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

RE: Charles and Barbara Bickford
Land Use Permit #5W1186-EB

MEMORANDUM OF DECISION

This decision pertains to motions to alter filed in response to the Board's decision Re: Charles and Barbara Bickford, #5W1186-EB, Findings of Fact, Conclusions of Law, and Order (May 22, 1995) (the "Decision"). As is explained below, the Board denies in part and grants in part the motions.

I. BACKGROUND AND PROCEDURAL SUMMARY

The Decision contains a detailed summary of the background and procedural history preceding the Board's issuance of the Decision.

Briefly, on November 12, 1993, the District #5 Environmental Commission (the "District Commission") issued Land Use Permit #5W1186 (the "Permit") and supporting Findings of Fact, Conclusions of Law, and Order to Charles and Barbara Bickford (the "Permittees"). The Permit authorizes the operation of a stone quarry on a 192 acre tract of land with an annual maximum extraction rate of 50,000 cubic yards (the "Project"). The Project is located off of U.S. Route 2 in Marshfield, Vermont.

On December 23, 1993, the Permittees appealed the Permit to the Board.

On January 10, 1994, Margaret K. Arthur cross-appealed from the Permit.

On January 12, 1994, Curtis and Ruth Whiteway cross-appealed from the Permit.

On February 18, 1994, Acting Chair Wright issued a Prehearing Conference Report and Order (the "Prehearing Order").

On August 17 and September 28, 1994, the Board convened hearings in this matter.

On May 2, 1995, the Board declared the record complete and adjourned the hearing.

On May 22, 1995, the Board issued the Decision and Amended Land Use Permit #5W1186-EB (the "Amended Permit").

On June 8, 1995, Curtis and Ruth Whiteway filed a motion to alter (the "Whiteways' Motion").

On June 21, 1995, the Permittees filed a motion to alter (the "Permittees' Motion").

On June 28, 1995, the Board deliberated relative to certain preliminary issues raised by the two motions.

On June 30, 1995, the Board ordered that: (i) no additional evidentiary hearings would be convened; (ii) the Whiteways' Motion relative to Permit Condition 35 would not be considered as a request for a stay; and (iii) the parties would be allowed to file responses to the motions.

On July 10, 1995, Acting Chair Wright issued a memorandum to the parties extending the response deadline. Acting Chair Wright's July 10, 1995 memorandum is incorporated herein by reference.

On July 26 and September 8, 1995, the Board deliberated relative to the two motions.

II. MOTIONS TO ALTER

EBR 31(A) authorizes parties to file, within 30 days of the date of a decision, such motions to alter as may be "appropriate." The rule provides:

> (A) Motions to alter decisions. A party may file within 30 days from the date of a decision of the board or district commission such motions to alter as may be appropriate with respect to the decision.
>
> The board or district commission shall act upon motions to alter promptly. The running of any applicable time in which to appeal to the board or supreme court shall be terminated by a timely motion filed under this rule. The full time for appeal shall commence to run and is to be computed from issuance of a decision on said motion. It is entirely within the discretion of the board or. district commission whether or not to hold a hearing on any motion.
>
> The board or district commission may on its own motion, within 30 days from the date of a decision, issue an altered decision or permit. Alterations by board or district commission motion shall be limited

> to instances of manifest error, mistakes, and typographical errors and omissions.

The Board has issued several decisions which set out the nature of what is appropriate under EBR 31(A). In general, these decisions indicate that a motion to alter is in the nature of reconsideration and the Board should not be asked to "reconsider" matters it was not asked to consider in the first place. Re: Finard-Zamias Associates, #1R0661-EB, Memorandum of Decision (Jan. 16, 1991). A motion to alter also is to be based on the existing record. Re: Swain Development Corp., #3W0445-2-EB, Memorandum of Decision at 3-4 (Nov. 8, 1990). New hearings are not held and new evidence is not taken. Id. at 4; Re: Berlin Associates, #5W0584-9-EB, Memorandum of Decision at 7 (April 23, 1990).

Thus, if parties were or should have been aware of possible conditions or use of procedures before final decision, they should not wait until after decision to object through a motion to alter.

