VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§6001-6092

Re: *John A. Russell Corporation and Crushed Rock, Inc*. | Land Use Permit Application #1R0489-6-EB (Remand)-EB

Memorandum of Decision

This proceeding concerns the proposed construction of an asphalt plant and other improvements at the previously permitted dolomite rock quarry in Clarendon, Vermont, known as "Crushed Rock," under Land Use Permit series #1R0489 (Project).

I. Procedural Summary

The history of this case prior to January 17, 2002 appears in the Environmental Board's (Board) Findings of Fact, Conclusions of Law, and Order (Decision) issued in this matter on that date.

On February 15, 2002, John A. Russell Corporation and Crushed Rock, Inc. (Russell), the applicants for a Land Use Permit for the Project, appealed the Board's decision to the Vermont Supreme Court. Later that same day, the Clarendon Planning Commission (CPC) and Gale LiCausi, parties to this case, filed a Motion to Alter the Decision.

II. Discussion

In its Decision, the Board considered, but did not answer, the question of whether the 1995 Clarendon Town Plan would govern Russell's application. The Board wrote:

> The Commission held that Russell's rights vested as of the date of its original application, August 24, 1998, and since the 1995 Town Plan was in effect at that time, that Town Plan governs the present application. Remand Decision at 7. This, however, ignores the fact that, after that initial application, the Town Plan expired. *See, Juster Development Co.*, #1R0048-8-EB, Findings of Fact, Conclusions of Law, and Order at 32 - 33 (Dec. 19, 1988) ("Town plan amendments made after the date of an Act 250 application, and which benefit an applicant, are properly included as part of the town plan for Act 250 purposes.") *Juster Development* thus stands for the proposition that the concept of vested rights defines what legal rights - not impediments - an applicant may choose to claim have vested in its application. Therefore, when a Town Plan has been amended during the pendency of an appeal before the Board, *Juster Development* would appear to allow an applicant to take advantage of the new Town Plan, if the new Town Plan allows what the old Town Plan might have prohibited. *And see, J.P. Carrara & Sons, supra; Renbel Richmond Trust,*

> *Carl & Esther Parker and Waylen & Dorothy Bowen*, #4C0818-EB (Jan. 15, 1991) (town plans which have expired cannot be revived).
>
> There is also Board precedent to the contrary, however. *See, Crushed Rock, Inc. and Pike Industries, Inc.,* #1R0489-4-EB, Findings of Fact, Conclusions of Law, and Order at 37 – 39 (Feb. 18, 1994) (regional plan that has expired may govern application in certain circumstances). At the very least, allowing an application to take advantage of a change to a Town Plan may also require its reexamination in terms of Act 250's other nine criteria under other applicable laws as they exist at the time of the change. *See, Swain Development Corp., and Philip Mans*, #3W0445-2-EB, Memorandum of Decision at 7 (Dec. 6, 1991) ("If the Applicants wish to have the benefit of the expiration of the Plan, they should file a new application for the reconfigured project to be reviewed under all ten criteria."); *and see, In re Great Waters of America*, 140 Vt. 105, 109 (1981) (a party "must take the bitter with the sweet."). Because this decision is based on a different legal theory, the question of which precedent applies here is moot and need not be decided; but the Board does note that the law is not wholly settled in this regard.

Decision at 13 –14 (footnote omitted).

The present Motion to Alter states:

> Ms. Licausi and the CPC request that the Board alter the Decision to provide that, even if the 200 town plan does not apply, the 1995 town plan does, and that the proposed asphalt plan is denied under Criterion 10. Alternatively, Ms. Licausi and the CPC request that the Board alter the Decision to explain why the 1995 town plan does not apply in the event that the CPC is compelled to file a cross appeal to the Vermont Supreme Court in response to an appeal by the applicants.

Motion to Alter at 1.

Russell opposes the Motion to Alter. Russell argues that the Motion fails to comply with Environmental Board Rule (EBR) 31(A)(2) because it fails to state the evidence in the record that supports it. This Motion, however, is not a request that the Board alter a Finding, which would require an indication of evidence. Rather, this Motion asks the Board to alter its conclusion not to address the applicability of the 1995 Town Plan, or, alternatively, to conclude that the 1995 Town Plan governs. As such, it

is a legal argument, not one concerned with fact, and the provisions of EBR 31(A)(2) cited by Russell do not apply.

Citing several provisions in the Decision, Russell also argues that the Board *did* decide that the 1995 Town Plan does not govern the application. None of Russell's citations support this argument, however; and Russell ignores the plain language on page 14 of the Decision which states, "Because this decision is based on a different legal theory, the question of which precedent applies here is moot and need not be decided…." Thus, neither of Russell's grounds for denying the Motion to Alter is meritorious.

Nevertheless, the Board declines to grant the Motion. The Board's decision concludes that the 2000 Clarendon Town Plan governs the application and that it is therefore not necessary to examine the applicability to the earlier Town Plan. The CPC and Ms. Licausi have not proffered sufficient grounds to convince the Board that it should revisit this earlier conclusion.

III. Order

The Motion to Alter filed by the Clarendon Planning Commission and Gale LiCausi on February 15, 2002 is denied.

Dated at Montpelier, Vermont this 15th day of March 2002.

ENVIRONMENTAL BOARD

__/s/Marcy Harding_____
Marcy Harding, Chair
Rebecca Day *
John Drake
George Holland
Samuel Lloyd
Rebecca M. Nawrath
Alice Olenick
Jean Richardson
Donald Sargent

*Alternate Member Day was not present for the March 6, 2002 deliberations, but she concurs with this decision.