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

Re: Dominic A. Cersosimo and
Dominic A. Cersosimo Trustee and
Cersosimo Industries, Inc.,
by
Jeffrey G. Morse, Esq.
P.O. Box 1800
Brattleboro, VT 05302

Land Use Permit
#2W0813-3 (Revised) - EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding concerns an appeal by Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries Inc. ("Permittees") from a condition imposed by the District 2 Environmental Commission limiting the noise generated by the Permittees' proposed rock quarrying operation.

I. PROCEDURAL SUMMARY

On March 9, 1998, Permittees filed an application to amend Land Use Permit #2W0813 ("Original Permit") to conduct rock quarry operations and to continue existing mineral excavation and processing on land located in the Town of Vernon, Vermont ("Project").

On February 11, 2000, the District #2 Environmental Commission ("Commission") issued Land Use Permit #2W00813-3 ("Dash 3 Permit") and supporting Findings of Fact, Conclusions of Law, and Order ("Decision") to the Permittees, which authorizes the Permittees to operate the Project. Condition 15 of the Dash 3 Permit, however, limits the noise generated by the operation of the Project; it reads, in pertinent part:

> Noise generated from operation of the quarry, with the exception of blasting noise, shall not exceed 50 dB(A) Leq [1] at any point on the site owner's

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[1] The Equivalent Sound Level ("Leq") is a logarithmic *average* of noise levels due to all sources of noise (for example, quarry operations, traffic, and ambient level in the absence of those sources) in a given area over a stated period of time (e.g. 24 hours, one year, etc.). By contrast, Lmax is the *maximum* sound level - - an instantaneous maximum level of noise at any one given point in time. *See Barre Granite Quarries,* #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 40 (Dec. 8, 2000).

property line.

On March 8, 2000, the Permittees filed a timely Motion to Alter seeking, *inter alia,* an amendment to Condition 15 to require that the 50 decibel limitation apply to sound levels at neighboring residences, not at the Permittees' property line.

On June 15, 2000, the Commission issued a Memorandum of Decision on the Motion to Alter denying the Permittees' request as to Condition 15. Because the Commission had made some revisions to the Dash 3 Permit as a result of the Permittees' Motion to Alter, it issued Land Use Permit #2W0813-3 (Revised) ("Permit"). Condition 15 of the Dash 3 Permit, however, remains unaltered in the Permit.

On July 14, 2000, the Permittees filed an appeal with the Vermont Environmental Board ("Board") from the Permit and Decision, alleging that the Commission erred in its conclusions concerning 10 V.S.A. §6086(a) (10) ("Criterion 10") with respect to the Vernon Town Plan as it concerns noise on neighboring properties. Permittees contend that Condition 15 of the Permit is too restrictive.

On July 24, 2000, David Rinfret filed a letter which the Board construed as a cross-appeal from the Permit and Decision, seeking signage to control dust, parking and shooting at the site. Rinfret withdrew this cross-appeal on August 4, 2000.

On August 8, 2000, following a Prehearing Conference, Board Chair Marcy Harding issued a Prehearing Conference Report and Order.

Only the Permittees and Todd Kinsman, a neighbor to the Project, who was granted party status under Environmental Board Rule ("EBR") 14(B)(1) and (2) on Criterion 10, appeared in this case. Neither the Town of Vernon, through its Selectboard ("Town"), nor any state agency, nor any other person has appeared as a party to this matter.

A hearing on this matter was held on November 21, 2000 in Vernon, Vermont before a Hearing Panel of the Board. At the hearing only the Permittees, represented by their counsel, Jeffrey Morse, Esq., appeared and proffered evidence.

Also at the hearing, with the consent of the Permittees, the Board took official notice, pursuant to 3 V.S.A. §810(4), of the Original Permit, as amended, and all accompanying Findings of Fact, Conclusions of Law, and Orders.

Following the hearing, the Panel deliberated on November 21 and December 6, 2000 and February 21, 2001.

Based upon a thorough review of the record and related argument, the Panel issued a proposed decision on February 23, 2001, which was sent to the parties. The parties were allowed to file written objections and request oral argument before the Board on or before March 12, 2001. On March 9, 2001, Permittees filed an objection to the proposed decision and requested oral argument.

On March 21, 2001, the Board heard oral argument and convened a deliberation concerning this matter. The Board held further deliberations on March 28 and April 18, 2001. Following a review of the proposed decision and the evidence and arguments presented, the Board declared the record complete and adjourned. This matter is now ready for final decision.

II. ISSUES ON APPEAL

As stated in the Prehearing Order, the Issues in this case are:

1. Whether Permit Condition 15, which limits the noise generated by the operation of the Project to 50 dB(A) Leq at any point on the Permittees' property line, is required in order for the Project to comply with 10 V.S.A. §6086(a)(10).

2. If the answer to Issue 1 is in the negative, whether the Board should impose a different condition in the Permit in order for the Project to comply with 10 V.S.A. §6086(a)(10).

III. FINDINGS OF FACT

To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. *See, Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation*, 167 Vt. 228, 241-42 (1997); *Petition of Village of Hardwick Electric Dept.*, 143 Vt. 437, 445 (1983).

