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

Re: J. P. Carrara & Sons, Inc.
Land Use Permit #1R0589-EB
Revocation

MEMORANDUM OF DECISION

This decision, dated April 23, 1992, pertains to a Petition for Revocation filed with the Environmental Board on September 12, 1990 by residents of Clarendon, Vermont (the Neighbors): Carroll Buffum, Jr., Lynn Brown, Nancy Buffum, Carroll Buffum, Sr., David P. O'Neill, Mary C. O'Neill, George Merrill, Jr., Nalda B. Merrill, Peter S. Soine, Marjorie J. Soine, Brenda A. Trombley, William A. Weeks, Doris H. Weeks, Thomas S. Weeks, Robert Sanford, Stephen Kapusta, D. W. Churchill, Kevin N. Morgan, Cheryl L. Morgan, Roy Seymour, Marilyn Seymour, David Bride, Diana Churchill, Judith W. Webster. The Petition alleges violations of Land Use Permit #1R0589-EB (the Permit). The Permit authorizes J. P. Carrara & Sons (the Permittee) to operate a quarry on a 59-acre tract of land in Clarendon.

I. BACKGROUND

On November 6, 1990, Stephen Reynes, former Chairman of the Board, acting as an administrative hearing officer, convened a public hearing in Clarendon. Following the hearing, the Chairman issued a proposed decision. In essence, the decision concluded that the Permittee had not exceeded the specific blasting limits of the permit, but did violate a finding of fact in the Permit (based upon a statement of the Permittee's expert), that there would be no vibration or effect from the blasts beyond a 200-foot radius from the charge location. The decision ordered the Permittee either to stop blasting or to apply for an amendment from the District Commission to revise the conditions of operation.

Oral argument was held at the request of the Permittee on April 4, 1991. Following oral argument, the Board conducted a deliberative session and voted to issue the proposed decision.

Before the decision was issued, the Permittee's attorney, James P. W. Goss, contacted the Executive Officer of the Board and requested that she meet with the parties to attempt to settle the issues raised in the Petition. Meetings were held on May 22 and August 29, 1991.

498M

On September 30, 1991, Attorney Goss submitted a letter to the Board outlining the reasons he believes the Board should implement any settlement agreement reached without remanding the matter to the District Commission for a permit amendment. These arguments are addressed below.

On January 14, 1992, a Stipulation of Compromise was filed with the Board, signed by the Permittee and nine of the Neighbors: Donald Churchill, Diana J. Churchill, Kevin N. Morgan, Cheryl Morgan, Carroll Buffum, Jr., Peter S. Soine, June S. Soine, Nancy Buffum, and Carroll R. Buffum. On February 3, the Board received a letter from Jon S. Readnour, attorney for Roy and Marilyn Seymour, asking for the opportunity to review the file and submit a response to the proposed decision.

On March 9, Attorney Readnour submitted, on behalf of the Seymours, a response to the proposed decision and to the Stipulation of Compromise. The Seymours did not sign the Stipulation because they believe it does not resolve all the problems they assert are caused by the operation of the quarry. They also believe that the Board cannot change the terms of the Permit without an opportunity for full participation by all affected parties and they support the requirement in the proposed decision that the Permittee receive an amendment from the District Commission before resuming blasting. The Seymours also request oral argument before the Board takes final action on the proposed decision.

II. DECISION

The Stipulation contains the following modifications of the quarry operation, in summary:

1. The Permittee will retain a licensed professional engineer to conduct a survey of all structures and water supplies within 1,500 feet of the quarry property which will be used for blasting and extraction of rock, upon the request of the homeowners. A procedure is established in the event that any of the water supplies fail.

2. The total allowable pounds of explosive per blast at the quarry will be increased from 2,500 to 10,000. The pounds per delay, length of delay, and total pounds of explosives per week will not change. The reasons for any deviation from the allowed blasting parameters will be documented.

3. All blasts will be monitored by the Permittee's blasting contractor with seismographic equipment which will measure particle velocity through the ground and the level of infrasonic sound. Blasting logs including seismographic reports will be submitted monthly to the District Commission.