One reason for these limits on the use of EBR 31(A) is that parties should not be encouraged to use motions to alter to convert Board decisions into "proposed" decisions to which they can later respond. Evidence and argument should be given to the Board before decision so that it is fully informed and can make the best decision, and so that the process is not unnecessarily elongated by motions to alter. As the Board has previously stated:

> [The Board's] interpretation is based on the need to maintain the integrity of the Board's appeal process by ensuring that arguments and evidence are introduced prior to final decision.

Finard-Zamias, supra at 2.

III. BOARD'S DECISION RELATIVE TO THE WHITEWAYS' MOTION

A. Permit Condition 35

The Whiteways' Motion requests that the Board reconsider the Decision's conclusions relative to Permit Condition 35.

The Decision's conclusions relative to Permit Condition 35 were made in the context of Criterion 8. Criterion 8 requires, in part, that, prior to issuing a permit, the Board find that a project will not have an undue adverse effect on the aesthetics of the area. The Board's Criterion 8 analysis

was set forth in Re: Quechee Lakes Corp., Applications #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-19 (Jan. 13, 1986). The Whiteways' Motion attempts to make proof of economic loss the indicator of the Project's undue adverse effect on the aesthetics of the area. Economic loss is not relevant under the Quechee Lakes analysis and, therefore, the Board denies the Whiteways' Motion relative to Permit Condition 35.

B. Amended Permit Condition 8 and Permit Condition 39 (B)

The Whiteways' Motion requests that the Board clarify an apparent inconsistency between Amended Permit Condition 8 and Permit Condition 39. Amended Permit Condition 8 supersedes Permit Condition 35. Amended Permit Condition 8 provides:

8. Condition 35 of Land Use Permit #5W1186 is superseded. Instead, the Project shall be operated only under the following restrictions:

A) From April 1 through June 30 of each year, the Project may operate from 7:00 am to 5:00 pm. Operations may include blasting, drilling, crushing and hauling.

B) From July 1 through Labor Day, the Project may operate from 7:00 am to 5:00 pm. No blasting, drilling, or crushing may take place during this period.

C) From the Tuesday after Labor Day through September 15th, the Project may operate from 7:00 am to 5:00 pm. Operations may include blasting, drilling, crushing and hauling.

D) From September 15th until Columbus Day, the Project may operate from 7:00 am to 5:00 pm. No blasting, drilling or crushing may take place during this period.

E) From the Tuesday after Columbus Day until December 1, the Project may operate from 7:00 am to 5:00 pm or sunset, whichever comes first. Operations may include blasting, drilling, crushing and hauling.

F) The Project may not operate on Saturdays or Sundays or the following holidays: Memorial Day (State & Federal), July 4th, Labor Day, Columbus Day (Federal), Thanksgiving and the Friday after Thanksgiving. The Project may not operate between December 1 and March 30.

The Whiteways' Motion contends that Amended Permit Condition 8 is inconsistent with Permit Condition 39. Permit Condition 39 'provides, in part, that active quarrying is prohibited between December 1 and April 1 annually unless prior approval is obtained from the Department of Fish & Wildlife on a year by year basis. The Whiteways' Motion requests that the Board "clarify the intent of [Amended Permit Condition 8] and whether Condition 39(B) is still in effect."

Subsequent to this appeal being filed with the Board, the Permittees filed a permit amendment application with the District Commission which resulted in the issuance of Amended Land Use Permit #5W1186-1 on April 14, 1995 (the "District Commission Amended Permit"). The District Commission Amended Permit added a "subsection G" to Permit Condition 35 and no appeal was taken. Subsection G provides:

G) In addition to the above, hauling from existing stockpiles is authorized in the event of unforeseeable natural events which create an emergency situation. The District Commission shall be notified within 72 hours in writing after the commencement of any emergency hauling and this notice shall specify the amounts of material hauled. These amounts will count against the yearly maximum extraction rate for the quarry. The Commission reserves the right to revoke this condition upon a finding, and following an opportunity for a hearing, that the relief allowed herein has been abused in contradiction of the controls and mitigation measures required in Findings of Fact 5W1186.

The Board concludes that there is the potential for confusion between Amended Permit Condition 8, as further

modified by the District Commission Amended Permit, and Permit Condition 39(B).