The Bemis Quarry Tract

1. The Bemis Quarry operated as a gravel pit for many years between 1947 and 1971.

2. The Permittees purchased the Bemis Quarry in 1971.

3. The Bemis Quarry Tract ("Bemis Tract" or "Tract") consists of about 110 acres, with its eastern boundary approximately 1,200 feet west of Vermont Route 142. Residential properties lie to the south of the Tract.

4. The Bemis Tract slopes upward from its eastern edge, at an elevation of 390 feet, to a high point of about 500 feet approximately 300 feet from the Tract's western property line.

5. The Tract is relatively level from north to south.

6. Parts of the Tract are fairly steep with rock outcroppings.

7. Where the gravel has not been quarried, the Tract is wooded.

8. At the time the Permittees purchased the Bemis Quarry the only house in existence was the Sak house, south of the pit. The Rinfret, Kinsman and other houses were built in proximity to the Quarry after the Quarry was operating.

9. The nearest houses are located about some 600 feet from the Tract's southern property line.

10. There is a knoll between the Bemis Tract and the Kinsman residence to the south.

11. The land is level from the Bemis Tract to the Sak residence to the south.

Previous permits for excavation at the Bemis Quarry

12. On April 27, 1990, the Commission issued the Original Permit to Cersosimo Lumber Company, Inc. for the construction of a 2,900 foot gravel roadway and the excavation of approximately one million cubic yards of gravel in five phases.

13. Condition 7 of the Original Permit states, "Noise levels at the perimeter of the Bemis tract shall not exceed 75 decibels as a result of the operation of the quarry or trucks."

14. The Findings of Fact and Conclusions of Law which accompany the Original Permit ("Original Decision") indicate that noise levels were discussed within a consideration of Criterion 1 (air pollution).

15. There is no indication in the Original Decision that the Commission ever specifically or directly considered noise impacts on neighboring properties within the

context of the Vernon Town Plan in existence in 1990.

16. As to Criterion 10, the Original Decision states: "The project is in conformance with the local and regional plan: a. The project provides a needed resource and has been designed to minimize natural resources and infrastructure impacts. Exhibit 6." Exhibit 6 reads in part: "This plan is designed to have a minimal impact and should be of no burden or inconvenience to its neighbors as it is well buffered by woodland and removed from the residential area."

17. The Permittees later sought and obtained amendments to the Original Permit for on-site storage of fuel for the machinery used at the gravel pit and for a cold-mix plant. Neither of these amendments discussed the Town Plan, as it existed at those times, as it relates to noise.

Present operations at the Bemis Quarry

18. The present operation at the quarry involves the excavation of gravel from a 40-acre portion in the central part of the Bemis Tract; this gravel is crushed and stockpiled at the site.

19. Condition 8 of the Original Permit allows the crusher to run between 7:00 a.m. and 5:00 p.m.; however, it does not run constantly. Presently, the Permittees crush gravel only 20 weeks during the year.

The Project

20. The Project involves the excavation of stone (by blasting) and crushing and stockpiling the stone on site.

21. The Project would expand the mineral excavation operation to include rock excavation on 30 acres adjacent to and westerly of the existing gravel operation. This area is about 1250 feet deep (north to south) and about 1200 feet wide (east to west).

22. The Project will excavate rock from east to west, beginning in the northern half of the Bemis Tract. The operation will begin in the northeast quadrant of the proposed quarry. Working faces on the western and southern sides of the quarry will point east and north away from the nearest residences. This will allow the excavation to take advantage of the existing topography to shield the neighboring properties and to create a wall on the excavation's southern and western edges in order to reflect the sound of the excavation away from properties to the south and west.

23. At its start, the Project will be between 1600 and 2000 feet from the nearest residence; at its end the Project will be 800 feet from the Kinsman residence.

24. All of the Project excavation will be visually shielded from existing residences by dense forest growth.

25. The Permittees will also build a berm twenty feet high along the Project's south and east boundaries to shield the Rinfret residence from noise.

26. Additional portable sound barriers can be erected as needed.

27. A 50-foot buffer will be maintained around the Project to provide sound shielding.

28. It is anticipated that rock will be crushed 20 weeks during the year.

29. The volume of stone (both crushed rock and gravel) produced at the Bemis Quarry will not increase from present rates; because of market limitations, the Project will not operate at higher rates than present operations.

Why the Permittees propose the Project

30. The proposed expansion of the Bemis Quarry is the result of changes made to the highway standards by the American Association of State Highway and Transportation Officials (AASHTO) in 1995. The changes to AASHTO standards require a high percentage of fractured faces in the stone that goes into pavement and sub-base materials and have resulted in a rapidly growing demand for quarried stone products in the aggregate industry.

31. There are other quarries which produce this stone, but they are at some distance from Vernon. Since transportation represents a large percentage of the cost of the products to be sold, having a quarry in Vernon will result in cost reduction for projects undertaken by the state, area towns and local general contractors.

Noise impacts from the Project

32. Neighbors to the Project will hear the initial rock drilling and the subsequent drilling which will occur on the top of the quarry.

