.[3]

2. On October 28, 2002, pursuant to Environmental Board Rule (EBR) 3(C)(3), the Coordinator reconsidered her conclusion in the PRS and issued Jurisdictional Opinion # 4-180.

3. In her October 28, 2002 reconsideration of her original PRS (Reconsidered JO), the Coordinator found that there had been significant changes in the design and construction of the Project from the information that she had been given in August 2002.

4. As a result of the changes in the Project's design and construction, the Coordinator concluded that the Project is subject to Act 250 jurisdiction, and a Land Use Permit is required. [4]

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[2] Although it is often less formal and less detailed in its analysis, a PRS is a jurisdictional opinion.

[3] At McEwing's request, the PRS was re-issued on August 22, 2001, in order to distribute copies to other persons.

[4] The Board notes that the Coordinator's Reconsidered JO included a finding that "At the end of September 2002, the Act 250 program received several inquiries concerning the replacement tower and its increased visibility." The Prehearing Order in this matter notes that McEwing disputes the facts alleged in the Reconsidered JO, and for the purposes of this discussion, the Board does not treat these "inquiries" as independent requests for a jurisdictional opinion, subsequent to McEwing's August 9, 2002 request, although the Board recognizes that they could be so treated in the appropriate case.

III. Conclusions of Law

A. The Statute – 10 V.S.A. § 6007(c)

The pertinent parts of the relevant statute, 10 V.S.A. §6007, state:

> (c) With respect to the partition or division of land, or with respect to an activity which might or might not constitute development, any person … may request a jurisdictional opinion from the district coordinator concerning the applicability of this chapter. …. A jurisdictional opinion of a district coordinator shall be subject to a request for reconsideration and may be appealed to the board by the applicant, by individuals or entities who may be affected by the outcome of the opinion, or by parties that would be entitled to notice under section 6084, if jurisdiction were determined to exist. An appeal from a jurisdictional opinion must be filed within 30 days of the mailing of the opinion to the person appealing. ….

B. The Rule – EBR 3(C)(3)

> (3) A jurisdictional opinion of a district coordinator may be appealed to the environmental board by any person who qualifies as a party under Rule 14(A) or who may be affected by the outcome of the opinion. … A district coordinator may reconsider, or accept a request for reconsideration of, a jurisdictional opinion at any time upon an adequate showing of a failure to disclose material facts or fraud.

C. In re Vermont Verde Antique International Inc., 13 Vt.L.W. 231 (2002)

McEwing argues that the September 2002 decision in *Vermont Verde* prohibits the Coordinator's issuance of the Reconsidered JO. In *In re Vermont Verde Antique International Inc.,* 13 Vt.L.W. 231 (2002), the Vermont Supreme Court held that the statute, 10 V.S.A. § 6007(c) does not contemplate Coordinators issuing *sua sponte* (i.e. on their own motion, unrequested) jurisdictional opinions. The Court therefore decided that EBR 3(C), as it authorizes the issuance of *sua sponte* jurisdictional opinions, is beyond the authority granted by §6007(c).

The Court first noted that an administrative body may promulgate only those rules within the scope of its legislative grant of authority. *In re Vermont Verde Antique*

International Inc., 13 Vt.L.W. 231, 232 (2002), citing, *In re Agency of Administration*, 141 Vt. 68, 76 (1982) (agency cannot use its rule-making authority to exceed or compromise its statutory purpose). Thus, an agency rule must be reasonably related to the intent of the enabling legislation. *In re Vermont Verde,* 13 Vt.L.W. at 232, citing *In re Baptist Fellowship of Randolph, Inc.,* 144 Vt. 636, 638 (1984).

The Court based its decision on the statute – focusing on the language in the statute that reads, "any person may … request a jurisdictional opinion *from* the district coordinator concerning the applicability of this chapter." 10 V.S.A. §6007 (emphasis added). The Court found: "[T]his suggests that 'any person' refers broadly to third parties exclusive of the coordinator, who is authorized to rule on such requests, but not to make them." *In re Vermont Verde,* 13 Vt.L.W. at 232.

The Court could have ended its discussion at this sentence in its decision, but it chose to make a further point - - that the Legislature contemplated separate roles for the Board (1) as a party in an enforcement action, and (2) as an adjudicatory body in jurisdictional determinations made at the request of the landowner or a third party. Thus, wrote the Court, "The Legislature has taken care to separate the prosecutorial and adjudicatory functions of the Board, which serves in turn to maintain its integrity when functioning as an adjudicatory forum for resolving jurisdictional questions." *Id.* The Court viewed the use of *sua sponte* jurisdictional opinions to be "the equivalent of an enforcement action." The Court continued:

> Although the statute provides that "any person" may request a jurisdictional opinion, the statutory context and structure demonstrates a legislative understanding that the request will originate from the landowner or an interested third party, not from an official of the Board itself.

