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

RE: George & Dorothy Carpenter by
Peter J. Monte, Esq.
Young, Monte & Lyford
P.O. Box 270
Northfield, VT 05673

Findings of Fact and
Conclusions of Law
Order
Application
#5W0976-EB

This decision pertains to an appeal filed on February 28, 1989 by George and Dorothy Carpenter from Land Use Permit #5W0976 issued by the District #5 Environmental Commission on July 29, 1988 and from the District Commission's decision denying the motions to reconsider and alter dated January 31, 1989. The permit authorizes the existing operation of a gravel pit on the Applicants' property located on Town Highway #33 in Waitsfield, Vermont. The Applicants object to several conditions in their permit that they believe are too restrictive. On March 10, 1989, a cross-appeal was filed by Daniel and Loopy Quinones and Gene and Lisa Winnicki (the Neighbors) on Criteria 1 (air), 5 (traffic), 8 (aesthetics), 9(E) (earth resources), and 10 (town plan).

At a prehearing conference convened on April 3, 1989, the parties agreed that the issue of what, if any, town plan applies to this project should be resolved before proceeding to a substantive review of the criteria at issue. Accordingly, the parties filed a stipulation of facts and legal memoranda on that issue. The Neighbors also filed a motion to address Criterion 10 prior to the other criteria. On May 10, the Board issued a Memorandum of Decision in which it granted the Neighbors' motion for a hearing on Criterion 10 and determined that it could not decide the question of town plan applicability until an evidentiary hearing was held.

On June 7, 1989, an administrative hearing panel of the Board convened a public hearing, with Chairman Leonard U. Wilson presiding. The following parties participated in the hearing:

The Applicants by Peter J. Monte, Esq.
The Neighbors by Charles F. Yeiser, Jr., Esq.
Town of Waitsfield by Elwin Neil1
Waitsfield Planning Commission by Ted Joslin, Esq.

The Board recessed the hearing pending submission by the parties of proposed findings. On July 3, the Applicants and the Neighbors filed proposed findings of fact and legal memoranda, and on July 10 the Neighbors filed a response to

the Applicants' proposed findings and memorandum. A proposed decision was sent to the parties on October 12, 1989 and the parties were provided an opportunity to file written objections and to present oral argument before the full Board. On October 19, Dan and Loopy Quinones and Gene and Lisa Winnicki requested oral argument. On November 16, the Board convened a public hearing in Montpelier and heard oral argument from the parties. On December 6, the Board reviewed the evidence, determined the record complete, and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based exclusively upon the record developed at the hearing. To the extent the Board agreed with and found necessary any findings proposed by the parties, they have been incorporated herein; otherwise, said requests to find are hereby-denied.

I. ISSUES IN THE APPEAL

The Neighbors contend that the new Waitsfield Town Plan adopted on June 6, 1988 should apply to this project and that the application should be denied because the Town Plan designates Town Highway #33 as a scenic road and states that commercial and industrial development shall be excluded from scenic roads. The Neighbors also argue that the Town Plan's statement that increased traffic on scenic roads can have a negative effect on scenic roads means that this project would violate the Town Plan because of the traffic that results from operation of the gravel pit. The Applicants believe that no town plan applies to their project since on the day that they filed their application for a permit no town plan was in effect. They contend nevertheless that their project complies with any town plan that was previously in effect and with the 1988 Town Plan. Under the 1988 plan, they argue that gravel pits are not commercial uses intended to be excluded from scenic highways, and that Town Highway #33 already experiences a substantial amount of traffic so that the increase from this pit would not be significant.

The Board at this time must determine the following:

1. Whether the Waitsfield Town Plan adopted on June 6, 1988 applies to this project.

2. If the 1988 Plan applies to this project, whether the gravel pit operation complies with the Town Plan.

II. FINDINGS OF FACT

1. On June 9, 1981, George and Dorothy Carpenter received a conditional use permit from the Waitsfield Board of Selectmen to remove and sell gravel from their pit located on Town Highway #33 in Waitsfield. That permit required, among other things, that the Carpenters comply with all state and local regulations. This permit was renewed in 1984 and 1987.

