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

Re: Elwood and: Louise Duckless
Application #7R0882-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an application for gravel extraction in Newport. As is explained below,' the Environmental Board denies the application pursuant to 10 V.S.A. § 6086(a)(l) (air pollution) and (8) (aesthetics, scenic or natural beauty).

I. SUMMARY OF PROCEEDINGS AND FINDING OF JURISDICTION

On July 15, 1992, the District #7 Environmental Commission issued Land Use Permit #7R0882 (the Permit) to Elwood and Louise Duckless (the Applicants). The permit states that it is limited to the Applicants' "Phase II excavation plan" and authorizes the removal of 4,000 cubic yards of earth resources annually. The project is located on an approximately 68.5 acre tract on the north side of Route 14 in Newport. An Act 250 permit is required for the project pursuant to 10 V.S.A. §§ 6001(3), 6081(a) and Board Rule 2(A)(2) because the project consists of the construction of improvements for commercial purposes on a tract of more than ten acres.

On August 5, 1992, adjoining landowners Michael Marcotte, Gunter Hartman, and Roy Barnett, Jr. (the Appellants) filed an appeal under the following criteria of 10 V.S.A. § 6086(a): 1 (air pollution), 8 (aesthetics and scenic beauty), 9(B) (primary agricultural soils), 9(C) (secondary agricultural soils), 9(D) (earth resource protection), and 9(E) (earth resource extraction). The Appellants were granted party status by the District Commission on Criteria 1 and 8 but did not seek or have party status on the other criteria before the Commission.

On September 10, 1992, the Appellants filed a petition for party status on Criteria 9(B) and 9(E). On September 11, 1992, Board Chair Elizabeth Courtney convened a prehearing conference in St. Johnsbury. Following a deliberation on September 24, the Board issued a memorandum of decision and prehearing order on September 30, denying party status on Criteria 9(B) and 9(E) and dismissing Criteria 9(B), 9(C), 9(D), and 9(E) from the appeal for lack of party status.

During December 1992, parties filed prefiled testimony and exhibits. On December 22, 1992, the Applicants filed a motion to dismiss. On January 4, 1993, Chair Courtney issued a memorandum, pursuant to Rule 16(B), containing a preliminary ruling that the appeal will not be dismissed.

An administrative hearing panel convened a hearing in Newport: Center, Vermont, with the following parties participating:

The Applicants by Robert Chimileski, Esq.
The Appellants by Michael Marcotte

After taking a site visit and hearing testimony, the panel recessed the matter pending review of the record, deliberation, and decision.

A decision proposing to deny this application was sent to the parties on February 4, 1993, and the parties were provided an opportunity to file written objections, and to present oral argument before the full Board. On March 3, parties were informed that any requested oral argument would occur on April 21. On March 12, the Applicants requested oral argument. On April 13, the Applicants filed a motion to reconvene the evidentiary hearing. On April 14, Board Counsel Aaron Adler wrote the Applicants and informed them that their motion would be considered by the full Board and that they could address the motion as part of oral argument on April 21. The Board convened a public hearing in Montpelier on April 21, with the following parties participating:

The Applicants by Robert Chimileski, Esq.
The Appellants by Michael Marcotte

The Board deliberated concerning this matter on that date. On June 8, following a review of the proposed decision and the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. MOTION TO RECONVENE

In their April 13 motion, which includes an offer of proof, the Applicants request that the hearing panel reconvene to take additional evidence regarding the number of trucks to be generated by this project and the adequacy of mitigation measures that the Applicants propose for the first time in their motion. One of these measures includes redesigning the extraction area of the proposed gravel pit to "significantly" increase the buffer between the eastern end of the gravel pit and adjoining residences. Through reconvening the hearing, the Applicants hope to convince the panel that, in contrast to the panel's proposed decision, this application should not be denied. The Applicants acknowledge that, even if denied, a reconsideration procedure is available before the District Commission under 10 V.S.A. § 6087(c) and Rule 31(B). Nonetheless, the Applicants would prefer that the panel hear their new evidence so that they can avoid another proceeding before the District Commission.

c. Procedure

At the prehearing conference, parties agreed that the Board would first decide the initial three issues discussed above. This decision would be made in deliberative session. The Board will then proceed to schedule a hearing on the merits. Concerning such a hearing, the Applicants requested that it not be held during hunting season.

