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

Re: Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks — Land Use Permit Amendment Application #5W0743-3-EB

MEMORANDUM OF DECISION ON MOTIONS TO ALTER

The parties have filed two Motions to Alter the Findings of Fact, Conclusions of Law, and Order issued on April 4, 2003 (Order). A full procedural summary is provided in the Order, and terms defined in the Order are used herein without definition.

The Permittees filed a Motion to Alter on May 5, 2003, asking the Board to reconsider the requirement that the Commission review all ten criteria on the shotfall issue. On the same date, George Wild, Jr. and the Town of Orange filed a joint motion to alter seeking relief for the lack of audiotapes from the hearing.[1] As set forth below, the Board denies both motions.

I. DISCUSSION

A. Permittees' Motion to Alter

Permittees argue that neither swing stops nor Commission review of a cure proposal on all 10 criteria is needed, and seek to alter the Order accordingly. Specifically, Permittees contend that they can "comply with the restrictions regarding shotfall zones by the presentation of the sporting clays." However, the Board rejected this argument already in the Revocation Decision. *Re: Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks*, #5W0743-2-EB (Altered) (Revocation), Findings of Fact, Conclusions of Law, and Order (June 23, 2000). In the Revocation Decision the Board ruled that the shotfall problem cannot be addressed by limiting the angles from which clay targets are fired:

> The Board does not believe that the cure to the Permittees' failure to install the required shooting stops lies solely in restrictions on the presentation of the target clays. Too many variables in such restrictions exist, and the Permittees themselves noted that, in order to conduct shooting competitions, clays must be presented at many angles and from many directions. Further, enforcement of a permit condition related to presentation would be virtually impossible, and "[t]he Board will not write a permit condition which it believes is unenforceable at the time it is written." *Old Vermonter Wood Products and Richard Atwood*, #5W1305-EB, Findings of Fact, Conclusions of Law, and Order at 16 (Aug. 19, 1999), *citing, In re Denio,* 158 Vt. at 240.

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[1] A duplicate of the Town of Orange and George Wild, Jr.'s Motion to Alter was also filed. Both copies are being treated as a single Motion to Alter.

> Rather, the Board believes that it is the placement of the shooting stations that dictates where shotfall will occur, and that, even if the angle of fire is as broad as 180 degrees, the stations can be located in such positions as to insure that shot does not leave the Project tract or fall in Baker Brook. This may mean that the number of stations must be reduced and the placement of the stations reconsidered. Again, the Board leaves it to the Commission's discretion to determine how to accomplish the above goals.

Revocation Decision at 2-3. What the Revocation Decision requires to cure the swing stops violation is reorientation of and/or reduction in the number of shooting stations as appropriate to keep shot out of Baker Brook and off other people's property. Changing the presentation of sporting clays cannot cure this violation.

Permittees have proposed to reorient the remaining shooting stations. Unlike the proposal to increase the vegetated buffer, which implicated only Criterion 8, there is no question that this proposal could have effects on criteria not on appeal. Also, this change permeates the entire project, so the Board properly ruled that full review was needed. *See, Re: Ronald E. Tucker*, Declaratory Ruling #165, Findings of Fact, Conclusions of Law, and Order at 9 (Feb. 27, 1985); *aff'd, In re R.E. Tucker, Inc.*, 149 Vt. 551, 553 (1988)); *and see C.V. Landfill, Inc. and John F. Chapple*, #5W1150-WFP (Unlined Landfill Facility) (Oct. 15, 1996, altered Feb. 3, 1997); *Re: John Gross Sand and Gravel*, Declaratory Ruling #280, Findings of Fact, Conclusions of Law, and Order at 9 (Jul. 28, 1993). In addition, given that the Permittees claim that they cannot operate the Project as originally conditioned, it is clear that the circumstances and context of the Project have changed significantly since the original permit was issued. *See, Re: Greater Upper Valley Solid Waste Management District*, Declaratory Ruling #418, Memorandum of Decision at 5-6 (May 13, 2003)(citing *Re*: *Homestead Design, Inc*, #4C0468-1-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Sep. 16, 1990). Full review on remand is appropriate. However, as with any application, the Commission may determine that certain criteria are not at issue. As in *Greater Upper Valley Solid Waste Management District*, the Board would encourage that the Commission convene a prehearing conference to discuss which criteria may be affected. *Greater Upper Valley Solid Waste Management District*, Memorandum of Decision at 5-6.