33. Crushing rock creates the same amount of noise as the present crushing of the gravel, since blasting produces the same size stone as is presently excavated in the gravel operation. However, more rock will be crushed by the Project than is

presently crushed in the gravel operation, and crushing rock takes more time than crushing the same amount of gravel. Thus, more time would be spent crushing rock than is presently spent crushing gravel.

34. In his report, the Permittees' sound expert, Greg Tocci, writes, "It has been determined that rock removal sound levels not exceeding 50 dB(A) should be acceptable and not be inconvenient to the nearest receptors." This recommendation is compiled from several different sources including typical municipal regulations, Environmental Protection Agency, U.S. Department of Housing and Urban Development and the American Petroleum Institutes ("API") Guidelines on Noise ("API Guidelines").

35. The Permittees expect to be able to meet a limitation of 50 dB(A) at the nearest existing residences, and 75 dB(A) at the property line.

36. While the Permittees might be able to meet a 50 dB(A) limitation at the south property line at the beginning of the Project, under later and normal operations, sound levels will exceed 50 dB(A) (and may reach 75 dB(A)) at the south property line.

37. Berms could be used to meet a 50-dB(A) limitation at the property line.

38. Rock drills create sound levels of 90 dB(A) at 50 feet; using portable barriers, this level could be reduced to 70 dB(A) at 50 feet; to meet a 50 dB(A) limitation, one would have to be 500 feet away from the drill.

39. A 20-foot high berm requires a base of 120 feet. The use of berms or a requirement that drills go no closer than 500 feet to a property line would reduce the useful area of the quarry and thereby limit the quarry's operations.

40. Sound levels will be reduced by 3 decibels for every 100 feet of dense foliage; however, the most sound reduction one can obtain from dense foliage is 10 decibels.

Noise Readings at neighboring properties

41. The Rinfret residence shown as site location 5 in Exhibit P9 is currently experiencing a sound level of 65 dB(A) from the present gravel operation. Permittee estimates that sound levels from the Project will vary from 45 to 56 dB(A) at the Rinfret

residence. [2]

42. The Kinsman residence is currently experiencing sound levels in the 41 dB(A) range and is projected to experience sound levels ranging from a low of 38 dB(A) to a high of 47 dB(A) range during the Project's quarrying activities.

The Vernon Town Plan

43. The Vernon Town Plan in effect at the time the Permittees filed the instant application was the 1995 Town Plan

44. The 1995 Vernon Town Plan provides, under *Earth Resources:*

> Policy:
>
> 1. Lands with high potential for extraction of mineral and earth resources should not be developed so as to interfere with the subsequent extraction or processing of resources.
>
> 2. The extraction of processing of minerals or earth resources should not have an adverse environmental impact resulting in inconvenience to or burden on neighboring property owners, nor represent a burden on municipal facilities.
>
> 3. The extraction of earth resources must ensure site rehabilitation suitable for alternative uses.

1995 Vernon Town Plan at 31.

45. The current gravel operation was found, by issuance of the Original Permit, not to be in conflict with the 1986 Vernon Town Plan.

46. The earth resources provisions of the 1986 Vernon Town Plan, in effect at the time the Original Permit was issued to the Permittees, are the same as those in effect in the 1995 Vernon Town Plan.

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[2] The Board notes that these estimates may be in conflict with its expectations as stated in Finding 35.

47. The Town has no zoning ordinance.

48. The Town has no regulations setting specific limits as to quarrying noise on adjacent properties.

49. There are no numerical standards (as to decibel levels) in the 1995 Vernon Town Plan.

50. The Town readopted the 1995 Vernon Town Plan in March 2000, for one additional year. At the time of readoption, there was no consideration of changing the *Earth Resources* language of the Town Plan, noted above in Finding 44.

Vernon Planning Commission/Town of Vernon approval

51. Neither the Town nor the Vernon Planning Commission ("Planning Commission") has appealed the Dash 3 Permit or appeared as a party to this appeal. However, Leonard Peduzzi, a member of the Vernon Selectboard, testified on behalf of the Town and the Planning Commission; Peduzzi conveyed his understanding of both the Town's and Planning Commission's positions concerning this appeal.

52. The Town supports the Project, as it views the Project as a valuable and needed addition to the Town.

53. The Planning Commission reviewed the gravel operations which the Permittees had proposed in the early 1990s with respect to the 1986 Vernon Town Plan and determined that such gravel operation, would not result in inconvenience to the neighbors. When the Planning Commission made this determination, however, it was concerned about well interference which could result from blasting; noise created by the proposed gravel operation was not a consideration.

54. The Planning Commission believes that the proposed Project would be operated in the same manner as the presently existing gravel operation and would not result in inconvenience to its neighbors. It is unclear as to whether the Planning Commission considered "inconvenience" in light of well interference or noise.

55. Mr. Peduzzi personally believes that the proposed expansion would not violate the 1995 Vernon Town Plan, but the Town does not want a citizen of the Town to have his property devalued.

56. Although the question of whether the proposed Project would violate the 1995 Vernon Town Plan was discussed, neither the Vernon Selectboard nor the Planning Commission voted on the question.

IV. CONCLUSIONS OF LAW

The primary question in this matter is whether the noise that will be generated from the Project is in compliance with Criterion 10, specifically, language of the 1995 Vernon Town Plan, which provides that

> The extraction of processing of minerals or earth resources should not have an adverse environmental impact resulting in inconvenience to or burden on neighboring property owners, nor represent a burden on municipal facilities.