The Board shall issue, pursuant to this Memorandum of Decision, Land Use Permit #5W1186-EB (Revised) (the "Amended Permit (Revised)") to avoid any confusion over the Project's operating conditions. Amended Permit (Revised) Condition 8(F) shall be modified as follows:

> F) The Project may not operate on Saturdays or Sundays or the following holidays: Memorial Day (State & Federal), July 4th, Labor Day, Columbus Day (Federal), Thanksgiving and the Friday after Thanksgiving. The Project may not operate between December 1 and March 30, except as otherwise provided in Permit Condition 39(B) of Land Use Permit #5W1186 issued to the Permittees on November 12, 1993, and Amended Land Use Permit #5W1186-1 issued to the Permittees on April 14, 1995, by the District #5 Environmental Commission.

Accordingly, the Board grants the Whiteways' Motion as provided above.

c. Criteria 8 and 10 and Molsano

The Whiteways' Motion requests that the Board generally reconsider the Decision under Criteria 8 and 10 due to the Vermont Supreme Court's decision In re Frank A. Molsano, Jr., 5 Vt. Law Week 314 Nov. 10, 1994). The Whiteways' Motion is contrary to the Board's interpretation of the Molsano decision.

i. Criterion 8

The Whiteways' Motion contends that the Board should not have made an affirmative finding under Criterion 8 because the Permittees did not produce evidence of the Project's approval pursuant to the Town of Marshfield's Zoning Regulations, effective March 20, 1985 (the "Regulations"). The Whiteways' Motion contends that such evidence is required by the Molgano decision.

As stated in the Decision, under the undue portion of the Criterion 8 aesthetics analysis, the Board considers whether a project violates a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area. A

project's receipt of a zoning permit (or lack thereof) is not relevant to whether a zoning ordinance contains an aesthetic standard, and, if so, whether a given project violates it.

The Board concludes that the Regulations do not set an aesthetic standard and that the Project does not violate a clear, written community standard. See Re MBL Associates, #4C0948-EB, Findings of Fact, Conclusions of Law, and Order at 31 (May 2, 1995). The Board denies the Whiteways' Motion relative to Criterion 8.

ii, Criterion 10

The Whiteways' Motion contends that, based on the Molsano decision, the Permittees are required to demonstrate that the Project is consistent with the Regulations under Criterion 10 even though there is no town plan which is applicable to the Project.[1]

The Prehearing Order clearly states that the only issue under Criterion 10 is whether the Project is in conformance with the Central Vermont Regional Plan. The only plan at issue under Criterion 10 is the Central Vermont Regional Plan.

The Decision relies on Molaano only for the limited proposition that because the Central Vermont Regional Plan was in effect when the Permittees filed their application for the Permit, such plan applies in this proceeding. Molqano, 5 Vt. Law Week at 315. Sed s o In re Taft Corners Assocs., 160 Vt. 583, 593 (1993); Re: Crushed Rock, Inc. and Pike Industries, Inc., #1R0489-4-EB, Findings of Fact, Conclusions of Law and Order at 38 (Feb. 18, 1994).

The Board has interpreted Molqano in the following decisions: Re: Leonard and Rose Lemieux, #3R0717-EB, Findings of Fact, Conclusions of Law, and Order at 11 (March 1, 1995); Re: MBL Associates, #4C0948-EB, Findings of Fact, Conclusions of Law, and Order at 32 (May 2, 1995); Re: Howe Center Limited, #1R0770-EB, Findings of Fact, Conclusions of Law, and Order at 35-36, and 36 n.2 (May 4, 1995); and Re: Taft Corners Associates, #4C0696-11-EB (Remand), Findings of Fact, Conclusions of Law and Order (Revised) at 54, 59 (May 5, 1995). The aforementioned Board decisions were all issued

[1]The District Commission issued a preliminary ruling on July 12, 1993, that there was no duly adopted town plan for the Town of Marshfield. No party disputed this ruling.

prior to the Decision and should have been reviewed prior to the filing of the Whiteways' Motion.