Id.

The Court wrote further that "an alternative ruling would result in a peculiar scenario. " The Court explained:

> [A]llowing the district coordinators to issue jurisdictional orders in the absence of a landowner or third party request … would put the Environmental Board in the awkward position of adjudicating orders based on evidence offered by its constituent officers. The district coordinator did not even appear and offer evidence at VVA's hearing before the Board. VVA was both denied the opportunity to confront an opposing party and shouldered with the burden of disproving allegations raised by the very entity charged with deciding their outcome. Accepting such a situation would put future parties before the Board in the manner that a schoolboy goes before the principal, and at a comparable disadvantage.

Id. The Court thus concluded that "EBR 3(C), to the extent that it authorizes the issuance of *sua sponte* jurisdictional opinions at the request of a district coordinator, exceeds the scope of §6007(c) and is invalid." *Id.* at 232-33.

D. Application of the Vermont Verde *decision to the instant matter*

In this case, McEwing seeks to take the *Vermont Verde* decision to another level – that a Coordinator is without the authority to reconsider, *sua sponte,* an initial decision, even when the decision arises out of a request from the landowner.

Relying heavily on *Vermont Verde,* McEwing raises a series of arguments in support of its claim that *sua sponte* reconsiderations are prohibited.

1. that the Coordinator issued a sua sponte jurisdictional opinion

McEwing contends that the jurisdictional opinion in the instant matter was, like the *Vermont Verde* jurisdictional opinion, issued *sua sponte.* While is it true that the *Reconsidered JO* was issued without a further request from McEwing or a third party, *the original jurisdictional opinion* was not issued *sua sponte*, it was issued at McEwing's request. This, in the Board's opinion, is a distinction with a difference: the Coordinator did not commence the jurisdictional process on her own, something which *Vermont Verde* disapproved; rather, she continued a process which McEwing itself voluntarily commenced.

Because the Reconsidered JO cannot be viewed in isolation as an independent act but is, rather, a continuation of an initial, valid request for a jurisdictional opinion, the blurring of prosecutorial and adjudicatory roles that the Supreme Court found to be troubling in *Vermont Verde* is not apparent, and the Coordinator's reconsideration of her earlier decision should not be barred on policy grounds.

The specific facts of this case also raise some disturbing policy concerns. Once McEwing had a decision which held that Act 250 jurisdiction was not triggered, it began to construct its tower. As far as the Coordinator was aware, the construction was following the limitations which McEwing had presented in its August 2002 request; while the construction was occurring, she therefore had no reason to believe that she should request that the Board bring an enforcement action to prevent unauthorized construction, and the tower was built. Once a building or other development is constructed, it becomes more difficult for the Board (or any other regulatory authority) to require its demolition; it is easier to stop illegal construction than to demand its removal once construction has been completed. In effect, therefore, there is an incentive to, as here, present incomplete or incorrect information to a Coordinator, obtain a jurisdictional opinion based on inaccurate facts, and then engage in the construction of a different

project, secure in the knowledge that the Coordinator cannot revisit the jurisdictional question absent a request from a third party, a request which may never come.

2. that McEwing is not confronted by an opposing party

Although the *Vermont Verde* Court noted that the Coordinator did not appear to offer evidence at the hearing before the Board, the Court failed to indicate that any prejudice resulted to Vermont Verde from this fact. The Court implies that Vermont Verde was deprived "of the opportunity to confront an opposing party," 13 Vt.L.W. at 232, but there is no explanation in the Court's decision as to how the Coordinator's absence worked to Vermont Verde's disadvantage, especially considering the fact that Vermont Verde did not bear the burden of persuasion.

Likewise, while McEwing notes that there is no other party to the present Petition, it does not state the prejudice that results from the fact that it is the only party which is present to provide evidence or argument to the Board.