1995 Vernon Town Plan, *Earth Resources, Policy* §2.

Before issuing a permit, the Board must find that the Project is in conformance with "any duly adopted local or regional plan(s) or capital program under Chapter 117 of Title 24." 10 V.S.A. §6086(a)(10). The burden of proof is on the Permittees. 10 V.S.A. §6088(a).

If a Town Plan's provisions are specific, they are applied to the proposed project without any reference to the zoning regulations. A provision of a town plan evinces a specific policy if the provision: (a) pertains to the area or district in which the project is located; (b) is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and (c) is sufficiently clear to guide the conduct of an average person, using common sense and understanding. *Re: The Mirkwood Group and Barry Randall*, #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 29 (Aug. 19, 1996).

The Board is unable to conclude that the provisions of the Town Plan relating to quarry noise, *Earth Resources, Policy* §2, are specific provisions under the *Mirkwood* test. While these provisions pertain to quarry operations and therefore pertain to the area or district in which the Bemis Quarry is located, and they are unquestionably intended to guide or proscribe quarrying operations, they are not sufficiently clear to guide the conduct of an average person, using common sense and understanding. *Compare, Re: Bull's Eye Sporting Center and David and Nancy Brooks, et al.,* #5W0743-2-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Feb. 27, 1997).

As the provisions are ambiguous, the Vermont Supreme Court's decision in *In re Molgano*, 163 Vt. 25 (1994), instructs the Board to examine the relevant zoning regulations to attempt to resolve the ambiguity. This does not mean that the Board conducts a general review of a project for its compliance with the zoning regulations,

but rather it sees if there are provisions in the zoning regulations that address the same subject matter that is at issue under the town plan. *Re: Fair Haven Housing Limited Partnership and McDonald's Corporation,* #1R0639-2-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Apr. 16, 1996*), aff'd, In re Fair Haven Housing Limited Partnership and McDonald's Corporation*, Docket No. 96-228 (Vt. Apr. 23, 1997) (unpublished). Here, however, the Town has no zoning regulations.

The recent decision by the Vermont Supreme Court in *In re Kisiel,* 11 Vt. L.W. 401 (Dec. 29, 2000), places a further level of review on the Board's Criterion 10 analysis when a provision of a Town Plan is found to be ambiguous. *Kisiel* instructs the Board to examine not only the town's zoning bylaws (if any) but also the actions of local administrative bodies (such as the Selectboard and Planning Commission) in issuing permits or other approvals in order to discern whether such actions provide an interpretation of the Plan. *Id.* at 404 – 05. Under *Kisiel* the Board is to give deference to such actions unless its finds them to be "plainly erroneous." *Id.* at 404.

Here, while there is testimony that the Selectboard and Planning Commission support this Project, there are no Selectboard or zoning board actions to consider. While the Vernon Planning Commission may have issued a permit to the Permittees for the proposed Project, the Record in this case is devoid of any reference to such permit.

When the Planning Commission was considering the initial gravel operations at the Bemis Tract, it determined that those operations would not result in "inconvenience" to the neighbors under the Vernon Town Plan. In making this determination, however, the Planning Commission was concerned about well interference; noise created by the proposed Project was not a consideration. What precisely the Planning Commission considered or determined as regards the presently proposed Project is unclear, however. The Planning Commission reviewed the proposed Project and determined that the Project, if operated in the same manner as the existing gravel operation, would not cause inconvenience to its neighbors under the present Town Plan. It is not clear, however, whether the Planning Commission considered "inconvenience" in light of well interference or noise. [3]

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[3] It is also unclear from the *Kisiel* decision whether the Board is required to consider statements or determinations made by local administrative bodies when those statements are merely gratuitous. In *Kisiel*, the Court noted that the Waitsfield Subdivision Regulations specifically required the Waitsfield Planning Commission to "refer to the goals, objectives and policies … established by the Town plan in making discretionary decisions." *Id.,* 11 Vt. L.W. at 404. The Board has no evidence as to whether any applicable Vernon regulations place similar requirements upon the Vernon Planning Commission in its deliberations.

The Board, therefore, is unable to obtain much guidance from the Town's actions, even assuming that those actions include the grant of a permit by the Planning Commission. The Town's actions in this matter are further clouded by the fact that, knowing that the Commission's Dash 3 Permit had conditioned the Project based on the language of the 1995 Vernon Town Plan, the Town did not to amend this Plan to make it clear that the Project's potential noise levels will not conflict with the "inconvenience" and "burden" language of the Plan. [4]

If the Board is unable to refer to either relevant zoning bylaws or to a town's actions to aid in its interpretation of the provisions of a town plan, "the Board will attempt to construe the town plan provisions at issue by further consideration of the town plan." *Re: Bull's Eye Sporting Center and David and Nancy Brooks, supra,* at 20, *citing Mirkwood* at 25. Thus, the Board must attempt to give all of the relevant provisions in a town plan some meaning, since surplusage cannot be assumed. *Clymer v. Webster*, 156 Vt. 614, 625 (1991) (court must "presume that all language is inserted in a statute advisedly"), *quoting State v. Racine*, 133 Vt. 111, 114 (1974).

