

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

Re: R.J. Colton Company, Inc.
Application #9A0082-1R-2-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision, dated April 10, 1992, pertains to an appeal regarding an application to expand an existing sand and gravel extraction project to include a gravel washing operation and the construction and operation of a concrete batching plant and manufacturing facility. At issue is whether the project as expanded will have an undue adverse effect on aesthetics through its noise impacts if it is closed only on six legal holidays rather than 12 such holidays as required by the District #9 Environmental Commission. As is explained below, the Environmental Board concludes that the project as expanded will not have such an effect because the Applicant proposes and the District Commission's permit requires other sufficient noise mitigation measures.

I. SUMMARY OF PROCEEDINGS

On September 11, 1991, the District Commission issued Land Use Permit Amendment #9A0082-1R-2 (the 1991 permit amendment), which authorizes the expansion of an existing sand and gravel extraction operation by the addition of a gravel washing operation and of buildings to house a concrete batching plant and a manufacturing facility. The new buildings will be served by on-site water and wastewater and a 2,500-foot access road. The existing project is located on 72 acres of a 750-acre tract in Starksboro and the proposed buildings will be located on an additional 9.9 acres of the tract. The 1991 permit amendment includes Condition 13, which in relevant part requires the Applicant to close on 12 legal holidays. Jurisdiction is based on the 'construction of improvements for both commercial and industrial purposes on a tract of sufficient size pursuant to 10 V.S.A. §§ 6001(3) and 6081(a) and alternatively on the proposal of a substantial and material change to a permitted project pursuant to Board Rules 2(G) and (P) and 34.

On October 10, 1991, the Applicant filed a notice of appeal of that portion of Condition 13 which requires closure on 12 legal holidays. On November 13, 1991, Assistant Executive Officer Aaron Adler convened a prehearing conference in Starksboro.

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On November 25, 1991, the Assistant Executive Officer issued a prehearing conference report and order. Following submission of memoranda by the Applicant and **adjoiner** Elsa Gilbertson, on January 14, 1992 the Board issued a memorandum of decision regarding various evidentiary exhibits proposed by the Applicant.

During February 1992, the parties submitted prefiled testimony. On February 19, an administrative hearing panel of the Board, Ferdinand Bongarts, Acting Chair, convened a hearing in Starksboro, with the following parties participating:

The Applicant by Richard **Colton** and Kent Stevenson
Elsa Gilbertson (adjoining landowner)

After taking a site visit and hearing testimony, the panel recessed the matter pending submission of proposed findings of fact and conclusions of law, review of the record, deliberation, and decision. On February 28, the Applicant submitted proposed findings.

A proposed decision was sent to the parties on March 24, 1992, and the parties were provided an opportunity to file written objections, and to present oral argument before the full Board. No party requested oral argument. On April 2 and 3, 1992, the Applicant and Ms. Gilbertson respectively submitted responses to the proposed decision. The Board **deliberated concerning** this matter on April 8, 1992. On that date, 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. ISSUES

The District Commission imposed Condition 13 of the 1991 permit amendment pursuant to 10 V.S.A. § 6086(a)(8) (Criterion **8**), which requires that, prior to issuing a permit, a finding must be made that a proposed project will not have an undue adverse effect on aesthetics. The Board interprets Criterion 8 to include evaluation of the aesthetic impacts of noise. Re: Juster Development Co., #1R0048-8-EB, Findings of Fact, Conclusions of Law, and Order at 30 (Dec. 19, 1988).

The issues raised by the parties relate solely to Condition 13. The Board believes those are best stated as follows:

a. Whether, pursuant to 3 V.S.A. § 810, the Board should take notice of prior decisions, permits, and amendments issued for this project.

b. Whether, because earlier permit amendments included conditions requiring closure on legal holidays, the doctrine of collateral estoppel bars the Applicant from seeking permission to operate on any days denominated as holidays under Vermont law.

c. If not barred by collateral estoppel, whether the project as expanded will have an undue adverse effect on aesthetics if the Applicant is allowed to operate on six of the days listed as holidays under Vermont law.

