

To: Act 250 Commission Members
From: Gerry Tarrant, Advisor
Subject: Update of Act 250 appeals and decisions
Date: December 6, 2018

I wish to update the appeal materials earlier presented to this Commission. To do so I am attaching three sets of documents. These include the information I earlier presented but brings them up to date by including appeals and decisions filed through November 2018. With the assistance of Joanne Charbonneau (Clerk of the Environmental Division) I took a stab at explaining some of the decisions identified in the attachments.

Attached are:

- 1.) data on appeals of Act 250 District Commission decisions from January 1, 2013 to December 2018;
 - 2.) data on appeals of Jurisdictional Opinions from January 1, 2013 to December 2018;
- and
- 3.) Administrative Directive No. 30 – ENVIRONMENTAL CASE DISPOSITION GUIDELINES.

From 2013 forward there have been a total of 65 appeals from District Commission decisions (detailed on sheet #1) and a total of 21 appeals from District Coordinator Jurisdictional Opinions (detailed on sheet #2), for a total of 86 appeals from Act 250 proceedings. These figures do *not* include Act 250 enforcement actions.

During this time frame there were twelve coordinated appeals involving Act 250.

During this time (1/1/13 to 12/4/18) when we looked at all of the cases the Environmental Division handles we found there were 980 cases added (not including civil citation matters) and 1,061 cases disposed (not including civil citation matters). These numbers include the Act 250 cases identified above. I tried to assess cases that seemed to take a little longer to resolve to give you an idea of some of the more novel and complex cases facing the Court. My review was intended to look at reasons for any possible delays or extensions, not understand the reasoning behind each party's argument. The Clerk of the Court assisted me in providing the following descriptions.

There were a handful of Act 250 appeals that seemed to exceed the Guidelines. A closer look indicates each seemed to present complicated or novel legal questions and issues. In nearly all of these appeals, our review indicates the parties presented strong reasons why the Court should provide extensions of time to the parties before entertaining its final rulings.

WHISTLEPIG. This case seems to have taken the longest, 1,002 days. While this particular docket was never formally coordinated with other matters, it probably should have been identified as a coordinated set of appeals, since the docket sheets reveal that the jurisdictional opinion appeal (Docket #21-2-13 Vtec) was regularly discussed at court

conferences with an appeal from the Act 250 permit that was subsequently issued to WhistlePig (Docket #58-5-14 Vtec) and an appeal from the municipal conditional use approval issued to Whistlepig (Docket #60-5-14 Vtec).

The Court initially set the JO appeal for trial April 1, 2013, but the parties filed a joint motion to continue the trial. The parties represented that the Act 250 and municipal permit applications that were then pending before the District Commission and the Town could lead to a voluntary resolution to the JO appeal. The Court granted the parties stipulated motion to continue the trial in the JO appeal - waiting for these two decisions.

Both the District Commission and the Town approved WP's applications, with conditions. WP appealed the conditions placed on its Act 250 permit, and concerned neighbors appealed the municipal approval. There was also extensive motion practice (the Court addressed 19 motions in the three appeals) and the trial was scheduled and continued at least twice.

The WP JO appeal initially challenged the District Coordinator's determination that the development required an Act 250 permit. All three appeals were ultimately closed after additional motions were decided. The parties then filed a stipulated motion to dismiss.

BURLINGTON AIRPORT. This decision regards the F-35's. There were numerous parties involved. The case was filed on 4/5/13, a motion for summary judgment was filed on 11/1/13, then a cross motion for summary judgment was filed on 12/3/13. Parties filed a Motion to Strike (certain aspects of the motion for summary judgment) on 1/22/14. A decision was issued on 5/13/14. The matter was appealed to the Supreme Court and affirmed.

LEVERENZ JO appeal. This took just over 11 months to resolve, from initial filing to judgment order. The appeal concerned the issue of whether a permit for a prior horse farm exhibition facility that had been abandoned and where the Act 250 permit was allowed to expire, could nonetheless be the basis for asserting that Act 250 jurisdiction applied upon a subdivision of that land that was otherwise below the Act 250 jurisdictional threshold.

This initial JO appeal was filed when the statute authorized the NRB to initially review all jurisdictional appeals. Therefore, the court review of the appeal did not begin until after the NRB completed its review. (The statute has since been amended to provide that JO appeals are expedited by direct appeals to the Environmental Division.)

Due to its complexity, the parties requested the Court to allow oral argument before rendering its decision on the pending cross motions for summary judgment. The parties filed motions for an extension of time to respond to the other parties' motion filing. The Court issued its decision and judgment order prior to the case reaching its one-year anniversary of filing.

BRADY SULLIVAN. This appeal was somewhat similar to WhistlePig in that there was both an appeal from the jurisdictional opinion (concluding that the developer who wanted to land his private helicopter in a pre-existing development needed to obtain Act 250 approval), and the developer's subsequent appeal from the Act 250 permit that was issued to him. The filing of an

Act 250 application while the JO appeal was pending caused the parties to ask that the JO appeal be placed on hold.