The evident intent of the 1995 Vernon Town Plan's *Earth Resources* Policy is that the extraction or processing of earth resources at a quarry should not occur in such a way as to cause adverse or permanent environmental impacts, or inconvenience to or burdens on those who live in the neighborhood of the quarry. The question that then arises is what is meant by the words "inconvenience" and "burden."

It is a long-established rule of statutory construction that, when words in a statute are undefined, they "are to be given their plain and commonly accepted meaning," *Vincent v. State Retirement Board*, 148 Vt. 531, 535 - 36 (1987); *and see In re Reynolds*, 11 Vt. L.W. 51, 749 A.2d 1133 (2000) (court presumes that the plain and ordinary meaning of statutory language was intended by the legislature); *Braun v. Board of Dental Examiners,* 167 Vt. 110, 116 (1997); *State v. Young*, 143 Vt. 413, 415 (1983); *State v. Baldwin,* 140 Vt. 501, 509 - 10 (1981). It is also presumed that language in a statute is inserted for a purpose. *Clymer, supra; Slocum v. Dept. of*

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[4] Even if the Board were able to obtain some guidance from the Town's actions, *Kisiel* may not be entirely applicable to the present case. It is apparent from *Kisiel* that the Court was concerned that a town, having approved a project under its local regulations and bylaws, should not be permitted to oppose the same project, through Criterion 10, before the Commissions or the Board. This is not the situation presented by this appeal.

Social Welfare, 154 Vt. 474, 481 (1990). Finally, remedial statutes are to be liberally construed to effectuate their purpose. *Human Rights Commission v. Labrie,* 164 Vt. 237, 245 (1995); *State of Vermont v. Custom Pools,* 150 Vt. 533, 536 (1988); *Greenafage v. Dept. of Emp. Sec.*, 134 Vt. 288, 290 (1976).

Applying these principles, the Board notes that the word "inconvenience" is defined as "the quality or state of being inconvenient; lack of comfort, ease, etc.; bother, trouble." *Webster's New Twentieth Century Dictionary* (Unabridged, 1977). "Burden" is defined as "that which is borne with labor or difficulty; that which is grievous, wearisome or oppressive." *Id.*

Excessive noise from quarrying operations causes inconvenience and burdens to neighboring landowners. Of course, "inconvenience" and "burden" are subjective terms; what is inconvenient to one person may be nothing to another. Nonetheless, the Board believes that it is possible to apply an objective test to the meanings of these words, and we therefore look to our decisions in similar cases for guidance.

Within the context of an analysis under 10 V.S.A. §6086(a)(8) ("Criterion 8"), the Board has, on several occasions, addressed noise from quarrying operations; such noise is often considered to be adverse because it does not "fit" or exist in harmony with its surroundings. *See, e.g., Re: Barre Granite Quarries, LLC and William and Margaret Dyott,* #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law and Order at 80 (Dec. 8, 2000); *Charles and Barbara Bickford,* #5W11860-EB, Findings of Fact, Conclusions of Law, and Order at 33; *John and Marion Gross d/b/a John Gross Sand and Gravel*, #5W1198-EB, Findings of Fact, Conclusions of Law, and Order at 13 (Apr. 27, 1995); [5] *H.A. Manosh Corp.,* #5L0918-EB, Findings of Fact, Conclusions of Law, and Order at 22 (Aug. 8, 1988); *H.A. Manosh Corp.,* #5L0690-EB, Findings of Fact, Conclusions of Law, and Order at 17 (Aug. 8, 1986).

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[5] In *John and Marion Gross, supra,* at 10, the Board found that:

> The *quality* of the noise of the crusher plant and associated trucks harms the Adjoiners in the use and enjoyment of the residential properties because it is industrial. The perception of industrial noise interferes with family uses of residential property, particularly during the months of July and August, when outdoor use of the Adjoiners' residential properties is increased. The interference occurs because, in a residential setting, the industrial-type noise of the crusher operation and the associated trucks is perceived as irritating and out-of-character with the setting.

In both *Barre Granite Quarries* and *Bickford,* the Board applied a quantitative analysis to gauge and control the noise impacts from quarries. In *Barre Granite Quarries* the Board found that the adverse aesthetic effects from noise from the quarry would not be undue if such noise were to be restricted by a permit condition such that noise levels would "not exceed 70 dB(A) *Lmax* at the Project boundary and 55 dB(A) *Lmax* outside any residence or area of frequent human use." *Barre Granite Quarries,* Land Use Permit #7C1079 (Revised)-EB, Condition 10 (Dec. 8, 2000). In *Bickford,* the Board held that, "Interference with activity and annoyance will occur if outdoor noise levels exceed 55 dB." *Bickford,* at 33.

Thus, at least within the context of a Criterion 8 analysis, the Board has established "unduly adverse" levels of 55 dB(A) Lmax at residences, and in the case of the *Barre Granite Quarries* decision, at any "area of frequent human use," which could, in some cases, be up to the quarry's property line.

The question, then, is whether the language in the 1995 Vernon Town Plan establishes a more restrictive standard than the Board has applied under its Criterion 8 "unduly adverse" test. The Board concludes that it does.