Generally, the Board resorts to a municipal zoning ordinance only if it first determines that a town plan is ambiguous with regard to whether a project is consistent with the town plan. Where the town plan is ambiguous, the Board will, consistent with the Molsano decision, use the zoning ordinance to help determine whether a project is consistent with the town plan under Criterion 10. The Board does not determine, however, whether a project is consistent with a municipal zoning ordinance under Criterion 10, and this is so regardless of whether there is a town plan which is applicable to the given project.

The Regulations are irrelevant to Criterion 10 since there is no town plan which is applicable to the Project, and thus, there is no town plan which can be construed by resort to the Regulations. The Board denies the Whiteways' Motion relative to Criterion 10.

IV. BOARD'S DECISION RELATIVE TO THE BICKFORDS' MOTION

A. Jurisdiction over the 192 Acre Tract

The Permittees repeat their contention that jurisdiction should only extend to the actual acreage used by the Project, and not to the 192 acre-tract on which the Project is operated. The Board concludes that the Decision is sound for the reasons stated therein with regard to this issue and the Permittees' appeal of Permit Condition 5. Moreover, since the issuance of the Decision, the Vermont Supreme Court has issued its decision in In re Stokes Communications Corporation, No. 94-208, slip. op. (July 21, 1995) wherein the Court upheld the Board's interpretation of EBR 2(F) such that a project's involved land is the entire tract and not just the amount of acreage consumed by it. The Board denies the Bickfords' Motion relative to the Project's involved land.

B. Amended Permit Condition 3

The Permittees repeat their contentionthat the requirement to map the wetland is unreasonable. The Board concludes that the Decision relative to Amended Permit Condition 3 is sound for the reasons stated therein, and the Permittees' Motion is denied. The Board will, however, extend the date of compliance with Amended Permit Condition 3 until November 1, 1995.

C. Finding of Fact 17 and Permit Condition 43

The Permittees' Motion contends that the Board should revise Decision Finding of Fact #17 and delete Permit Condition 43;

i. Finding of Fact #17

The Permittees' Motion relative to Finding of Fact #17 is based upon the prefiled testimony provided by Mr. James McDonald, and as modified by Mr. McDonald concurrent with the prefiled testimony's admission into the record on September 28, 1995. One of the purposes of having witnesses be available at'hearings is so that they can make corrections to their prefiled testimony.

The Board grants the Permittees' Motion relative to Finding of Fact #17. Finding of Fact #17 shall be revised as follows:

> Stage 2 consists of excavation behind the present quarry face. Quarrying behind the tree barrier on top of the current face will reach approximately 975 feet above sea level, which is the same elevation as the top of the present face. The trees atop the face will no longer serve a screening function; the grown trees on the berm will provide increased screening from below. Further excavation will then take place, including removal of the face.

The Board will, concurrent with this Memorandum of Decision, is$u,e a revised Decision pages 7 and 35 (Revised) incorporating the Board's grant of the Permittees' Motion relative to Finding of Fact #17.

ii, Permit Condition 43

The Board concludes that its decision relative to Permit Condition 43 is sound for the reasons stated in the Decision. The Permittees' Motion relative to Permit Condition 43 is denied.

D. Permit Condition 44

The Board concludes that the Decision relative to Permit Condition 44 is sound for the reasons stated therein and, therefore, the Permittees' Motion relative to Permit Condition 44 is denied.

V. ORDER

1. The Whiteways' Motion relative to Permit Condition 35, and Criteria 8 and 10 is denied.

2. The Whiteway's Motion relative to Amended Permit Condition 8 and Permit Condition 39(B) is granted.

3. The Permittees' Motion relative to jurisdiction over the 192 Acre Tract, and Permit Conditions 43 and 44 is denied.

4. The Permittees' Motion relative to Amended Permit Condition 3 is denied except that the date of compliance shall be made November 1, 1995.

5. The Permittees' Motion relative to Decision Finding of Fact #17 is granted.

6. Land Use Permit #5W1186-EB (Revised), and Decision pages 7 and 35 (Revised) are hereby issued. Jurisdiction is returned to the District #5 Environmental Commission.

Dated at Montpelier, Vermont, this 12th day of September, 1995.

