

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

Re: Vermont RSA Limited Partnership

Declaratory Ruling #441

Memorandum of Decision

This proceeding involves a Petition (Petition) for a Declaratory Ruling (DR) filed with the Environmental Board (Board), by Vermont RSA Limited Partnership d/b/a Verizon Wireless (Vermont RSA) from a Jurisdictional Opinion which asserts jurisdiction pursuant to 10 V.S.A. Ch. 151 (Act 250) over the proposed construction of cellular and PCS antennas in the towers of St. Mary's Star of the Sea Church in Newport, Vermont (Project).

I. Procedural History

On June 24, 2004, in response to a January 27, 2004 request for a Jurisdictional Opinion from Vermont RSA, the District 7 Environmental Commission Assistant Coordinator issued Jurisdictional Opinion #7-219, which found Act 250 jurisdiction over the Project. Vermont RSA timely requested reconsideration of this decision.

On October 22, 2004, the District 7 Environmental Commission Coordinator issued Jurisdictional Opinion #7-219 (Reconsideration), concluding that the Project is subject to Act 250 jurisdiction.

On November 18, 2004, Vermont RSA filed the Petition. Stating that it intends to file an Act 250 permit application for the Project, Vermont RSA requests that its Petition be held in abeyance until the District Commission has decided the application and all appeal periods have expired.

On December 16, 2004, an attorney representing a group of neighbors to the Project (the Neighbors)¹ filed a Memorandum with the Board, asking that proceedings on the Petition go forward.²

On January 7, 2005, Vermont RSA replied to the Neighbors' Memorandum.

On January 19, 2005, the Board deliberated on the issue presented.

¹ The Board notes that the Neighbors have yet to establish standing to participate in this Petition.

² The Neighbors' Memorandum also included arguments as to why Act 250 jurisdiction over the Project should be found. This decision does not address those claims.

II. Discussion

In its Petition, Vermont RSA states that it intends to file an application for an Act 250 Land Use Permit for the antennas:

Because Verizon Wireless intends to file its Act 250 application with the District Environmental Commission (“DC”) within the near future, logic and judicial economy militate in favor of waiting to allow the DC to complete the permit hearings and to rule on the permit application that will soon be pending before it. For this reason, this Petition should be held in recess until the DC has made its ruling and all appeal periods have expired.

Pursuant to *In re Barlow*, 160 Vt. 513 (1993), Vermont RSA may pursue an Act 250 permit for the Project while still contesting Act 250 jurisdiction over the Project.

Vermont RSA’s request is not uncommon, given the rights granted under *Barlow*. For example, *In Security Self Storage, Inc.*, Declaratory Ruling #386, Continuance Order at 2, in response to a similar request:, the former Chair wrote:

10 V.S.A. § 6085(e) and Environmental Board Rule 16(D) encourage the promotion of expeditious, informal, and non-adversarial resolution of issues. The Petitioners intend to file an application for a permit amendment with the Commission; resolution of such application may resolve the issues presented by this Petition.

Therefore, “in the interest of the efficient and economic use of resources,” former Chair Harding issued an Order continuing Security Self Storage’s Declaratory Ruling petition pending resolution of its application for a Permit. *Accord, Re: Rutland Public Schools*, Declaratory Ruling #414, Continuance Order, (Dec. 17, 2002); *Burlington Broadcasters, Inc.*, Declaratory Ruling #322 and *NYNEX Mobile*, Declaratory Ruling #323, Continuance Order at 2 (Aug. 13, 1996).

In the above-noted cases in which the Board honored the request of the landowner-applicant, however, no other party has appeared to argue against holding a petition in abeyance while a permit application moves forward. This is the first instance in which any potential party to a Declaratory Ruling proceeding has requested that the proceeding go forward contrary to a landowner’s request.

The Board is presented with two competing and diametrically opposed arguments, both based on claims of administrative efficiency and economy. Vermont

RSA argues that it makes little sense to proceed with a jurisdictional process when it may obtain a permit and withdraw its Petition. Should the Board proceed with the Declaratory Ruling petition and find jurisdiction, and should the Commission later issue a permit which is acceptable to Vermont RSA, one could then argue that the Board's actions on the petition were unnecessary. Conversely, should the Board hold the petition in abeyance, and the Commission issue an acceptable permit, economy will be also served when Vermont RSA withdraws the petition.

The Neighbors contend that the Commission should not proceed with a permit application for a Project which would be unnecessary should the Board later find that no jurisdiction exists.³

Under any scenario (save the one which depends on Vermont RSA's agreeing with a permit's terms and conditions), either the Board or the Commission could find itself engaging in actions that may later prove to have been needless. This is, therefore, not a matter in which a balancing of the efficiencies readily yields a clear and easy answer. Yet it is this balance that the Board must attempt to find.

The Board concludes that, in this case, the arguments of the Neighbors are the more compelling. Given all the paths that this matter can follow, only one action has the potential to immediately and conclusively end this case, independent of any decision by any party - - that the Board proceeds with the Petition and finds no jurisdiction.⁴ All other permutations result in subsequent proceedings.

Further, the Board questions the efficiency, given the context of this matter, to proceed with a permit application when jurisdiction is at issue. It is better for the Board to decide the jurisdictional question than to ask the Commission to expend its resources in proceedings whose validity may ultimately be challenged by Vermont RSA.

³ The Neighbors further assert that a "cloud" may hang over the Commission proceedings, in that the Commission may feel obliged to issue a permit favorable to Vermont RSA, in order to forestall jurisdictional challenge by Vermont RSA. Vermont RSA counters that one should not assume that the Commission will be so affected. The Board cannot agree with the Neighbors that the Commission process would be so unduly influenced, and its decision today does not rely upon this argument.

⁴ The Board does not, of course, intend this statement to indicate that jurisdiction does not exist over the Project. A decision on that question must await a hearing and the arguments of the parties.

III. Order

1. The Board will proceed with the Petition.
2. The Chair will set this matter for a Prehearing Conference.

Dated at Montpelier, Vermont this 25th day of January 2005.

ENVIRONMENTAL BOARD

*/s/ Patricia Moulton Powden*____
Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
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