When analyzing adverse aesthetic effects, the Board will conclude that such effects are “undue” if it reaches a positive finding with respect to any one of the following factors:

> Does the Project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?
>
> Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings?
>
> Does the Project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

See, Re: Black River Valley Rod & Gun Club, Inc., #2S1019-EB, Findings of Fact, Conclusions of Law, and Order at 19 - 20 (June 12, 1997); *Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 25 - 29 (Aug. 19, 1996); *Re: Quechee Lakes Corp*., #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 19 - 20 (Nov. 4, 1985). It is the third of these factors that is relevant to this matter.

While both are fact-specific analyses and while both are tied to the particular character of the area, a standard that requires noise to be "offensive or shocking" before it constitutes an adverse aesthetic impact sets a higher threshold for annoyance than a standard which asks merely whether noise is an "ínconvenience" or a "burden." Thus, if under the *Barre Granite Quarries* standard, noise levels above 55 dB(A) Lmax at "any residence or area of frequent human use" are "offensive and shocking" and thereby cause noncompliance with Criterion 8, noise levels above 55 dB(A) Lmax will certainly cause noncompliance with provisions of a town plan which states that earth resources extraction "should not have an adverse environmental impact resulting in inconvenience to or burden on neighboring property owners…." Indeed, restrictions on noise must be established at a level lower than 55 dB(A) Lmax in order to meet the more stringent requirements mandated by an "inconvenience" or "burden" test.

Using the objective test established by an analysis of Criterion 8 from other cases, the Board can establish an objective test for the "inconvenience to or burden on neighboring property owners" language of the 1995 Vernon Town Plan. The Board concludes that the said Town Plan requires that noise levels, exclusive of those caused by blasting, at any residence or areas of frequent human use not exceed 50 dB(A) Lmax.[6] The Board will therefore revise the provisions of Permit Condition 15 to reflect this limitation. [7]

The Board is aware that its decision today does not, as *Barre Granite Quarries* does, address or set a decibel level at the Bemis Tract property line. The focus of the language of the 1995 Vernon Town Plan is on inconvenience to the neighbors of an earth resources extraction operation; what is important under the Town Plan is the sound levels

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[6] The Board notes that Tocci's report and testimony are vague as to whether the Permittees believe that the dBA readings are Leq or Lmax. As noted in note 1, *supra*, these are quite different sound measurement units. However, Tocci does state that, "It has been determined that rock removal sound levels not exceeding 50 dBA should be acceptable and not be inconvenient to the nearest receptors." The Board considers the use of the words "not exceeding" to establish an upper level of sound that should not be exceeded, or, in other words, an acceptance of an *Lmax* measurement. The use of *Lmax* is also consistent with the restrictions established in the *Barre Granite Quarries* case.

[7] The present Vernon Town Plan is currently in the process of being revised. The Town and its citizens are, of course, free to rewrite their Town Plan in a manner that establishes numerical decibel limitations on noise for quarry operations.

at the neighbors homes or properties. While the sound levels at the quarry's property lines will certainly have an impact on the sound levels at its neighbors' lands, what the neighbors will actually hear will depend on a range of factors, including their distance from the quarry operations, the topography of the land and the density of the vegetation. *See, Re: Bull's Eye Sporting Center and David and Nancy Brooks, et al.,* #5W0743-2-EB (Altered) (Revocation), Findings of Fact, Conclusions of Law, and Order at 10 (June 23, 2000). The Board thus sees no need to impose limitations on the sound levels at the Bemis Tract property lines when it has imposed such limitations at the neighbors' lands, the more essential receptor points under the Town Plan. [8]

The Permittees' collateral estoppel claims

The Permittees contend that principles of collateral estoppel act to limit the Commission or the Board from applying a noise standard more restrictive than that imposed by the Original Permit at the property line. Condition 7 of the Original Permit states, "Noise levels at the perimeter of the Bemis tract shall not exceed 75 decibels as a result of the operation of the quarry or trucks." Although this Condition does not state a decibel unit of measurement, it must be read as imposing a 75 dB(A) Lmax limitation, as the use of the words "shall not exceed" indicates that, at no time, can the noise from the

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[8] Two additional comments are necessary. First, the Permittees have expressed a concern that the noise limitations imposed by the Commission and Board for its proposed Project – the rock extractions operations on the western portion of the Bemis Tract – might be also imposed on its existing operations. The Permit issued by Commission is somewhat ambiguous on this point, as it authorizes 'the permittees to conduct rock quarry operations with a maximum annual extraction rate of 50,000 cubic yards, on 30 acres of the Bemis Tract *and continue existing mineral excavation and processing on the balance of the parcel."* (Emphasis added) The Permit later indicates that it apparently only applies to the proposed rock quarrying operations, as it states, "The project is subject to Act 250 jurisdiction because it is a material change to an existing Act 250 project."

Should there be any misunderstanding or confusion, the Board's noise restrictions as set out in this decision, and the Land Use Permit issued on even date with this decision, apply only to the proposed rock quarrying operations. They do not apply to the Permittees' existing operations, which are governed by the Original Permit.

