

State of Vermont  
Water Resources Board

Re: Appeal of Verburg/Wesco  
Authority: EP Rules §2-02E

Docket No. 91-03

ORDER

**BACKGROUND**

On April 26, 1991, counsel for Jacob and Harmke Verburg and Wesco, Inc. filed an appeal pursuant to the Environmental Protection Rules ("EP Rules"), §2-02E, of a Department of Environmental Conservation ("DEC") ruling on a Petition for Declaratory Ruling. This ruling addressed the issue of whether an applicant can meet flood plain elevation requirements of the EP Rules, §3-09, by modifying an otherwise unsuitable building site through the placement of fill pursuant to EP Rules §7-14.

According to findings made by the DEC hearing officer, the petitioners own a two lot subdivision on Route 2 at the Richmond interchange of I-89. The subdivision took place in 1986 pursuant to Deferrals of Permit issued by the DEC.\* The petitioners proposed to construct a gasoline station and convenience store on one lot and a sewage disposal system for the public building on the other lot. Both lots are located within a 100 year flood plain.

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\* Section 3-06 of the Subdivisions portion of the EP Rules provides that a purchaser of an unimproved lot of land less than 10 acres in area may waive his development rights thereto involving the construction or erection of any building or structure, the useful occupancy of which would require the installation of plumbing and sewage treatment facilities. Upon the filing of an application consisting of a plot plan of the parcel and statement signed by the purchaser of the parcel that he waives development rights, the Division may issue to the proprietor a deferral of permit for conveyance of the parcel. No structure or building, the useful occupancy of which will require the installation of plumbing and sewage treatment facilities may be constructed or erected on a lot subject to a deferral of permit, unless the lot owner first obtains a permit as required by the subdivision regulations.

At approximately the same time an appeal was filed with the Board, an appeal was filed with the Vermont Supreme Court. The petitioners claimed that both appeals were necessary. They reasoned that the decision from which appeal was taken concerns, in some respects, the subdivision regulations of the EP Rules. In part, they argue, the decision being appealed concerns waste disposal regulations. Section 2-02E of the EP Rules provides that appeals from declaratory rulings by DEC under the subdivision regulations go to the Water Resources Board. The section provides that all other appeals go to the state court system.\* The Supreme Court case has been stayed pending a decision by the Board regarding whether it does or does not have jurisdiction.

The filing was completed on May 7, 1991. A pre-hearing conference was held on June 26, 1991, at which time certain participants were requested to file a Petition for Party Status. The Richmond Land Trust ("RLT") filed such a petition on July 8, 1991.

On July 10, 1991, the DEC filed a Motion to Dismiss arguing that the Board lacks jurisdiction to hear the case and that, even if the Board determines that it does have jurisdiction, jurisdiction was divested when the petitioners filed the simultaneous appeal with the Supreme Court. No party filed an opposition to the motion.

Also on July 10, petitioners filed a Memorandum in Opposition To Petition For Party Status regarding the RLT request.

A final pre-hearing order was issued on September 3, 1991.

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\*The EP Rules govern four different regulatory programs: subdivisions, public buildings, campgrounds, and mobile home parks. Section 3-09(B) of the Subdivisions portion of the EP Rules specifies that a certain percentage of a subdivided lot must be at least one foot above the 100 year flood plain elevation. The authority for site modification to a proposed subdivision site is contained in §7-14 of the Sewage Disposal portion of the EP Rules. These two sections of the EP Rules are the subject of this action and give rise to petitioners' perceived need to file appeals simultaneously with the Board and with the Vermont Supreme Court.

## DISCUSSION

### I. Jurisdiction

Title 3 V.S.A. §2873(c) sets forth the statutory authorization for the DEC and the Board in relation to the application of the EP Rules. Subsection (3) of §2873(c) provides that the DEC may make declaratory rulings on the statute and regulations regarding, among other things, the subdivision of land, pursuant to 3 V.S.A. §808 (Administrative Procedures Act). The subsection makes no provision for an administrative review or appeal of a DEC declaratory ruling.

Subsection (4) of §2873(c) provides that the Secretary may make any one of a number of decisions relative to agency permits regulating buildings or land. The subsection also states that appeals shall be to the Board. These appeals are in relation to the permit decisions made by the Secretary. This appeal is with respect to a declaratory ruling. Subsection (4) of §2873(c) provides no specific delegation of appeal authority to the Board for declaratory rulings.

Title 3 V.S.A. §808 permits an appeal under 3 V.S.A. §815(a) to the Supreme Court in those situations where no other court is expressly provided by law. The question then is whether an appeal lies under §815(a) to the Supreme Court or under §2-02E of the EP Rules to the Board.

A quasi-judicial body has only those powers expressly conferred by statute, 3 V.S.A. §203, Miner v. Chater, 137 Vt. 330, 333 (1979), or prescribed in terms definite enough to serve as a guide. State v. Auclair, 110 Vt. 147 (1939). An agency must operate for the purposes and within the bounds authorized by its enabling legislation. In re Agency of Administration, 141 Vt. 68, 75 (1982). The courts are especially vigilant where an agency exercises its adjudicative functions. Id.

Petitioner suggests that the EP Rules provide the Board with jurisdiction to hear appeals of DEC declaratory rulings. There is no statutory basis, however, for DEC giving such appellate power to the Board. The legislature cannot transfer its legislative power to enact laws. Village of Waterbury v. Melendy, 109 Vt. 441, 451. Functions which are strictly and entirely legislative cannot be delegated. Id. The legislature can, however, confer discretion upon an agency in the manner and method for execution of validly adopted statutes. Vermont Educational Buildings Financing Agency v. Mann, 127 Vt. 262 (1968) (and cases cited). The grant of appellate jurisdiction by DEC to the Board does not involve the manner and method of execution of §2873(c)(3). It is a grant of legislative power and is beyond DEC's jurisdiction.

The Board holds that it lacks jurisdiction under §2-02E of the Environmental Protection Rules to hear appeals of a declaratory ruling of the Department of Environmental Conservation authorized under Title 3 V.S.A. §2873(c)(3).\*

## II. Supreme Court Appeal

The DEC argues that even if the Board has authority to review DEC's declaratory ruling, the Board's jurisdiction was divested when Petitioners filed a simultaneous appeal with the Supreme Court. Because the Supreme Court has stayed any consideration of the case pending a decision by the Board, this argument is moot.

## III. Party Status

Unless and until this case is remanded to the Board with directions to hear the appeal, there is no reason to address the issue of party status.

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\*The DEC made several arguments in addition to that discussed above supporting its motion to dismiss. The DEC argues that it is proper that it be responsible for interpreting and determining the applicability of its own rules. Whether and by whom an appeal can be heard are independent of the issue of who should interpret and determine the applicability of a rule in the first instance.

The DEC also argues that the Board hearing an appeal would frustrate the legislature's mandate for "prompt disposition" of declaratory rulings. The legislation merely directs an agency to dispose of these rulings quickly. The Board is not yet persuaded that the mandate to be prompt extends to an appeal of a declaratory ruling.

Dated at MONTPELIER, Vermont, this 9th day of January, 1992.

Vermont Water Resources Board  
by its Chair

  
Dale A. Rocheleau, Chair

Concurring: Elaine Little  
Stephen Reynes