2. On November 5, 1982, the Town of Waitsfield adopted its municipal plan.

3. On November 5, 1987, the 1982 town plan expired.

4. On February 2, 1988, the Carpenters were notified by the Assistant District Coordinator for Act 250 that they needed to obtain an Act 250 permit, pursuant to 10 V.S.A. Chapter 151.

5. On March 3, 1988, the Waitsfield Planning Commission determined to warn a public hearing on the proposed new town plan.

6. On March 30, 1988, a public hearing was held on the proposed town plan.

7. On April 5, 1988, the Carpenters filed an application for an Act 250 permit to authorize the removal of gravel.

8. On June 6, 1988, the Waitsfield town plan was adopted.

9. On June 30, 1988, the hearing on the Act 250 application was adjourned.

LO. On July 15, 1988, Land Use Permit #5W0976 was issued to the Carpenters.

11. The Applicants claim that they have sold gravel from their pit since approximately 1968. Records of sales of gravel from this pit beginning in 1970 are available, as follows:

Year	Sales	Aooroximate Price	Aouroximate Volume
1970	258.20	Under 1.00	260 Cubic Yards
1971	920.28	"	1,200 " "
1972	168.00	"	225 " "
1976	3,120.00	"	4,160 " "
1983	2,352.00	2.00	1,176 " "
1984	10,388.00	2.00	5,169 " "
1985	3,580.00	2.00	1,790 " "
1986	24,710.00	2.00	14,355 " "
1987	47,627.00	2.35	20,267 " "
1988	2,050.00	2.50	820 " "

12. The Town Plan contains a section entitled "Inventory and Analysis." The introduction to this section states:

> This section of the Plan provides the background information and rationale for the Recommendations section. This section contains information which will be of assistance in zoning, subdivision, and Act 2.50 reviews and in capital programming.

13. In the "Inventory and Analysis" section of the Town Plan, Town Highway #33 is designated a scenic road and the following statement is made with regard to scenic roads:

> These scenic roads are vulnerable to development and to construction. Increased traffic and the proliferation of curb cuts can affect the enjoyment of travel along scenic roads, as well as their aesthetic quality.

14. The "Recommendations" section of the Plan contains the following:

> Development shall be controlled along scenic roads by curbcut limits, increasing frontage requirements, density controls, siting and landscaping requirements, and exclusion of commercial and industrial development, as applicable through zoning, subdivision control, and Act 250 review.

Aside from this statement, the words "commercial" and "industrial" are not defined in the Town Plan.

15. The "Implementation" section of the Plan includes the following:

> The Town Plan is key to the Act 250 review process where consistency with the Plan is required for permit approval. This Plan has been prepared with its use in the Act 250 process in mind. The term "shall" in the Recommendations section is meant to be mandatory and constitute requirements of this Plan. ...

16. Elwin Neill, a Waitsfield Selectman who has served previously on the Zoning Board, believes that the word "commercial" as used in the Town Plan means retail sales and not gravel pits, and that therefore the provisions in the Town Plan excluding commercial uses from scenic roads was not intended to apply to gravel pits.

17. The common meaning of the word "commercial" is "of or connected with commerce or trade." "Commerce" is defined as "the buying and selling of goods ...." The common meaning of the word "industrial" is "having the nature of or characterized by industries ... of, connected with, or resulting from industries." "Industry" is defined as "any particular branch of productive, especially manufacturing, enterprise." Webster's New World Dictionary, Second Edition.

III. CONCLUSIONS OF LAW

A. Applicability of the 1988 Town Plan

The first issue the Board must decide is whether the Waitsfield Town Plan that was adopted on June 6, 1988 applies to this project. The Board has determined that the gravel pit must be reviewed for its conformance with the Town Plan adopted on that date, for the following reasons.