There were also two municipal appeals filed with the Court that were coordinated with the Act 250 appeals; the first was the developer's appeal from a notice of zoning violation issued by the town after he began landing his helicopter without first receiving a municipal permit (*Brady Sullivan SV, LLC Notice of Violation*, Docket No. 144-10-13 Vtec); the second appeal was also brought by the developer, after his PUD amendment application for helicopter landings was denied (*Snow Vidda Condominium PUD Amendment*, Docket No. 145-10-13 Vtec).

The Brady Sullivan appeals seem to have been further complicated by the developer's assertion that the Court's jurisdiction was superseded by the jurisdiction of the federal transportation authority ("FTA"). After the FTA approved the developer's request for approval to land his helicopter at a non-airport location, the Court completed its legal analysis and issued decisions, noting that federal authority does not wholly supersede state and municipal review. That issue alone took additional briefing by the parties and presumably some additional research and drafting by the Court.

LABERGE SHOOTING RANGE. There was preliminary motion practice. The matter went up to the Supreme Court for an interlocutory appeal. The Supreme Court denied that request. The Appellant filed a request for reconsideration which was denied by the Supreme Court. Motions for summary judgment before the Environmental Division were filed on 5/12/17 by both parties. A written decision was issued on those motions on 8/15/17. The matter proceeded to trial on 1/31/18 and a written decision was issued on 3/9/18. The matter was appealed to the Supreme Court and affirmed.

SCOTT JO Appeal. This was an example of the parties arguing for the Court to allow more time to voluntarily resolve their dispute. The appeal was linked to an ANR enforcement action that the parties voluntarily resolved prior to the appeal being filed with the Court. When the JO appeal began to approach the limits outlined in the Disposition Guidelines, the Court advised the parties that it intended to set the matter for trial. The parties then completed their negotiations and filed a stipulated resolution with the Court. The judgement order, based on the parties' stipulation, was issued just as the appeal was to reach 11 months pending before the Court.

COSTCO APPEALS. Costco operates a members-only retail facility in Colchester that it wanted to expand, including the addition of gas fueling stations. Two nearby and competing gas station/convenience store facilities opposed Costco's expansion. This opposition was the basis of twelve different appeals, including several appeals from Act 250 determinations. Prior to trial, seven of those appeals were resolved through either decisions by the Court on pre-trial motion or stipulations by the parties. The remaining five appeals were the subject of a coordinated trial, which took 10 days to complete. That merits decision was issued on August 26, 2015. On Aug. 5, 2016, the Supreme Court affirmed all decisions appealed.

MOUNTAIN TOP INN JO Appeal. This appeal presented the question of when and on what properties does Act 250 attach when a resort takes the responsibility of booking stays in

nearby private homes. The District Coordinator had concluded this contractual relationship resulted in Act 250 jurisdiction over all of the resort facilities, as well as all of the private homes enrolled in its rental program. There was an appeal from the District Coordinator's determination on the resort's request to have all of its Act 250 permits, spanning 40+ years, to be included in a master plan proceeding. The two appeals were coordinated; the appeals were filed by the resort and a number of area residents entered the appeals as interested parties.

After extended discovery disputes and preliminary decisions, the parties filed cross-motions for summary judgment. After the Court issued its decisions on those summary judgment motions, the non-prevailing party filed a motion for reconsideration. The Court issued a decision on the post-judgment motion, about 15 months after the initial JO was filed. No appeal was taken.

COMTUCK APPEAL. This appeal seems to have been extended by the complexity of the legal issues, the number of parties appearing in the appeal (12 parties, including Appellant Comtuck), and a number of pretrial motions filed (12, mostly filed by Appellant Comtuck). The appeal presented the following question: to what extent is an Act 250 approval, issued nearly 50 years ago, dispositive of the project a successor developer (Comtuck) now announces that it wishes to develop. The original permit was believed to be only the third permit ever issued under Act 250 when it first began in 1970. The permit, findings of fact and conclusions of law only took up three pages and governed the entire Haystack Resort development, as then proposed.

The Court addressed the legal issues presented in a recent Nov. 2, 2018 decision. There is a motion to reconsider pending before the Court.

CARPENTER FARM JO. This probably shouldn't really be considered a case that took that long to resolve. The appeal was filed on May 18, 2017, and was essentially resolved 50 days later, on July 10, 2017. The original developer either died or abandoned the project; a young family was attempting to purchase the property to build their primary residence. However, they did not wish to complete the purchase until all permit issues were resolved. Complicating the case was that there was an enforcement action pending against the original developer. The purchasers worked with the NRB staff to resolve all the final issues, and that took several more months. Because the parties were diligently working to resolve the permit issues, it appears the Court granted several requests for extensions. The matter was resolved and a final Order issued five months after the JO appeal was first filed.

The **DISPOSITIONAL GUIDELINES** were established by the Supreme Court for the various kinds of cases the Court handles. My review with Joanne Charbonneau indicates that the Environmental Division disposed of most of the appeals and enforcement cases (including Act 250 matters) by or before the Guidelines established for those cases. I understand that at the beginning of each case, the Environmental Division prepares a specific Guideline sheet for that case, referencing specific dates and deadlines. The parties and their lawyers therefore have an advanced explanation of how long they may expect a case to take before completion. Complex and unique cases sometimes take longer.

I expect to be present on both December 7th and 14th to answer any questions the Commission or its staff may have.