III. FINDINGS OF FACT

1. On September 5, 1979, the District #9 Environmental Commission issued Land Use Permit #9A0082, which authorizes Arthur Cota and Sons to operate a gravel pit with a crusher on 17 acres of a 750-acre farm located off Route 116 in Starksboro (the Cota tract).
2. On August 6, 1987, the District Commission issued Land Use Permit Amendment #9A0082-1 (Reconsideration) (the 1987 permit amendment), which authorizes the extraction of sand, stone, and gravel on 72 acres of the Cota tract. The 1987 permit amendment was issued to both Cota and Starksboro Sand and Stone Co., Inc. and effectively allowed expansion of the existing gravel extraction area from 17 to 72 acres, to occur in four phases with each phase lasting seven years. The 1987 permit amendment contains Condition 21, which provides in relevant part:

The hours of operation shall be from 7:00 a.m. to 5:00 p.m. Monday through Friday and 7:00 a.m. to 12:00 noon on Saturday. There shall be no traffic or operations on Sundays or legal holidays. The Commission hereby establishes a maximum cap of 110 loaded truck trips or 220 total trips per day.

The permit amendment does not define "legal holidays."

3. The 1987 permit amendment also contains the following relevant permit conditions:
 - a. 18(d) and 22, which require implementation of plans for landscaping, planting on a nearby ridge, and berm construction and planting on the berm.
 - b. 19, which in relevant part requires that the crushing operation be no closer than 1000 feet from any boundary of an abutting residential property.
 4. The ridge referred to in Conditions 18(d) and 22 of the 1987 permit amendment consists of a large wooded knoll and ridge which lie northwest of the pit area, between it and the residence of **adjoiner** Elsa Gilbertson, whose property is off Route 116. The knoll is at an elevation of 680 feet and the ridge rises to 760 feet. The berm referred to in Conditions 18(d) and 22 runs south along Route 116 from the knoll to the pit access road. The Applicant is required by the 1987 permit amendment to maintain the ridge, the knoll, and the berm and to make significant plantings on all of them.
 5. In the findings of fact supporting the 1987 permit amendment, the District Commission made several findings pursuant to Criterion 8 concerning the project's noise impacts, including the following:
 - a. An ambient noise level of 35 decibels (dba) is common for a rural area.
 - b. The area surrounding the project cannot be characterized as completely rural because it includes significant traffic along Route 116, which is a major arterial highway providing a north-south transportation corridor between Chittenden and Addison Counties.
 - c. For residences near Route 116, maximum background noise levels will be in the range of 70 dba due to passing traffic.
 - d. The project's crushing and screening operation will produce 70 dba at 800 feet, 65 dba at 1600 feet, and 60 dba at a distance of 3200 feet.
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- e. Most trucks from the pit operation will head north from the pit on Route 116. On a peak day, sound emanating from a loaded truck driving north up Route 116 could approach 85-90 dba at a distance of 50 feet. Noise levels tend to drop 5 dba for "every doubling of the distance."
 - f. The crusher will be 1200 feet from the nearest residence, at which the maximum noise level from the crushing operation will be 60 dba. At the Gilbertson residence, located 3200 feet from the crusher, the maximum noise level from the crusher will be 50 to 55 dba.
6. The 1987 permit amendment was appealed to the Board. Closure on legal holidays was not at issue in the appeal. On December 10, 1987, the Board issued Land Use Permit Amendment #9A0082-1-EB, which did not revise any of the findings or conditions discussed above, and which added Condition 25:

The crusher shall not be operated on Saturdays. This shall not prevent maintenance of the crusher on Saturdays, but no material shall be crushed on Saturdays.

7. On April 17, 1989, the District Commission issued Land Use Permit #9A0082-1R-1 (the 1989 permit amendment), which amended Condition 21 of the 1987 permit amendment to increase the maximum number of daily loaded truck trips by 15 trips a year for five years, so that by 1993 that number will increase to 185 trips. In the 1989 permit amendment, the District Commission included the following relevant conditions:
- a. 8, which in pertinent part reiterates the hours of operation stated in the 1987 permit amendment and the requirement not to operate on legal holidays (again undefined).
 - b. 11 and 12, which require the Applicant to study the use of quieter back-up alarms for trucks and allow the District Commission to impose further conditions regarding noise impacts.