Until recently, the rule announced by the Vermont Supreme Court in Smith v. Winhall, 140 Vt. 178 (1981), constituted the clear state of the law on the question of when an applicant for a permit to develop land acquires a vested right against future changes in the law. In that case, the Winhall Planning Commission had denied an application for a local subdivision permit because the subdivision did not comply with the amended zoning ordinance that had been proposed and adopted after the landowner had filed his application for a permit. The question in that case was whether the application would be reviewed for compliance with the zoning regulations in effect at the time the application was filed or with the amendments to the

zoning ordinance enacted subsequent to the filing of the application. The Court, in reversing the Winhall Planning Commission's decision, adopted the common law minority rule, that an applicant has the right to have its project reviewed under the ordinance in effect at the time that a "proper application" is filed when no changes to the law had been proposed.1 The Court justified its adoption of the minority view of vested rights by the need to create certainty in the law and its administration. Citing In re Preseault, 132 Vt. 471, 474 (1974), the Court stated that vested rights arise from proceedings validly brought and pursued in good faith to implement rights available under previous law.

In two recent decisions, the Vermont Supreme Court has somewhat modified its Smith v. Winhall vesting rule by allowing that in some instances there must be a balancing of competing interests in determining whether a landowner has acquired vested rights. See In re Raymond F. Ross, No. 87-565 (Jan. 27, 1989); In re McCormick Manaaement Co., Inc., 150 Vt. 431 (1988). In Ross, an appeal of an Environmental Board decision, the Court stated:

> Smith should not be interpreted as an open-ended right to "freeze" the applicable regulatory requirements by proposing a developing with inadequate specificity. In In re McCormick Manaaement Co., we limited Smith to instances where some zoning regulation existed at the time of the application. In doing so, we analyzed the issue as balancing competing policy interests; there, the town's interest in orderly physical development of a community against the individual's interest in reaping rewards from a permit and acts in reliance on it. . . . We also noted that the legislative mandates, to the extent they existed, protected development in reliance on a permit but gave no protection to "a planned or intended use without substantial improvement of the premises." (citations omitted)

In re Raymond F. Ross at 4. The Court also emphasized its previous statements in In re Preseault and Smith v. Winhall

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1The rule adopted by the majority of state courts holds that "neither the filing of an application for a permit nor issuance of the permit, even though valid and conforming to regulations, vest rights in the applicant against future changes in zoning regulations.** Smith v. Winhall at 181.

that in order to acquire vested rights, a landowner must be acting "in good faith to implement rights available under previous law."

Based upon our interpretation of the Supreme Court's holdings regarding vested rights, we believe that the Carpenters did not acquire a vested right not to have to comply with the 1988 Town Plan, for several reasons. A permit may have been required for the Carpenters' gravel operation since 1970.2 In any event, the Carpenters have been on notice since 1981, as a condition of their first conditional use permit from the Town and of the subsequent renewals of this permit, that they needed to comply with all state and local regulations, and they made no attempt to determine whether a state permit was required. It was not until they were contacted by the District Office and told that they needed a permit to continue their gravel operation that they applied for a permit.

The Board does not believe that the vesting of rights prior to the adoption of the Town Plan in June, 1988 is warranted in this case because the vesting rule is clearly not intended to apply in a situation in which a landowner has been operating illegally for a number of years and then files an application for a permit to authorize its operation several months before a new Town Plan is adopted. During the course of the District Commission proceedings in this matter, the Town warned a hearing on a new Town Plan and subsequently adopted the Plan prior to the issuance of the Carpenters' Act 250 permit. Because the Carpenters should have obtained a permit to operate the gravel pit years ago, the timing of the application in relation to the adoption of this Plan was purely arbitrary. That is, the Carpenters did not plan their development in good faith reliance on an existing ordinance. Had the District Coordinator not contacted the Carpenters until after June 6, 1988, the Town Plan would have been in effect on the date that the Carpenters filed their application. Absent good faith reliance, the Board does not believe that the reason for the vested rights rule of Smith v. Winhall is applicable.

2No information regarding the amount of gravel extracted from the pit prior to 1970 was submitted to the Board. According to the records of sales submitted, which begins in 1970, in 1971 the amount of gravel extracted increased more than 400 percent since 1970. 1986 figures show a 1600 percent increase over 1971 extraction rates.