ENVIRONMENTAL BOARD

Steve E. Wright

Steve E. Wright, Acting Chair*
Arthur Gibb
Samuel Lloyd
William Martinez
John T. Ewing

*On February 1, 1995, John T. Ewing became Chair of the Board. Steve Wright has continued as Acting Chair on this case at Mr. Ewing's request.

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The extraction rate increased to approximately 50,000 cubic yards per year in the late 1980's through 1992.

12. The Permittees applied for an Act 250 permit for the Projecton July 13, 1990. The District Commission issued Land Use Permit #5W1093 to the Permittees. However, the Board voided the permit in Re: Charles and Barbara Bickford, #5W1093-EB (Revocation), Memorandum of Decision (April 12, 1993), because the permit application did not list Mr. and Mrs. Whiteway as adjoining landowners.

13. Mr. and Mrs. Whiteway reside 500 feet to the west of the Access Road, on the south side of U.S. Route 2, where they own and operate a small tourist cabin complex known as the Unique Cabins (the Unique Cabins).

14. Ms. Arthur and her husband, Alan W. Cheever, live approximately one mile to the west of the Project on the north side of U.S. Route 2. Their house is on a rise approximately 200 feet above U.S. Route 2. The view from the house's south (and longest) side is of rolling hills and forested mountains, and the Winooski River; to the east, the quarry face unobstructed by hills, trees, knolls or other buildings or structures; and to the west, the Twinfield Union School in the valley set against a backdrop of rolling hills and mountains.

15. The Project is divided into three stages based upon the estimate that there exists sufficient stone to conduct operations for 50 years. The stages are only projections as the Project's pace depends upon market demand for quarried products. The Permit, as issued by the District Commission, is due to expire in the year 2020.

16. Stage 1 of the Project is expected to last eight years or more. After the existing excavation area has been widened, the plan is to proceed up behind a wooded area and excavate the top of the knoll. This procedure will have the effect of screening operations from viewpoints around the Project Site.

17. Stage 2 consists of excavation behind the present quarry face. Quarrying behind the tree barrier on top of the current face will reach approximately 975 feet above sea level, which is the same elevation as the top of the present, face. The trees atop the face will no longer serve a screening function; the grown trees on the berm will provide screening from below. Further excavation will then take place, including removal of the face.

person would take to improve the harmony of the proposed project with its surroundings?

The Project is divided into three stages based upon the estimate that, there exists sufficient stone to conduct operations for 50 years.

Stage 1 of the Project is expected to last eight years or more. After the existing excavation area has been widened, the plan is to proceed up behind a wooded area and excavate the top of the knoll. This'procedure will have the effect of screening operations from viewpoints around the Project Site.

Stage 2 consists of excavation behind the present quarry face. Quarrying behind the tree barrier on top of the current face will reach approximately 975 feet above sea level, which is the same elevation as the top of the present face. The trees atop the face will no longer serve a screening function; the grown trees on the berm will provide screening from below. Further excavation will then take place, including removal of the face.

Stage 3 involves lowering the entire quarry floor to the level of floor that is now to the west of the berm, i.e. 885 feet above sea level, as depicted in Bickford Exhibit 2-E. Finally, Bickford Exhibit 2-G shows how the Project Site will look after all reclamation is completed in the year 2043 pursuant to the 50 year estimate. As depicted on Exhibit Bickford 2-G, the shaded areas are quarry walls that descend well below the tree line; the floor of the quarries would be topsoiled and seeded; and McDonald expects that trees and brush would grow up in this location.

The plans for the berm, plantings, seedlings, erosion control, and excavating were prepared, in part, by Terrence Boyle, a landscape architect and planning consultant. Mr. Boyle produced these plans based on the assumption that the Project would be in operation for 50 years. The Permittees and McDonald have adopted the plans prepared by Mr. Boyle. However, there is no evidence that Mr. Boyle will be monitoring the Project to ensure compliance with the plans he prepared.

In sum, while the Permittees have attempted to show what the Project will look like, their drawings merely depict what they expect will happen in the future. Given that the Project provides for the extraction of 50,000 cubic yards per year, the Permittees cannot conclusively predict what the Project will look like in the future as the three stages unfold.