

VERMONT SUPERIOR COURT  
Environmental Division  
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Docket No. 22-ENV-00117

Sugar Mountain Holdings, LLC Act 250 Permit Amendment
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### DECISION ON MOTION IN LIMINE

Title: Motion in Limine (Motion: 2)  
Filer: Chris Roy, Esq.  
Filed Date: February 24, 2023

Natural Resources Board and Agency of Natural Resources Joint Memorandum in Opposition filed on March 10, 2023, by Attorneys Jenny E. Ronis, Catherine Gjessing, and Elizabeth Lord.

Applicant Reply to Memorandum in Opposition filed on March 24, 2023, by Attorney Chris Roy, Esq.

**The motion is DENIED.**

This is an appeal of a decision of the District #2 Commission approving in part Sugar Mountain Holdings, LLC's (Applicant) Act 250 permit amendment application for the conversion of an existing ski base lodge to a brewery and distillery with a tasting room, with the ability to host outdoor functions with music (the Project) at 3219 West River Road, Dummerston, Vermont (the Property). Before the Court is Applicant's motion to exclude any evidence and review of land within the Property that is located easterly of West River Road/VT Route 108 (the Easterly Area).<sup>1</sup>

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<sup>1</sup> Applicant concedes that this evidence is relevant to confirm no development is proposed in the area and, in its Reply, that the evidence is relevant to the determination of whether it has a "vested right" to use the Easterly Area. It asserts, however, that the evidence is otherwise inadmissible.

The Vermont Rules of Evidence apply to matters before the Environmental Division. V.R.E.C.P. 2(e).<sup>2</sup> Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” V.R.E. 401. Relevant evidence is generally admissible. V.R.E. 402. All Environmental Division merits hearings are bench trials and, therefore, we are generally liberal in allowing relevant evidence to be admitted. The Van Sicklen Ltd. P’ship, No. 4C1013R-EB, slip op. at 1 (Vt. Env. Bd. Sep. 28, 2001). Because of this, we are unlikely to be “unduly swayed by a questionable evidentiary offering” as a jury may be. Id. Once relevant evidence is admitted, we afford it the weight it deserves, if any. Id.; In re Application of Lathrop Ltd. P’ship I, 2015 VT 49, ¶ 90, 199 Vt. 19.

The evidence that Applicant seeks to exclude is directly relevant to the Project before the Court and issues that are set forth in Question 1 through 5 of Applicant’s Statement of Questions.<sup>3</sup> The parties dispute the use of the Easterly Area, both in the context of the proposed

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<sup>2</sup> The V.R.E.C.P. allow the Environmental Division to relax evidentiary rules when appropriate. See V.R.E.C.P. 2(e).

<sup>3</sup> These Questions ask:

1. Did the district coordinator’s “Act 250 Jurisdictional Opinion” dated January 17, 2020, which was included within a certain Project Review Sheet issued on January 22, 2020, constitute an appealable determination that the landowner’s vested right to use the existing graveled parking area and associated land between VT Route 30 and the West River had somehow been “abandoned” for jurisdictional purposes?
2. Did use of the gravel parking area and land between VT Route 30 and the West River somehow constitute “abandonment” such that the landowner lost its vested rights regarding use of that area as established under Act 250 Permit #2W0724?
3. If the level of use of the land located easterly of VT Route 30 somehow constituted “abandonment” such that vested rights under previously-issued Act 250 permits were dissolved, is Act 250 jurisdiction over the entirety of the Project tract likewise dissolved, or can the district coordinator arbitrarily select what land is, and is not, burdened or benefited on a prospective basis by previously-issued Act 250 permits?
4. Since the Application was for the amendment of a previously-issued land use permit pursuant to Act 250 Rule 34(A), is the scope of review regarding the Application limited to only the impacts under pertinent Act 250 criteria that would arise from the new development that is proposed as part of the Project?
5. Since the Project proposes no “development” as defined by Act 250 in the area situated between VT Route 30 and the West River, can the scope of review under any pertinent, impacted Act 250 criteria properly extend to that area?

Project and as it relates to prior uses at the Property, and Act 250 permitting thereof. Evidence related to the Easterly Area will have a “tendency to make the existence of any fact that is of consequence to the determination” of Questions 1 through 5 more or less probable than it would be absent the evidence. See V.R.E. 401.

In effect, Applicant does not seek an evidentiary ruling, but is, in practice, seeking summary judgment on its Questions regarding the Easterly Area.<sup>4</sup> We will not so rule upon these Questions in the context of a motion in limine. See State v. Dubois, 150 Vt. 600, 602 (1988) (citing Schichtl v. Slack, 293 Ark. 281, 285 (1987) (motions in limine “are not to be used as sweeping means of testing issues of law”)); see also 75 Am. Jur. 2d Trial § 42 (Applicability of motion in limine practice and limitations thereon) (“The use of motions in limine to summarily dismiss a portion of a claim has been condemned, and the trial courts are cautioned not to allow motions in limine to be used as unwritten and unnoticed motions for summary judgment or motions to dismiss) (citations omitted)).<sup>5</sup>

In sum, this Court understands that the evidence sought to be excluded by Applicant is directly relevant to the issues raised in this appeal, specifically in the context of Applicant’s own Statement of Questions. Applicant’s motion is, therefore, **DENIED**.

Electronically signed this 27<sup>th</sup> day of March 2023 pursuant to V.R.E.F. 9(D)

A handwritten signature in black ink that reads "Tom Walsh" with a stylized flourish at the end.

Thomas G. Walsh, Judge  
Superior Court, Environmental Division

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<sup>4</sup> Applicant notes that the effect of granting its motion would be the resolution of Questions 1 through 5.

<sup>5</sup> To the extent Applicant, in its reply, argues that Questions 1 through 5 are outside of the scope of this Court’s jurisdiction, we disagree. Applicant’s assertion is premised on the fact that it alleges it is entitled to judgment in its favor on these Questions. This is not a jurisdictional issue. Instead, it is further evidence that the motion seeks to serve as an unnoticed motion for summary judgment without any sufficient factual basis to allow the Court to determine material facts. This is not a proper motion in limine.