The Board denies Permittees' Motion to Alter.

B. George Wild, Jr. and Town of Orange's Motion to Alter

1. VRAP 10(c)

George Wild, Jr. and the Town of Orange move to alter, claiming that they are prejudiced by the absence of audiotapes. Vermont Rule of Appellate Procedure (VRAP) 10(c) sets out the process for handling appeals in which hearing tapes are

not available.[2] The process established in VRAP 10(c) does not contemplate having the trial tribunal recreate the record before any appeal is filed. Instead, it is a party-driven process.

The moving parties argue that, if VRAP 10(c) does not apply then the "Board should prepare its own statement of the oral testimony and evidence or the hearing should be reconvened." (Wild/Orange Motion to Alter, at 7.) However, VRAP 1(a) clearly states that the VRAP apply to appeals from decisions of administrative boards.

The fact that one judge offered to reconstruct the record from her own notes in a case at Environmental Court does not bind the Board. Likewise, the fact that the Board may have reconstructed missing portions of the record in certain cases does not mean that it must do so whenever all or part of the recording is missing. Also, the fact that Board counsel phoned the parties to notify them that most of the audiotapes did not record does not mean that the VRAP 10(c) should not apply.

The moving parties claim that they will be prejudiced by the lack of a transcript in the event of an appeal because a transcript would show that their evidentiary objections were preserved. Specifically, the moving parties argue that a transcript would show that "the parties did not contest the Chair's evidentiary rulings to save time and avoid full deliberation by the Board," and that these objections were somehow preserved. This is not the case. The Chair's evidentiary rulings are preliminary rulings under EBR 16(B). If these rulings are challenged, they must be considered by the full Board. If they are not challenged, they become final. There is no way to preserve an objection to a Chair's ruling without raising that objection to the full Board. In this case, counsel for the moving parties did not object to the Chair's rulings, so their evidentiary objections were not preserved. Had any party

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[2] VRAP 10(c) provides:

> c) **Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript Is Unavailable.** If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the Presiding Judge of the superior court or the judge of the District Court for settlement and approval and as settled and approved shall be included by the clerk of such court in the record on appeal.

suggested skipping this step to save time, the Chair would have made clear that objections are not preserved unless presented to the full Board.

The moving parties also claim that they need a transcript to prove that the Permittees' expert made certain statements concerning his sound testing, in order to demonstrate that the Board erred in denying certain evidentiary objections and in concluding that the cure complies with Criterion 8. As discussed above, however, the moving parties failed to preserve any evidentiary objections. Further, with respect to the validity of the Board's conclusions, the absence of a transcript will not cause prejudice because the validity of Permittees' sound testing was not at issue. Nevertheless, the Board's findings did note the flaws in the original and subsequent sound tests that were conducted in snowy conditions. *See,* Findings 17 and 18. There is no dispute that Permittees and the Board focused on the appropriate cure in this revocation matter, whereas Mr. Wild's case focused on denying a permit on Criterion 8. Should an appellate court determine that the Board should review the entire Project for compliance with Criterion 8, the case can be remanded for full hearing. The absence of a transcript would not prejudice the moving parties.

Likewise, the moving parties' claim that certain evidence is needed to establish whether the Project can comply with its permits misconstrues the issues in this revocation case. The violations have been established. This proceeding concerns only the cure for the Permittees' logging in the vegetated buffer. The moving parties have not demonstrated that the lack of a transcript would prejudice them or prevent them from prosecuting an appeal effectively. *See*, VRCP 59(f).

The moving parties claim that, even if no appeal is taken, they will be prejudiced because Mr. Wild cannot use transcripts from the Board hearing in his civil nuisance case.[3] It is not the Board's role to assist parties in their private causes of action. Also, Mr. Wild can call these sound experts as witnesses at any new trial of the nuisance suit, should the Vermont Supreme Court grant plaintiffs/appellants' motion to remand. The lack of hearing tapes in this proceeding will not prejudice Mr. Wild in his private lawsuit.

