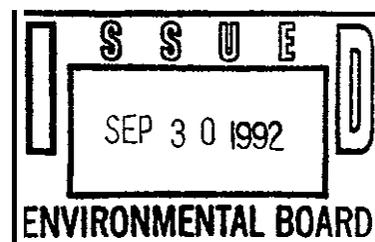


VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151



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

MEMORANDUM OF DECISION AND PREHEARING ORDER

This decision includes a prehearing report and addresses preliminary matters involving an appeal of a permit issued for gravel extraction in Newport.

I. PREHEARING REPORT

A. Backaround

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.

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), V(C) (secondary agricultural soils), V(D) (earth resource protection), and V(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 August 26, 1992, the Environmental Board issued a notice of prehearing conference. In relevant part, that notice informed the Appellants that their appeal on Criteria 9(B), 9(C), 9(D), and V(E) might be dismissed unless they filed a petition for party status which persuades the Board of the following: (a) that the project may have a direct effect on their property under those criteria and (b) that they will experience a substantial inequity or injustice if the appeal on those criteria is disallowed.

On September 10, 1992, the Appellants filed a petition for party status on Criteria V(B) and V(E). On September 11, 1992, Board Chair Elizabeth Courtney convened a prehearing conference in St. Johnsbury with the following parties participating:

The Applicants by Elwood Duckless
The Appellants

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The Board deliberated concerning preliminary issues on September 24, 1992.

B. Issues

1. Whether to grant the Appellants party status and therefore, appeal rights on Criteria 9(B) and 9(E). The Appellants argue that the project area has been farmed for 20 years and that turning this farmland into a gravel pit will affect them by changing the character of the area from rural-residential to commercial-industrial. They also argue that this project is prohibited by town zoning and that allowing it to proceed will work an injustice by denying them the protection afforded by zoning laws. The Applicants argue that the Appellants' property will not be directly affected under these criteria.

2. Whether to dismiss the appeal on Criteria 9(C) and 9(D). The Appellants' petition for party status does not include these criteria.

3. Whether to require the Applicants to submit landscaping and reclamation plans to the Board as part of this appeal. Condition 5 of the Permit requires the Applicants to submit a reclamation plan within 90 days of the Permit's issuance. The Applicants state that they have obtained a letter from the District #7 office stating that this condition is stayed pending appeal. The Appellants argue that the Board cannot properly assess the project without a reclamation plan or a landscaping plan submitted as part of this appeal. The Applicants do not want to submit such plans to the Board because of alleged expense.

4. Whether the application complies with Criteria 1 (air) and 8 (aesthetics, scenic beauty) and with any other criteria on which appeal is allowed. The Applicants contend that the application meets the Act 250 criteria. With respect to Criterion 1 (air), the Appellants are concerned that control of dust generated by the project will be inadequate and assert that airborne dust and dirt from the project will create a nuisance which will render their properties unusable. With respect to aesthetics, the Appellants assert that this gravel pit does not fit in what they allege is a visually pleasing rural-residential area. They also argue that proposed plantings will not adequately screen the project.

The Board declines to reconvene the evidentiary hearing, through the panel or otherwise, for two separate reasons. First, the Applicants' offer lacks sufficient specificity to warrant an additional hearing. For example, the Applicants do not state what the distances will be, following redesign, from adjoining residences to the edge of the pit. (This example is intended to be illustrative and not exhaustive.) Second, based on the findings of fact and **conclusions** of law made in Sections IV and V, below, and the evidence submitted by the parties, it appears that, to have any possibility of meeting Criterion 8, the proposed project would have to be so significantly redesigned that the redesigned project would have to be heard first by the District Commission. Cf. In re Juster Associates, 136 Vt. 577, 581 (1978) (district commissions are assigned initial review of development proposals).

III. ISSUES UNDER THE CRITERIA

1. Whether, pursuant to Criterion 1, the proposed project will create undue air pollution in the form of dust.
2. Whether, pursuant to Criterion 8, the proposed project will have an undue adverse effect on aesthetics or scenic or natural beauty.