Second, the Board is aware that much of the land surrounding the Bemis Tract, including a parcel south of the Tract, does not presently contain residences. Should residences be built on these lands, the noise level restrictions imposed by this decision and the amended Permit issued today will apply at such residences.

quarry's operations be greater than 75 decibels.

Because this decision does not set a noise restriction at the property line, the Permittees' arguments are moot. However, the Board does not consider itself bound by the standard established in Condition 7 of the Original Permit for a number of reasons.

The doctrine of collateral estoppel, also known as "issue preclusion," bars "the subsequent relitigation of an issue which was actually litigated and decided in a prior case between the parties resulting in a final judgment on the merits, where that issue was necessary to the resolution of the action." *Berlin Convalescent Center v. Stoneman*, 159 Vt. 53, 56 (1992), *quoting American Trucking Ass'ns v. Conway*, 152 Vt. 363, 370 (1989). The Vermont Supreme Court has held that collateral estoppel is appropriate where:

> (1) [i]t is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

Cold Springs Farm Development, Inc. v. Ball, 163 Vt. 466, 469 (1995), *quoting Trepanier v. Getting Organized, Inc.,* 155 Vt. 259, 265 (1990). *Accord, In re Tariff Filing of Central Vermont Public Service Corp.,* 12 Vt. L.W. ____ (Feb. 9, 2001); *and see, Olchowik v. Sheet Metal Workers' International Ass'n*, 875 F.2d 555, 557 (6th Cir. 1989), *citing, Montana v. United States*, 440 U.S. 147, 153 (1979).

There is no question that collateral estoppel is available in the administrative context. Applying collateral estoppel to administrative decisions in the zoning context, our Supreme Court has held that:

> Although collateral estoppel does not apply to administrative proceedings as an inflexible rule of law, the principles of *res judicata* and collateral estoppel generally apply in zoning cases as in other areas of the law.

In re Carrier, 155 Vt. 152, 157-58 (1990).

Carrier further established the general rule for applying the doctrine of collateral estoppel in zoning cases:

> [A]s a general rule, a zoning board or commission "may not entertain a second application concerning the same property after a previous application

> has been denied, *unless a substantial change of conditions had occurred or other considerations materially affecting the merits" of the request* have intervened between the first and second applications. *Silsby v. Allen's Blueberry Freezer, Inc*., 501 A.2d 1290, 1295 (Me. 1982).

Carrier, 155 Vt. at 158 (emphasis added). As the Court noted, this rule "provides some finality" and "protects the integrity of the process." *Id*. The underlying concerns of finality and integrity are equally applicable in the context of the Act 250 process.

Looking at each element of the collateral estoppel doctrine, the Board concludes that it cannot apply to this case.

First, the doctrine may only be asserted against "one who was a party or in privity with a party in the earlier action." [9] The Permittees make a novel argument in this regard; they argue that the State (in the body of the Commission) was a "party" to the Original Permit and, as no other party has appeared in the present case, the Board (as an agency of the State) is a "party" to this proceeding, apparently by default. They cite no authority for this proposition, and they fail to recognize that the State, in the person of various State agencies, is authorized to appear as a party before the Commissions and the Board. *See* 10 V.S.A. §6085(c)(1), *referring to* 10 V.S.A. §6084(a); *and see* EBR 14(A)(4). The Board therefore concludes that neither the Commissions nor the Board are "parties" to their decisions, as that term is used within the context of collateral estoppel. [10]

Second, collateral estoppel bars "the subsequent relitigation of an issue which was actually litigated…." *Berlin Convalescent Center, supra.* As the Board has never appeared as a party to any action involving the question before it in this appeal, it has never "litigated" the issue. (And, therefore, the fourth collateral estoppel element – that "there was a full and fair opportunity to litigate the issue in the earlier action" – is likewise not present.) Without prior litigation of an issue, there can be no relitigation.

Third, the Permittees have provided the Board with no authority for the proposition that any finality doctrine, whether it is collateral estoppel or *res judicata,* is

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[9] In this respect it is similar to *res judicata,* which *"*bars *parties* from *relitigating … claims*." *Merrilees v. Treasurer, State of Vermont,* 159 Vt. 623, 624 (1992) (emphasis added).

[10] Nor are the Board or Commission "parties" for *res judicata* purposes, either.

applicable to a court or an administrative body when it is acting as a quasi-judicial decision-maker. *See In re Juster Associates*, 136 Vt. 577, 580 (1978) ("The [Environmental] Board acts as a quasi-judicial appellate body").

The second collateral estoppel element requires that "the issue was resolved by a final judgment on the merits." [11] It is clear that the Commission considered noise within the context of a Criterion 1 analysis in the Original Permit. Whether the Original Permit was an adjudication that also addressed the quarry's noise within a discussion of the 1985 Vernon Town Plan is less clear. As to Criterion 10, the Original Decision states: "The project is in conformance with the local and regional plan: a. The project provides a needed resource and has been designed to minimize natural resources and infrastructure impacts. Exhibit 6." Exhibit 6 reads in part: "This plan is designed to have a minimal impact and should be of no burden or inconvenience to its neighbors as it is well buffered by woodland and removed from the residential area." Whether Exhibit 6 addresses noise is a matter of speculation. However, the fact that the Commission read Exhibit 6 as evidence that the gravel extraction operation has been designed in such a way as to "minimize *natural resources* and *infrastructure* impacts," would indicate that the Commission's focus was not on noise or other aesthetic considerations that would be of particular concern to the quarry's neighbors. The Board is thus unable to conclude that, in the Original Permit, the Commission conclusively determined that noise impacts from the existing gravel operations were in compliance with Criterion 10.