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[3] Superior court dismissed Mr. Wild's claims for injunctive relief and monetary damages and denied his motion to reopen. (Actually, Mr. Wild is one of several plaintiffs, all neighbors of the shooting range.) That decision is on appeal at the Vermont Supreme Court, and the plaintiffs/appellants have filed a motion to remand back to superior court in light of the Board's decision. This is because Judge Davenport had based her decision in some part on the fact that Act 250 adequately protects the plaintiffs' interests, citing the Commission's decision to bar shooting for ten years.

2. Requested Alterations

The moving parties request certain alterations in their Motion to Alter.[4] Specifically, the moving parties seek the following changes to the Order:

1. *A statement that there is no tape recording of the hearing.*

This is not necessary. Should an appeal be taken and a transcript requested, VRAP 10(c) would apply to any relevant portions of the transcript that are unavailable. The lack of such a statement would not prejudice the parties.

2. *A statement that evidentiary objections were preserved, even though no party objected to the Chair's evidentiary rulings.*

As discussed above, no party objected to the Chair's rulings on evidentiary objections, and they are final pursuant to EBR 16(B), so such a statement cannot be added to the Order. The moving parties attempt to restate their evidentiary objections in the Motion to Alter. The Board cannot consider these objections now, since the Chair's rulings were not challenged in a timely manner.

3. *A ruling taking official notice of the Revocation Decision and the Board's September 21, 2000 Memorandum of Decision.*

This is unnecessary because these documents already are part of the record. It would be improper to take notice of these documents because they are the law of the case, not "judicially cognizable fact." 3 V.S.A. § 810(4).

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The Board notes that the moving parties did not number their requested alterations as required by EBR 31(A)(2), and did not cite supporting evidence in the record. The moving parties cite *Re: John Russell Corporation*, #1R0489-6-EB (Remand)-EB, Memorandum of Decision at 2-3 (Mar. 15, 2002), in support of their claim that EBR 31(A)(2), which requires that each requested alteration be numbered separately and supported by citations to the record, etc., does not apply to motions to alter conclusions of law. The moving parties read *Russell* too broadly. In *Russell*, the Board held only that a party using a Motion to Alter to make a purely legal argument, not concerned with fact, need not cite supporting evidence in the record. *Id.* at 2-3. The holding in *Russell* is limited and does not govern the instant Motion to Alter.

4. *Deletion of the Order and adoption of the proposed findings and conclusions of the moving parties.*

The moving parties also argue that the Commission did not abuse its discretion in barring shooting for ten years, and that the Board undercut the Commission's discretion in its recent decision, so should alter the decision and adopt the proposed findings and conclusions the moving parties submitted. (Wild and Orange Motion to Alter at 4.) This argument misstates the standard of review. The Board does not review a district commission's decision for an abuse of discretion. The Board conducts a *de novo* review. 10 V.S.A. § 6089(a)(3). Thus, what the Commission did in this case has no bearing on the Board's decision. Furthermore, the Order clearly states that: "To the extent that any proposed findings of fact are included herein, they are granted; otherwise, they are denied. *See Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983)." (Order, at 5.) The Board declines to adopt the moving parties' proposed findings and conclusions verbatim.

3. Conclusion

The Board's conclusions of law are properly limited to the issue presented, and are well supported by the findings of fact and the evidence. Should an appeal be taken, VRAP 10(c) adequately protects the parties' rights. The moving parties have provided no reason to alter the Board's decision. Accordingly, the Board denies this Motion to Alter.

II. ORDER

1. Permittees' Motion to Alter is DENIED.

2. The Motion to Alter filed by George Wild, Jr. and the Town of Orange is DENIED.

3. Jurisdiction is returned to the District 5 Environmental Commission.

DATED at Montpelier, Vermont this 9th day of June, 2003.

/s/Jean Richardson
Jean Richardson, Acting Chair
Rebecca Day
George Holland
Samuel Lloyd
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