D. Witnesses and Exhibits

Parties did not list witnesses and exhibits. However, at the prehearing the Chair explained that, because the law requires a "de novo" appeal, exhibits or evidence submitted to the District Commission are not automatically reviewed by the Board, and that if parties want the Board to consider such evidence or exhibits, they must be submitted anew to the Board. A list of witnesses and exhibits will be required by a date to be established.

II. DECISION

1. The Appellants's petition for party status on Criteria 9(B) and 9(E) is denied. We have stated before that, to appeal a criterion, one must have party status on that criterion before the district commission. There are two exceptions to this rule. First, appeal may be made on a criterion by an individual who requested and was denied party status on the criterion, if the individual can persuade us that he or she should have party status. Second, appeal may be made on a criterion where disallowing appeal would work a substantial injustice or inequity. See 10 V.S.A. §§ 6085(c), 6089(a); Board Rules 2(K), 14, 40; Re: Sherman Hollow, Inc., #4C0422-5-EB, Memorandum of Decision at 4 (Feb. 3, 1988); Re: Swain Development Corp., #3W0445-2-EB, Memorandum of Decision at 5-7 (July 31, 1989).

The Appellants meet neither the rule nor the exceptions. They did not seek or obtain party status on Criteria 9(B) and 9(E) before the District Commission. They also have not persuaded us that a substantial injustice or inequity will result if appeal on those criteria is disallowed. Their argument that an injustice will occur is based on lack of compliance of town zoning. However, Act 250 does not enforce town zoning laws. Rather, Act 250 and

town zoning are separate. Cf. In re Aoencv of Transportation, No. 90-299, slip op. at 6 (Vt. July 12, 1991) (court review of zoning permits does not preclude Act 250 supervision).

2. The appeal on Criteria V(C) and 9(D) is dismissed for lack of party status.

In view of the above decisions, appeal will go forward only on Criteria 1 (air) and 8 (aesthetics).

3. We have decided to require the Applicants to produce reclamation and landscaping plans prior to a hearing on the merits.

10 V.S.A. § 6027(a) grants us the power to compel the production of evidence. In addition, our Rule 20(A) states that we may require applicants to submit relevant supplementary data for use in resolving issues raised in a proceeding. This rule was ratified by the General Assembly. 1985 Vt. Laws No. 52 § 5; In re Spencer, 152 Vt. 330, 336 (1989).

We exercise these powers to require submission of reclamation and landscaping plans because we do not believe that we can properly assess the application's compliance with Criterion 8 without them. Under that criterion, our aesthetics analysis includes (but is not limited to) evaluation of whether a project will fit within its context and whether adequate mitigation measures have been taken to mitigate any adverse effect. See Re: Quechee Lakes Corp., #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-19 (Jan. 13, 1986). Unless we know how and when the land is to be reclaimed and planted, we cannot assess whether the project fits into its context or whether reclamation or landscaping constitute adequate mitigation.

We recognize that the Applicants contend that the District #7 office has "stayed" Condition 5 regarding provision of a reclamation plan within 90 days of the date of the Permit. However, the Applicants have submitted no documentation from the District #7 office to support this contention. Further, under our Rule 42, the power to stay permit conditions resides with the Board and not the District Commission. Thus, we have decided to issue a partial stay of Condition 5: We will stay those portions of the condition which require that the reclamation plan be submitted within 90 days and that the submission be to the

11. In Land Use Permit #7R0882, the District Commission approved Phase II, authorizing extraction of up to 4,000 cubic yards of gravel per year. The life of the permit is 20 years. In the future, the Applicants plan to seek approval for more than 4,000 cubic yards per year.

12. The Applicants plan to extract gravel from the tract generally from spring to fall each year, although they do not want to be limited to any specific time frame during the year. Trucks will be used to haul gravel. The Applicants expect that the project will generate an average of approximately 50 truck trips per day.[1]

13. The "Phase II" extraction area is approximately 300 feet wide by 700 feet long. It begins west of the Applicants' residence and runs east to a point approximately 100 feet from the Barnetts' western border and approximately 125 feet from the Barnetts' residence. The Applicants will begin extraction on the west and at the beginning will locate stockpiles just west of the extraction area. As extraction runs east, stockpiles will be located in previously extracted areas. A maximum of two acres within the extraction area will be disturbed at any given time.