The third collateral estoppel element is that the issue must be "the same as one raised in the later action." There is no question that the proposed Project is not the same as the project approved by the Original Permit. Their locations differ, the topographies of the sites differ, and, most importantly, their operations differ - - the proposed Project involves rock drilling and blasting, activities that are not a part of the Permittees' present gravel extraction business. [12] Cersosimo argues, however, that

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[11] Similarly, *res judicata* means, literally, "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment." *Blacks Law Dictionary,* (Abridged 6th Ed., 1991).

[12] To the extent that the Permittees rely on the doctrine of *res judicata*, the Board notes that the doctrine has likewise long been held not to apply when there has been a change in fact. *In re Forslund,* 123 Vt. 341 (1963); *Miller v. Miller*, 123 Vt. 221 (1962); *and see Roddy v. Roddy*, 168 Vt. 343, 347 n.2 (1998) (for *res judicata* to apply the subject matter and causes of action must be "identical or substantially similar"); *Sure-Snap Corp. v. State Street Bank and Trust Co.,* 948 F.2d 869 (2d Cir. 1991).

while this is a different project, the *law* has not changed; i.e. the provisions in today's Town Plan are the same as those which were in the 1986 Vernon Town Plan at the time the Original Permit was issued in 1990. Thus, Cersosimo argues, if 75 dB(A) at the property line satisfied Criterion 10 in 1990, the same should hold true today. [13]

The recent *In re Tariff* case from the Vermont Supreme Court, looked at collateral estoppel's applicability to questions of law. It noted that courts have often treated issues of law and fact differently for purposes of collateral estoppel. The Restatement of Judgments recognizes that collateral estoppel generally applies to issues of law, *Restatement of Judgments* (*Second*) §27 (1982), but provides exceptions to the general rule when:

> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws[.]

Id., §28(2). Here, an argument could be made that this appeal and the circumstances surrounding the Original Permit involve similar claims, although the fact that this is a different type of operation on a different portion of the Tract may make the claims "substantially unrelated." It is the second prong of the exception, however, that is particularly applicable here – namely, that to bind the Board to the decisions of a Commission will result in the "inequitable administration of the laws."

Under Act 250, decisions of the Commission are appealed to the Board. 10 V.S.A. §6089(a)(1). Decisions of the Board set precedent that binds the Commissions; indeed, our Supreme Court has held that the Board is the ultimate administrative environmental authority in Vermont. *In re Hawk Mountain Corp. et al.,* 149 Vt. 179, 185 (1988). In essence, the Permittees contend that the actions of a lower tribunal in one case (the Commission) can somehow bind a higher tribunal (the Board) in carrying out its responsibilities under *de novo* review in a different matter. But this stands the statutory hierarchy on its head and would lead to absurd results, since each of the nine different Commissions would be vested with authority to dictate - and restrict - the actions of the Board. The lack of a final, central authority on Act 250 matters would inevitably result in the "inequitable administration of the laws," as different Commissions could arrive at different decisions on identical questions of law, and the

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[13] This assumes, of course, that the Original Permit actually concluded that 75 dBA at the property line satisfied Criterion 10. As noted, the Board has declined to make this finding.

Board would be powerless to provide any uniformity and stability in the administration of the Act.

The analysis immediately above makes it therefore clearly evident that the Permittees' claims fail the final element of the collateral estoppel doctrine - - that "applying preclusion in the later action is fair." It is neither fair to the Board to attempt to bind it to the decisions of a lower tribunal, and it is not fair to Vermont to sanction an administrative system which guarantees inconsistencies.

Finally, the Board notes that "What's sauce for the goose is sauce for the gander." *See, Circuit City Stores, Inc. v. Adams,* ___ U.S. ___, 2001 WL 273205, 273215 (March 21, 2001) (Souter, J., dissenting). If the Permittee successfully argues that the limitations set by the Commission in the Original Permit are binding and final on the Board, as a "party", such limitations would likewise be binding on the Permittees, who were, without doubt, parties to the Original Permit. As noted, Condition 7 of the Original Permit establishes a maximum limitation at the Bemis Tract property line of 75 decibels for "the operation of the quarry…." Condition 7 would then apply to *all* quarrying operations at the Permittees' quarry, including blasting, which is not presently restricted under Condition 15 in the Permit. This may not be in the Permittees' best interests.

The Board finds the Permittees' collateral estoppel claims to be without merit.

V. ORDER

1. Land Use Permit 2W0813-3 (Revised)-EB is issued.

2. Jurisdiction is returned to the District 2 Environmental Commission.

Dated at Montpelier, Vermont this 19th day of April 2001.

ENVIRONMENTAL BOARD

_/s/Marcy Harding_____
Marcy Harding, Chair
George Holland
Samuel Lloyd
W. William Martinez
Alice Olenick
Greg Rainville
Nancy Waples