

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

RE: John A. Russell Corporation
Land Use Permit Application #1R0849-EB
Docket #749

MEMORANDUM OF DECISION

This proceeding concerns Land Use Permit Application #1R0849 (“Application”) pertaining to John A. Russell Corporation’s (“Applicant”) proposal to construct and operate an asphalt plant at property owned by the Russell Corporation on the east side of Route 7B in Clarendon, Vermont. The Application includes the addition of an asphalt plant (cold feed hoppers, dryer, and stack), three fuel and asphalt cement tanks, and various roadway, drainage and other features designed to support the asphalt plant (“the Project”).

This Memorandum of Decision addresses the Neighbors’ (defined below) Objection to Prehearing Conference Report and Order. As further described below, the Board hereby modifies the filing and hearing dates and amends issue number 8, relating to Criteria 9(B), as set forth in the March 20, 2000, Prehearing Conference Report and Order.

I. PROCEDURAL SUMMARY

On June 21, 1999, Anthony Stout on behalf of the Applicant filed a land use permit application for the Project with the District #1 Environmental Commission (“Commission”) pursuant to 10 V.S.A. §§ 6001-6092 (“Act 250”).

On December 7, 1999, the Commission issued its Findings of Fact, Conclusions of Law and Order of Denial of Permit (“Decision”) denying the Applicant’s permit application for the Project.

On January 6, 2000, the Applicant filed a Motion to Alter with the Commission.

On January 12, 2000, in reaction to the Applicant’s Motion to Alter, the Commission issued its Memorandum of Decision on Motion to Alter (“MOD”) which declined to alter the Commission’s Decision.

On February 8, 2000, the Applicant filed a Notice of Appeal with the Board from the Commission's Decision contending that the Commission erred by finding that the Project fails to comply with 10 V.S.A. § 6086(a)(5), (8) and (9)(B) (“Criteria 5, 8 and 9(B)”). The Applicant also appealed the Commission’s grant of party status to Mary and Albert Trombley, Helen Darby, Barbara Doty, Henry and Ilse Vergi, Marjorie Southard, Doris Roach, Shirley Loomis and Shelly Allen, Scott and Liza Stratton and F. Pierce and

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Ardis King. The Notice of Appeal was filed on behalf of the Applicant by Edward V. Schwiebert, Esq.

On February 22, 2000, Doris Roach, Ardis King, Frederick P. King, Scott C. Stratton, Lisa Stratton, Mary Trombley, Albert Trombley, Barbara Doty, Bernard Doty, Marjorie E. Southard, Helen W. Darby, Nancy Buffum, Carroll R. Buffum, Shirley W. Loomis, Shelly K. Allen and Henry Vergi (the "Neighbors") filed a Cross Appeal with the Board from the Commission's Decision contending that the Commission erred by finding that the Project complied with 10 V.S.A. § 6086(a)(1), 1(B), 1(G), (2), (3), (5), (8), (8)(A), (9)(K) and 10 ("Criteria (1), 1(B), 1(G), 2, 3, 5, 8, 8(A), 9(K) and 10"). The Neighbors also filed a Motion for Party Status on the same date. The Cross Appeal and Motion for Party Status were filed on behalf of the Neighbors by Mary C. Ashcroft, Esq.

On March 17, 2000, Board Chair Marcy Harding convened a prehearing conference with the following participants:

The Applicant by Mary Grady, Esq.
The Neighbors by Mary C. Ashcroft, Esq.
Doris Roach
Marjorie White Southard

On March 20, 2000, Board Chair Harding issued a Prehearing Conference Report and Order ("PHCR&O").

On March 28, 2000, the Neighbors filed an Objection to Prehearing Conference Report and Order.

On April 12, 2000, Applicant filed its Response to Cross Appellants' Objection to Prehearing Conference Report and Order.

In an April 13, 2000 Memorandum of Decision, the Board addressed petitions for party status and amended the issues set out in Section III. ISSUES ON APPEAL of the PHCR&O by deleting issues numbered 3 (Criterion 1(G), 4 (Criterion2), and 7 (Criterion 8(A)).

The Board preliminarily deliberated on the Neighbors' objection on March 29, 2000. The Board deliberated on the Neighbors' objection and the Applicant's response on April 19, 2000.

II. DISCUSSION

The Neighbors' objection to the PHCR&O objects to the filing and hearing dates set out in the order and objects to two issues stated in the order. First, with respect to the filing and hearing dates, the Neighbors seek additional time to prepare their case. The Neighbors argue that more time is necessary due to the preliminary determinations of party status, the anticipated lengthy filings due to the number of criteria on appeal and an intervening holiday. The Neighbors claim that due process protections require additional time for them to participate effectively. The Neighbors also ask that the hearing be postponed to the first week in August, 2000.

With respect to revising the issues set out in the PHCR&O, the Neighbors request that issue number 8 concerning Criteria 9(B) be expanded to include consideration of subcriteria (iv) which would require the Applicant to provide that the development would not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential. Neighbors allege that they use their property for various agricultural enterprises. The Neighbors also request that under the issues relating to Criteria 5 and 9(K), issues numbered 5 and 9 in the PHCR&O, consideration be given to the nearby airport and airways thereto, based safety concerns at that transportation facility and the impact of this project on public investment which the Neighbors claim are on-going concerns.