4. The typical bore hole and blast designs that will be used are identified.

5. Maximum blast infrasonic sound level and maximum ground vibration/particle displacement level from each blast are established.

6. Tailgates will be removed from trucks at the quarry.

The Stipulation also provides that the Neighbors will actively support implementation of the Stipulation in the context of the revocation proceeding and, if the Stipulation is not so implemented, that they will actively support any application for an amendment necessary to implement the Stipulation.

The Permittee argues that the Board should incorporate the terms of the Stipulation into the Permit and that the Stipulation "would constitute an interpretation of the disputed finding [that states that there will be no vibration or effect from the blasts beyond a 200-foot radius from the charge location] specifying the steps necessary to avoid a violation, would satisfy the neighbors' objectives in obtaining stricter parameters in the operation of the quarry, would allow for judicial economy in not sending the Permittee back through the District Commission and possibly ultimately to the Board again and would otherwise further what so far has been a fairly amicable resolution to this situation."

The Permittee further contends that none of the conditions in the Stipulation, with the possible exception of the increase of total pounds of explosives per blast, constitutes a material or substantial change to the Permit and thus the Board could incorporate the terms of the Stipulation without requiring that the Permit be amended. The Permittee argues, as an alternative, that the Board could use Rule 38(A), that allows the Board to give an opportunity for a Permittee to correct a violation prior to

any revocation taking effect, to provide "guidelines" concerning what the finding means. Finally, the Permittee argues that because the statement in the Finding that there will be no vibration or effect beyond a 200-foot radius is inconsistent with the other blasting parameters in the permit, the Board should not give it any effect.

III. DECISION

There is no authority in either the statute or the Board's rules that allows the Board to change any conditions of a permit other than in the context of an appeal of a permit issued by a district commission. The conditions of the Stipulation would alter the conditions of the quarry operation. These changes cannot be implemented without the approval of the District Commission. They also cannot be implemented without an opportunity for all statutory parties and other potentially affected persons to participate in the consideration of the changes.

Furthermore, the Board can neither delete nor "interpret" the Finding of Fact in the Permit that states: "There will be no vibration or effect from the blasts beyond a 200 foot radius from the charge location." Its meaning is plain and unambiguous. No appeal was taken from the finding at the time it was issued. Thus, the Permitee is bound by it.

In addition, the finding in question was based word for word on a statement made in the Permitee's blasting expert's prefiled testimony in the 1987 appeal proceedings. Parties have a right to rely on representations of an applicant concerning the impacts of a project. Re: Devartment of Forest and Parks, Knight Point State Park, Declaratory Ruling #77 at 3 (Sept. 8, 1976).

Moreover, because it is impossible at this time to determine whether the Board would have reached the conclusion to approve the Permittee's blasting plan had this assertion not been made, the finding cannot be deleted without a hearing to determine what the impacts from the blasting really are.

Accordingly, in order to delete the finding from the decision, the Permittee must file an amendment application and the District Commission must consider the impacts of the proposed blasting parameters without the Permittee's assurance that there will be no vibration or effect beyond a

ZOO-foot radius. Until the finding is deleted, the Permittee is bound to stay within that limitation. If, as the Permittee asserts, that is not possible, then blasting must cease until the permit, which includes the findings, is amended so that compliance with it can be achieved.

The Board commends the Permittee and the Neighbors for attempting to settle their disputes in a non-adversarial forum. The Board is hopeful that the District Commission will give weight to the parties' agreement and that the proceedings will be less contentious and more expeditious as a result of the parties' willingness to work out an agreement.

With regard to the Seymours' request for oral argument, the Board notes that oral argument already took place and that the Seymours participated both in that hearing and in the evidentiary hearing in November 1990, and accordingly denies the request.

IV. ORDER

1. The Board denies the Permittee's request to implement the Stipulation of Compromise.

2. The Seymours' request for oral argument is denied.

Dated at Montpelier, Vermont this 23rd day of April, 1992.

ENVIRONMENTAL BOARD

Elizabeth Courtne , Chair
Samuel Lloyd
Charles F. Storrow
Steve E. Wright
Terry Ehrich
Lixi Fortna

a:carrara.mem(S20)