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

Re: John A. Russell Corporation and Crushed Rock, Inc.

Application #1R0489-6-EB (Remand)-EB

Chair's Preliminary Ruling

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. Background

The Procedural Summary of this case appears in the May 11, 2001 Prehearing Conference Report and Order ("Prehearing Order") and is incorporated herein.

On July 2, 2001, John A. Russell Corporation and Crushed Rock, Inc. ("Russell) and Gail LiCausi filed status reports, as required by the Prehearing Order. Other parties did not file reports.

On July 9, 2001, Russell filed a reply to LiCausi's report; also on July 9, LiCausi filed a response to Russell's reply.

II. Discussion

It was the Chair's hope that the parties might be able to stipulate to a series of facts in this matter, thus obviating the need for some evidentiary filings. While Russell has suggested that it would stipulate to certain facts and Exhibits,[1] the parties have

---

[1] Russell states:

> The Applicants [Russell] have reviewed the record that was before the Board on the original appeal, and will stipulate to the record and make no objection to the Board taking notice of the prior proceedings before it.
>
> .... The Applicants are willing to stipulate that the 1995 Clarendon Town Plan expired on June 12, 2000 and an updated Clarendon Town Plan was readopted on November 13, 2000. As to the exhibits that were before the District Commission on remand, the Applicants will stipulate to the admission of Exhibits 75-76 (the updated air permit and the V-Trans permit). The Applicants will stipulate to the admission of the Clarendon Town Plan as updated and readopted on November 13, 2000.

unfortunately not been able to arrive at a more global stipulation. Rather, Russell has suggested certain dates for the filing of testimony, exhibits, and memoranda, and for the hearing; and both Russell and LiCausi have set out their respective positions on whether the Board should take official notice of certain documents submitted to the District 1 Environmental Commission ("Commission") in earlier proceedings in this matter.

LiCausi suggests in her July 2 submission that the Board take official notice of certain exhibits submitted to the Commission, to wit: "District Commission Remand Exhibits 73-133c as set forth in the District 1 Environmental Commission's decision *Re: Russell Asphalt Plant,* #1R0489-6-EB-Remand, Conclusions of Law and Order of Denial of Permit (Jan. 4, 2001)." While Russell stipulates that the record if the 1999 proceedings before the Board may be a part of the present record, and that certain facts may be found, it objects to the Board taking official notice of all of the evidence submitted to the Commission, contending that some is not relevant to the present appeal.

To support her request, LiCausi cites to the Board's decision in *Re: Nehemiah Associates, Inc.,* Application #1R0672-1-EB (Remand), Findings of Fact, Conclusions of Law, and Order (April 11, 1997).

Nehemiah stands for the proposition that evidence that was admitted by the Board in connection with the matter which the Board decided in 1999, *John A. Russell Corporation and Crushed Rock, Inc.,* Land Use Permit Application #1R0489-6-EB, Findings of Fact, Conclusions of Law, and Order (Aug. 19, 1999), remains before the Board and need not be resubmitted. However, *Nehemiah* does not hold that the Board can take official notice of the exhibits that were submitted to the Commission in connection with its January and February 2001 decisions, decisions which are before the Board by virtue of this appeal. *Russell Asphalt Plant,* #1R0489-6-EB-Remand, Conclusions of Law, and Order of Denial of Permit (Jan. 4, 2001).

In *Nehemiah Associates* the Board denied a land use permit application under the doctrine of collateral estoppel. The Vermont Supreme Court reversed the Board's decision and "remanded for the Board to balance the policy considerations raised by the parties to determine whether to grant the permit amendment." *In Re: Nehemiah Associates, Inc.,* 166 Vt. 593, 595 (1996). In compliance with the Court's remand order, the Board issued a memorandum informing the parties "that an evidentiary hearing is

---

Letter, Edward V. Schweibert to John H. Hasen (July 6, 2001)

not necessary to satisfy the Vermont Supreme Court's reversal and remand order...." *Nehemiah Associates,* Application #1R0672-1-EB (Remand), Memorandum to Parties (Feb. 27, 1997). The Board used the evidence that had earlier been produced by the parties to the Board in making its decision after remand.