3. that McEwing must shoulder the burden of disproving the Coordinator's allegations

It is possible that the Court's *Vermont Verde* decision misunderstood the application of burden of proof in Declaratory Rulings of this nature. Vermont Verde was not "shouldered with the burden of disproving allegations raised by the very entity charged with deciding their outcome." 13 Vt.L.W. at 232. It is true that Vermont Verde, as the party who claimed an exemption from Act 250 jurisdiction, had the burden of *producing information* as to its pre- and post-1970 operations so that the Board could have information on which to determine whether or not a substantial change had occurred (thereby triggering Act 250 jurisdiction over a pre-existing development. [5] However, the Board's Prehearing Order in the *Vermont Verde* case clearly states, "The *burden of persuasion* with respect to the substantial change lies with the state or those who contend that permit is required." *In Re: Vermont Verde*, Declaratory Ruling 387, Prehearing Conference Report and Order at 2 (Jul. 13, 2000) (emphasis added), citing , *Thomas Howrigan Gravel* Extraction, Declaratory Ruling #358, Findings of Fact, Conclusions of Law, and Order at 14 (August 30, 1999). Thus, the Court's statement that Vermont Verde was somehow put in the untenable situation of having to "disprove allegations" is incorrect; Vermont Verde bore no burden of persuasion.

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[5] In a detailed discussion of burdens of proof, the Board later dismissed Vermont Verde's Declaratory Ruling Petition when it failed to produce the required evidence. *In Re: Vermont Verde*, Declaratory Ruling 387, Dismissal Order (Feb. 2, 2001). This dismissal led to the Supreme Court appeal; the Court's decision does not address Vermont Verde's claims that it should not have this burden.

While the Prehearing Order in this case does not discuss burdens of proof, the *Thomas Howrigan Gravel Extraction* and the *Vermont Verde* decisions, as noted above, place the burden of persuasion on those who seek to apply jurisdiction, not on McEwing. McEwing's argument is therefore without merit.

4. that there is no statutory authority that permits a Coordinator to reconsider, sua sponte, an initial jurisdictional opinion

McEwing notes (and emphasizes) the language in the statute that reads:

> A jurisdictional opinion of a district coordinator shall be subject to a request for reconsideration and may be appealed to the board *by the applicant, by individuals or entities who may be affected by the outcome of the opinion, or by parties that would be entitled to notice under section 6084, if jurisdiction were determined to exist. An appeal from a jurisdictional opinion must be filed within 30 days of the mailing of the opinion to the person appealing*.

McEwing argues that "this statutory provision authorizes appeals of the jurisdictional opinion only by other parties, not the district coordinator." (Emphasis added). Thus, McEwing, contends, only the first four sentences of EBR 3(C)(3) are authorized – not the last sentence, which permits the Coordinator to reconsider "a jurisdictional opinion at any time upon an adequate showing of a failure to disclose material facts or fraud."

McEwing's argument, however, is misplaced: the Coordinator's actions in this matter do not constitute an appeal of her initial decision; a reconsideration is not an appeal, something which the statute makes clear when it speaks to both "reconsiderations" and "appeals" as different animals in the same sentence. Thus, the argument that only parties can appeal is misdirected, and nothing in the statute directly prohibits the acts of the Coordinator in this case.

McEwing's statutory arguments therefore fail, and for the policy reasons stated above (in particular, that the reconsideration is not the equivalent to an original decision but is merely a continuation of an initial third-party request), *sua sponte* jurisdictional reconsideration decisions should be treated differently from *sua sponte* initial jurisdictional opinions. The Board therefore concludes that the *Vermont Verde* decision does not control this matter, and it answers the Preliminary Issue in the negative.

IV. Order

1. The Vermont Supreme Court decision in *In re: Vermont Verde International, Inc.,* No. 2001-116 (Sept. 6, 2002), does not invalidate all or part of the final sentence of Environmental Board Rule 3(C)(3), which states, "A district coordinator may reconsider, or accept a request for reconsideration of, a jurisdictional opinion at any time upon an adequate showing of a failure to disclose material facts or fraud." The Preliminary Issue is therefore answered in the negative.

2. The Chair shall issue a Scheduling Order relative to the Merits Issues in this matter.

Dated at Montpelier, Vermont this 18th day of April 2003.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden___
Patricia Moulton Powden, Chair
George Holland
* Samuel Lloyd
Donald Marsh
** Patricia A. Nowak
Alice Olenick
Richard C. Pembroke, Sr.
Jean Richardson
Donald Sargent

* Board Member Lloyd did not participate in the April 16, 2003 deliberations of this matter but concurs with the result.

** Board Member Nowak dissents from this decision.

Board Member Christopher D. Roy was present during, but did not participate in, the April 16, 2003 deliberations of this matter.