The Applicant's response to the Neighbors' objection requests that the Board deny the Neighbors requests for more time and that the Board decline to amend the issues stated within the PHCR&O.¹ The Applicant argues that the Neighbors' claims of preliminary party status issues should not delay the schedule in this matter because adverse party status determinations will only decrease the amount of work for the Neighbors. Furthermore, the Neighbors argue in their Petition for Party Status that they have already completed research and work concerning the criteria below during the Commission proceedings, and thus, the Neighbors' groundwork should already be completed. The Applicant also argues that the Neighbors only have themselves to blame for the large number of issues on appeal. The Applicant states that it is ready to proceed with the

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In a footnote at page 4 of its response, the Applicant states that it did not appeal Criterion 5. At page 3 of its Notice of Appeal, however, the Applicant states that "[t]he Commission erred in limiting the number of turning movements and tonnage of production from the Project under Criterion 5, and requiring a formal traffic study for higher levels, in contravention of the evidence of record which addressed the higher production and traffic levels. Accordingly, the Applicant's notice put Criterion 5 at issue.

current schedule.

The Board concludes that due to the number of parties and the number of issues on appeal, additional time is warranted for prefiled testimony. Accordingly, the Board amends the schedule as set forth in Section III. Order below. The Board also concludes the neighbors have alleged sufficient interests in continuing agricultural use of their properties, and accordingly, issue number 8 of the PHCR&O concerning Criterion 9(B) should be revised to include sub-criteria (iv). The Board concludes that the Neighbors do not sufficiently allege any effects caused by the Project to their property or other interests relating to the nearby airport and airways. Accordingly, the Board will not amend issues numbered 5 and 9, relating to traffic and public investment.

III. ORDER

A. The Neighbors Objection to the PHCR&O is **SUSTAINED** in part and **OVERRULED** in part as follows:

1. The Order at Section VI. of the PHCR&O is revised as follows:

5. On or before **Tuesday, May 23, 2000**, all parties shall file (a) exhibits, (b) prefiled direct testimony for all witnesses they intend to present, and (c) lists of witnesses and exhibits.

6. On or before **Tuesday, June 27, 2000**, all parties shall file (a) rebuttal exhibits, (b) prefiled rebuttal testimony, and (c) a final list of witnesses and exhibits reflecting the addition of rebuttal witnesses and exhibits.

7. On or before **Tuesday, July 18, 2000**, parties shall file written requests for time beyond the time allotments outlined in Section V, SCHEDULING. The Chair may allow more time if good cause is shown.

8. On or before **Tuesday, July 18, 2000**, parties shall file proposed findings of fact and conclusions of law.

9. On or before **Tuesday, July 18, 2000**, parties shall file evidentiary objections to the pre-filed evidence or such objections shall be deemed waived.

10. On or before **Tuesday, August 8, 2000**, parties shall file

responses to evidentiary objections to the pre-filed evidence or such responses shall be deemed waived.

11. Chair Harding will conduct a second prehearing conference at the Board offices on **Monday, August 28, 2000 at 10:00 a.m.** at the Environmental Board's Conference Room in the National Life Records Center Building, National Life Drive, Montpelier, Vermont to address any pending evidentiary objections, the site visit, other preliminary rulings, etc. Any party wishing to participate in this conference by telephone should advise Board Secretary Donna Seckington (telephone 802-828-5449) accordingly on or before **12:00 noon on Thursday, August 24, 2000.** Ms. Seckington will arrange the conference call.

12. The Board will convene a hearing in this matter on **Wednesday, August 30, 2000 at 9:00 a.m.** The specific location of this hearing shall be announced later.

2. The remainder of the Order at Section VI. of the PHCR&O is unchanged.

B. The Neighbors request that issue numbered 8 of the PHCR&O, relating to primary agricultural land (Criteria 9(B)), be revised to include consideration of subcriteria (iv) is hereby **GRANTED**. Accordingly, the Board amends the issue set out in Section III. ISSUES ON APPEAL of the PHCR&O as follows:

8. Whether, pursuant to 10 V.S.A. § 6086(a)(9)(B), the Project will not significantly reduce the agricultural potential of the primary agricultural soils, specifically in failing to conform to subcriteria (i), (ii) and (iv).

C. The Neighbors' request that issues numbered 5 and 9 of the PHCR&O, relating to traffic and public investment, be revised to include consideration of the nearby airport and airways is **DENIED**. The remaining issues set out in Section III. ISSUES ON APPEAL of the PHCR&O, as amended by the Board's April 13, 2000 Memorandum of Decision, will remain at issue before the Board.

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Dated at Montpelier, Vermont this 21th day of April, 2000.

ENVIRONMENTAL BOARD*

/s/Marcy Harding
Marcy Harding, Chair
John Drake
George Holland
Rebecca M. Nawrath
Alice Olenick
Robert Opel
Nancy Waples

* Member Donald Sargent participated in the March 29, 2000 preliminary deliberation, did not participate in the April 19, 2000 deliberation, but concurs with this decision. Member Samuel Lloyd participated in the March 29, 2000 preliminary deliberation, but did not participate in the April 19, 2000 deliberation.