IV. FINDINGS OF FACT

1. Elwood and Louise Duckless (the Applicants) own and reside on an approximately 68.5 acre tract located in the Town of Newport, Vermont. The tract is cut in two by Vermont Route 14. The greater portion of the tract, consisting of approximately 56 acres, is located on the south of Route 14, and the remainder, consisting of approximately 12 acres, is north of that route. The tract formerly was a small farm.
 2. Most of the southern portion of the tract is wooded, with open fields located in the northeastern and northwestern corners of that portion.
 3. Of the northern portion of the tract, roughly half is wooded and half open field, with the wooded portion generally located near the tract's northern border with Sargent's Pond, and the open field generally located next to Route 14. The field is relatively flat.
 4. The Applicants' residence is located on the northern portion of the tract, about mid-way between the western and eastern boundaries, along with two barns.
 5. On the tract's northeastern corner, the open field runs all the way to the tract's northern border with the lands of Michael and Danielle Marcotte. As the field approaches the tract's northern border, it slopes down. The
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Marcottes' residence is located just north of the tract's northeastern corner, next to the eastern shoreline of Sargent's Pond. The Marcottes own the Pond.

6. Exhibit D1, a site plan submitted by the Applicants dated November 9, 1992, incorrectly shows the Marcottes' residence as screened from the tract by woods. In fact, there are no woods between the northeastern end of the tract and the Marcottes' residence. Instead, the only trees between their residence and the tract are four spruce trees near their house which provide limited screening.
7. Town Highway #55 runs south from the Marcottes' residence to Route 14. At the junction of that town highway and Route 14 is property owned by Roy and Sue Barnett. This property is mostly open. Its western and northern boundaries consist of the Applicants' tract. Its eastern boundary is the town highway and its southern boundary is Route 14. The area of the Applicants' tract next to the Barnetts' property is all open field. The only visible separation between the two is a hedgerow planted by the Barnetts along their western boundary.
8. Gunter and Leoni Hartman own property to the west of the Applicants' tract. On their property, they operate the Forsthaus Restaurant, which is located just south of Route 14.
9. The Applicants proposed to extract gravel from their tract for commercial purposes. Originally, they filed Application #7R0882 with the District #7 Environmental Commission for a three-phase gravel extraction project. Phase I was to be located on the northwestern portion of the tract, north of Route 14 and across from the Forsthaus Restaurant. Phase II was also to be on the northern portion of the tract, running from the middle of that portion east toward the properties of the Barnetts and the Marcottes. Phase III was to be located well into the woods on the portion of the Applicants' tract south of Route 14.
10. During the time this application was pending before the District #7 Commission, the Applicants withdrew Phases I and III after discussions with Assistant District #7 Coordinator Linda Matteson. The reasons for withdrawal of these phases were that Phase I was too visible from the Forsthaus Restaurant and there was not enough detail in the application concerning Phase III.

District Commission. Instead, we will require that the reclamation plan (along with the landscaping plan) be submitted to the Board in accordance with the attached order.

III. ORDER

1. The Appellants' request for party status on Criteria 9(B) and 9(E) is denied.
 2. The appeal on Criteria 9(B), 9(C), 9(D), and 9(E) is dismissed for lack of party status.
 3. Appeal will go forward on Criteria 1 (air) and 8 (aesthetics).
 4. Staff is directed to contact parties concerning setting a schedule for this case. The schedule is to include a date for a hearing and dates for submissions before the hearing. Those submissions will include prefiled initial testimony and prefiled rebuttal testimony and lists of witnesses and exhibits. If the parties and staff cannot agree on a schedule, the Chair shall set one.
 5. The following portions of Permit Condition 5 are stayed: the requirement to submit a reclamation plan to the District Commission and the requirement to submit the plan within 90 days. Instead, along with their prefiled initial testimony, the Applicants shall submit reclamation and landscaping plans to the Board.
 6. No individual may be called as a witness in this matter if he or she has not been identified in a witness list filed in compliance with the schedule developed in accordance with Paragraph 4, above. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. If prefiled testimony has not been submitted by the date specified, the witness will not be permitted to testify. Instructions for filing prefiled testimony are attached.
 7. The Board may waive the filing requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.
 8. Parties shall file an original and ten copies of prefiled testimony, legal memoranda, all exhibits which are 8½ by 11 inches or smaller, and any other documents with the
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Board, and mail one copy to each of the parties listed on the attached Certificate of Service. This requirement also applies to the landscaping and reclamation plans discussed above, except that the Applicants need file only one copy of those plans with the Board.

With the exception of the landscaping and reclamation plans discussed above, parties are required to file only lists identifying exhibits which are larger than 8½ by 11 inches that they intend to present, rather than the exhibits themselves. Exhibits must be made available for inspection and copying by any parties prior to the hearing.

9. The hearings will be recorded electronically by the Board or; upon request, by a stenographic reporter. Any party wishing to have a stenographic reporter present or a transcript of the proceedings must submit a request by November 6, 1992. One copy of any transcript made of proceedings must be filed with the Board at no cost to the Board.

ENVIRONMENTAL BOARD

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