Furthermore, the Board believes that the Carpenters did not acquire vested rights in the absence of a town plan because the new Town Plan had been proposed and a public hearing held prior to the date that the Carpenters filed their application for an Act 250 permit, and the Plan was adopted prior to the adjournment of the Act 250 hearing and the issuance of the Act 250 permit. In our decision RE: Raymond F. Ross, Memorandum of Decision and Order, #2W0716-EB (Nov. 2, 1987), we stated:

> [A] careful reading of Smith v. Winhall indicates that the so-called vesting rule--that the laws and regulations that govern are those in effect at the time an application is filed--applies only in situations where no amendments to the town plan had been proposed or were in the process of enactment. See Smith v. Winhall at 180-82. Since [in the Ross case] amendments to the Dover Town Plan had been proposed and were in the process of being amended, the Smith v. Winhall vesting rule is not applicable.

Id. at 3.

The Board believes that in'light of the total circumstances of this case and our previous decision in Ross, we must conclude that the Carpenters' gravel pit must be reviewed for its conformance with the Waitsfield Town Plan adopted on June 6, 1988.

B. Conformance with the Waitsfield Town Plan

Raving determined that the Waitsfield Town Plan applies to this project, the Board must now decide whether the gravel pit operation conforms with the Town Plan, in accordance with 10 V.S.A. 6086(a)(10). We conclude that the project does not conform with the Town Plan.

The Town Plan designates Town Highway #33 as a scenic road. The Plan's provisions regarding scenic roads are clear: Commercial and industrial developments are excluded. The Board believes that the words "commercial" and "industrial" are unambiguous, and that this gravel pit meets both definitions. Moreover, the Plan specifically states that it was "prepared with its use in the Act 250 process in mind." Most importantly, the section that recommends that commercial and industrial development be excluded from scenic roads specifically refers to Act 250. Act 250

regulates gravel pits because they are commercial and industrial activities. It would be contradictory to find that this gravel pit is not a commercial or industrial activity when its commercial and industrial nature is the very reason for Act 250 jurisdiction.

The Applicants argue that the Board should accept the testimony of the Waitsfield Selectman that gravel pits are not considered either "commercial" or "industrial" and were not intended to be included in the prohibition against commercial and industrial operations on scenic roads. The Board, however, believes it is bound by the plain language of the Town Plan. The prohibition against commercial operations on scenic roads in Waitsfield is unambiguous, as is the characterization of this gravel pit as both commercial and industrial. A dangerous precedent would be set were the Board to determine for itself what was "really meant" when a town plan was written; such interference by the State would undermine a town's authority to express its own values and goals through its plan. If the Town of Waitsfield does not wish to exclude gravel pits from scenic roads, it may amend its Plan to so state. Until that time, the Board is bound to interpret the Town Plan according to its plain language.

For all the reasons explained above, we find that the gravel pit operation does not comply with the Town Plan as written and that the permit must therefore be denied.[3]

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[3]The neighbors argue that the increased traffic on the road violates the provision of the Plan that states that "[i]ncreased traffic ... can affect the enjoyment of travel along scenic roads, as well as their aesthetic quality." This statement is found in the Inventory and Analysis section of the Plan, and not in the Recommendations section. As the Plan explicitly states, the purpose of the Inventory and Analysis section is to provide "the background information and rationale for the Recommendations section." The Board believes that the inclusion in this section of the statement that increased traffic can affect the aesthetic quality and enjoyment of scenic roads is merely descriptive and not for the purpose of prohibiting any use on a scenic road that results in increased traffic. The Board therefore cannot conclude that the Town Plan is violated because of increased traffic from the gravel pit.

IV. ORDER

1. Land Use Permit Application #5W0976-EB is hereby denied.

2. Land Use Permit #5W0976 is void.

Dated at Montpelier, Vermont this 19th day of January, 1990.

ENVIRONMENTAL BOARD

Leonard U. Wilson, Acting Chair
Stephen Reynes, Chairman
Ferdinand Bongartz
Samuel Lloyd
Charles F. Storrow

Member dissenting:
Roger N. Miller

A:carp2 (disc 2)