The language that was used by the Supreme Court when it remanded *Nehemiah* is considerably different than the language that the Court used in remanding the present case. In its Order remanding the *Russell* case back to the Board, the Court wrote:

> The parties jointly filed a motion to remand this case to the Environmental Board for the limited purpose of (1) receiving evidence from those persons with party status under 10 V.S.A. § 6086(a)(10) regarding the status of the Clarendon Town Plan and whether there is any duly adopted Clarendon Town Plan in effect for the purposes of application 1R0489-6-EB, and (2) to determine, in light of that evidence, whether the appellants' land use permit application to install an asphalt plant, #1R0489-6-EB, is in conformance with any duly adopted local or regional plan or capital program under Chapter 117 of Title 24 (as required by 10 V.S.A. § 6086(a)(10)).

In re John A. Russell Corp. and Crushed Rock, Inc., Dkt. No. 1999-418 (Sept. 25, 2000).

As evident from the Court's Order, the *Russell* case was remanded so that the Board would gather further evidence. The Board, in turn, remanded the case to the Commission, using language identical to the Court's Order. *John A. Russell Corporation and Crushed Rock, Inc.,* Land Use Permit Application #1R0489-6-EB, Memorandum of Decision (Sept. 28, 2000).

The language used by the Court in the remands of *Russell* and *Nehemiah* is different, requiring the Board to perform different functions. The *Nehemiah* case is therefore not comparable to the current case, and LiCausi's reliance on it to support her official notice argument is misplaced.

Further, when a party appeals from a District Commission determination on a permit application, the Board provides a "*de novo* hearing on all findings requested by any party that files an appeal or cross-appeal, according to the rules of the [B]oard." 10 V.S.A. § 6089(a)(3); *and see* EBR 40(A); *Re: Woodford Packers, Inc., d/b/a WPI*, #8B0542-EB, Memorandum of Decision at 3 (Feb. 27, 2001). "A de novo hearing is one where the case is heard as though no action whatever had been held prior thereto. *All*

of the evidence is heard anew, and the probative effect determined by the appellate tribunal (superior court here) as though no decision had been previously rendered." *In re Poole*, 136 Vt. 242, 245 (1978); *accord, In re Maple Tree Place*, 156 Vt. 494, 499 (1991); *In re Green Peak Estates*, 154 Vt. 363, 372 (1990) ("In a de novo hearing, the tribunal hears the matter as if no prior proceedings had taken place.")

Thus, the Board must conduct its own review of the matter before it, and the Board cannot, without the consent of all parties, take "official notice" of the evidence presented to the Commission even if doing so might save time and money, as was suggested by LiCausi.

III. Order

1. The request by Gail LiCausi that the Board take official notice of District Commission Remand Exhibits 73-133c as set forth in the District #1 Environmental Commission's decision *Re: Russell Asphalt Plant,* #1R0489-6-EB-Remand, Conclusions of Law and Order of Denial of Permit (Jan. 4, 2001) is denied.

2. Evidence that was admitted by the Board in connection with the matter which the Board decided in 1999, *John A. Russell Corporation and Crushed Rock, Inc.*, Land Use Permit Application #1R0489-6-EB, Findings of Fact, Conclusions of Law, and Order (Aug. 19, 1999), remains before the Board and need not be resubmitted.

3. This matter will be set for an evidentiary hearing, pursuant to a Scheduling Order to be issued.

4. This Chair's Preliminary Ruling is issued pursuant to EBR 16(B) and is binding on all parties unless a written objection to it, in whole or in part, is filed on or before **4:30 PM on Tuesday, August 14, 2001.** A legal memorandum shall accompany any such objection.

Dated at Montpelier, Vermont this 1st day of August 2001.

ENVIRONMENTAL BOARD

Marcy Harding

Marcy Harding, Chair

appeals/russell/cpr10801