14. The majority of the Phase II extraction area will be within the open field on the northern portion of the Applicants' tract. The remainder will be within the wooded portion. A 150 foot buffer will be maintained between the extraction area and Sargent's Pond.

15. The extraction area will be visible from Route 14. The Applicants propose a line of evergreens to screen the extraction area from Route 14. These evergreens will consist of new, three-foot plantings of scotch pine, balsam fir, or spruce.

16. The Applicants propose to plant three new six-foot evergreens west of the Barnetts' house to block a break in their hedgerow.

17. The Applicants state that they intend to plant. trees to screen the Marcottes' residence from the extraction area. However, the plans submitted do not show any such plantings; instead, as stated above, Exhibit D1 incorrectly shows the Marcotte residence as screened by woods that are not in fact there.

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[1] *This finding is based on the Applicants Exhibit D2. At oral argument and in their motion to reconvene, the Applicants contended that the actual number of trips will be lower. However, the estimate the Applicants supplied in Exhibit D2 is what is before the Board.*

18. The field which is the site of the proposed Phase II extraction is at an elevation of 1,020 feet. The Marcottes' residence is at an elevation below 980 feet. The Bametts' residence is an elevation of 1,020 feet.

19. At the closest point, the edge of the extraction area will be about 225 feet from the Marcottes' southern property line and about 350 feet from their residence. From their residence, the Marcottes will be able to see the northeastern lip of the extraction area unless they are standing directly behind the four existing evergreens on their property or unless the Applicants plant adequate screening.

20. The existing hedgerow on the Barnetts' property does not mn along their entire western boundary. From their residence, the Barnetts will be able to see the extraction area to the northwest, beyond where the hedgerow ends. If the Barnetts are standing on their property north of where the hedgerow ends, the extraction area will not be screened at all.

21. Once Phase II extraction and reclamation are complete, most of the open field on the northern portion of the Applicants' tract, west of the Barnetts' house, will be gone, having been replaced by a 36 foot depression below existing grade. The side slopes of this depression will be 1:2. The depression will grow progressively larger while extraction is occurring.

22. The Applicants' tract is located within an approximately eight-mile stretch of Route 14 which contains about seven gravel pits. The closest gravel pit is located about 1000 feet to the west of the Applicants' tract. Gravel extraction activities are already audible from the Applicants' tract. There is no evidence in the record that the existing gravel pits are visible from the Applicants' tract or the Appellants' properties.

23. Dust will be generated by trucks hauling to and from the pit and by excavation within the pit itself. The Applicants propose to apply water as necessary to control dust, and to cover loaded trucks. There is no information in the record as to how much dust can be expected and no specificity as to when the Applicants will apply water and whether they or people hired by them will be on-site to ensure that the loaded trucks are in fact covered.

24. The Applicants will not operate any stone crushing equipment on the site. Their planned hours of operation will be limited to 7:00 a.m. to 6:00 p.m. Monday through Friday and 7:00 a.m. to 1:00 p.m. on Saturdays. Extraction operations will not occur outside of those times except in emergencies.

25. The proposed gravel extraction will result in a substantial increase in noise levels experienced by the residents in the neighborhood of the gravel pit.

26. The originally proposed Phase III extraction area would be located across the road from the Phase II area and further away from Sargent's Pond, the Marcottes and Barnett residences, and other residences in the vicinity of the Applicants' tract. Because it was originally proposed to be located within existing woods, the Applicants could use these woods for screening Phase III.

V. CONCLUSIONS OF LAW

1. Before issuing a permit, the Board must find that a proposed project will not create undue air pollution. 10 V.S.A. § 6086(a)(1). The burden of proof with respect to this criterion is on the Applicants. 10 V.S.A. § 6088(a).

The Board concludes that the Applicants have not met their burden of proof to demonstrate that the proposed project will not create undue air pollution in the form of dust. Dust will be generated by the proposed project and the Applicants have not shown how much will be generated and have not provided sufficient specificity in their plans to control dust generation. The Board believes that greater specificity is warranted in this case in light of the proximity of nearby residences, the proposal to disturb up to two acres at any given time, and the fact that dust will be generated by trucks exiting and entering the extraction area.

2. Before issuing a permit, the Board must find that a proposed project will not have an undue adverse effect on aesthetics and scenic and natural beauty. 10 V.S.A. § 6086(a)(8). The burden of proof with respect to this criterion is on the Appellants. 10 V.S.A. § 6088(b). However, the Applicants must provide sufficient information for the Board to make affirmative findings. Re: Killington, Ltd. and International Paper Realty Corp., #1R0584-EB-1, Findings of Fact and Conclusions of Law and Order (Revised) at 21 (Sep. 21, 1990).

The Board uses a two-part test to determine whether a project meets Criterion 8. First, it determines whether the project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. Re: Quechee Lakes Corp., Applications #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-19 (January 13, 1986).

With respect to the analysis of adverse effects on aesthetics and scenic beauty, the Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. In making this evaluation, the Board looks to a number of specific factors, including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space. Id. at 18.

Concerning the context of the proposed project, the Applicants point out that" the proposed extraction site is located within a stretch of Route 14 that contains several existing gravel pits. Thus, they imply, their gravel pit should not be considered out of context.

The Board agrees that the general context of the proposed project contains existing gravel pits. However, the immediate context of the proposed extraction site is an area consisting of the Applicants' residential tract (a former farm), the Appellants' residences, and Sargent's Pond. Thus, the immediate context is rural and residential.

Within this context, the proposed project, a commercial gravel extraction operation, will have an adverse aesthetic effect. It will remove an open field and replace it with a 36-foot depression located within viewing distance of nearby properties. It will substantially increase the noise experienced by nearby residents and expose them to dust and truck traffic from a commercial operation.

Having found that the proposed project will have an adverse aesthetic effect, the Board turns to deciding whether such effect will be undue. In evaluating whether adverse effects on aesthetics and scenic beauty are undue, the Board analyzes three factors and concludes that a project is undue if it reaches a positive conclusion with respect to any one of these factors, which are:

a. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?

b. 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?

c. Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings?

Quechee at 19-20.

We look at each one of these factors in turn. First, there is no clear, written community standard regarding aesthetics in evidence. In this regard, we note that the Appellants sought at hearing to offer the Newport town zoning ordinance into evidence but conceded that it contains no provisions regarding aesthetics.

Second, the Board finds the project to be offensive because it is significantly out of character with its surroundings. Specifically, the project consists of a commercial gravel extraction operation that will be placed in close proximity to existing residences located in a rural and residential area that contains a pond. One

of these residences will be only 350 feet from the edge of, and at an elevation below, the extraction area, and thus its residents will experience the extraction operation as a nearby commercial enterprise sitting immediately above them. Another of the residences will be.only 125 feet from the edge of, and on the same grade as, the extraction area, and its residents therefore will experience the commercial extraction operation in a highly immediate and direct manner. Further, given the topography and size of the Phase II extraction area, and its proximity to existing residences, the Board finds it difficult to envision a proposal for extraction in this area that would be sufficiently distant from the residences not to be offensive.

Third, the Board finds that the Applicants have not taken generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings. In this regard, the Board believes that mitigating steps include the possibility of using another location on the project tract for the proposed commercial purpose. The Board refers here to the area of the originally proposed Phase III extraction site, located in the woods and across Route 14 from the residences of the Applicants, the Marcottes, and the Barnetts. The Board believes that the combination of increased distance from the residences and the possibility of using existing woods for screening makes this site a potential alternative to the Phase II extraction site. This alternative has not been sufficiently explored.

Based on the foregoing, the Board concludes that the proposed Phase II extraction project. will have a detrimental effect on the public welfare and should be denied.

VI. ORDER

1. Application #7R0882-EB is denied.

2. Land Use Permit #7R0882 is void.

3. Jurisdiction over this matter is returned to the District #7 Environmental Commission.

Dated at Montpelier, Vermont, this 11th day of June, 1993.

ENVIRONMENTAL BOARD

Elizabeth Courtney, Chair
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