8. The findings of fact supporting the 1989 permit amendment including Finding 23, which states:

On March 21, 1989 the Applicant measured decibel levels [from truck back-up alarms] From the northern rim of the gravel pit 60 dba were measured [from] a loader operating in the center of the pit; 64 dba at the eastern rim, 63 dba at the southern rim, and 67 dba at the berm along Route 116. At the intersection of the Green Mountain Cemetery Road and Route 116, across from the Gilbertson residence, the alarm was not audible and registered less than the meter's lowest level of 60 dba. [At another nearby residence along Route 116], the alarm was barely audible and the meter registered less than 60 dba.

9. On September 11, 1991, the District Commission issued Land Use Permit Amendment #9A0082-1R-2 (the 1991 permit amendment), which authorizes the addition to the project of a gravel washing operation and of a 16,000 square foot precast manufacturing building and a concrete batching plant. The manufacturing operation will be served by on-site water and wastewater and a 2,500-foot access road. The project will be located on additional 9.9 acres of the Cota Farm tract.

10. The Applicant, R.J. Colton Co., is a sister corporation of Starksboro Sand and Stone Company, Inc. It is the successor-in-interest to ownership of the tract on which the project is located.

11. In the 1991 permit amendment, the District Commission issued Condition 13, which provides:

The hours of operation, including warm-up time shall be from 7:00 a.m. to 5:00 p.m., Monday through Friday and 7:00 a.m. to 12:00 noon on Saturday. There shall be no operations on Sundays and legal holidays. Legal holidays shall be observed as defined in Findings of Fact #65 of this decision.

12. Finding of Fact #65 supporting the permit amendment states:

Legal holidays are defined in V.S.A., Title 1, section 371 to include the following: New Year's Day, January 1; Lincoln's Birthday,

February 12; Washington's Birthday, the third Monday in February; Town Meeting Day, the first Tuesday in March; Memorial Day, May 30; Independence Day, July 4; Bennington Battle Day, August 16; Labor Day, the first Monday in September; Columbus Day, the second Monday in October; Veterans' Day, November 11; Thanksgiving Day, the fourth Thursday in November; Christmas Day, December 25.

Thus, Condition 13 requires the Applicant to close on 12 legal holidays. Many of these holidays by law must fall on weekdays; others may fall on weekends.

13. The proposed gravel washing operation will include a portable wash plant and two lined ponds. The wash plant will be located in the northwest corner of the pit's Phase I extraction area, behind the berm which runs parallel to Route 116 south of the knoll. The ponds will be located on the existing pit floor.
14. The proposed concrete batching plant and manufacturing facility will be located each in a separate building (the proposed buildings) on an approximately 9.9 acre portion of the tract located north of the existing pit area and east of the existing wooded knoll. Their elevation will be at approximately 600 feet.
15. The nearest house to the proposed building location is off Route 116, 1,000 feet from the edge of the project boundary. The Gilbertson residence is approximately 1,500 from the project boundary. The wooded ridge and knoll are located between these residences and the proposed building site.
16. The closest town road to the proposed buildings will be Varney Hill Road, located approximately 750 feet north.
17. The Applicant proposes to set aside a 35-acre reserve area located on the west, north, and east sides of the project area. The reserve will include the ridge and knoll on the west, the area lying between the proposed buildings and Varney Hill Road, and a wetland on the eastern side of the project. The Applicant proposes that no development or cutting of trees be permitted in the reserve. In the 1991 permit amendment, the District Commission included Condition 21, as follows:

The Permittee and all assigns and successors in interest shall not cut or disturb any trees in the 35 acre reserve with [sic] the approval of the District Environmental Commission.

18. The manufacturing facility will be located just north of the batching plant, near the woods to be preserved as part of the reserve.
19. The Applicant proposes to construct an access road to the proposed buildings which will run from the existing access point to the pit on Route 116 northeast to the building site, roughly parallel to the highway. The road will be constructed so that it will be as much as 14 feet below the existing grade of Route 116. The maximum grade of the road will be eight percent.
20. The washing operation is quieter than the crushing operation and therefore it will not increase overall noise levels.
21. The batching plant and manufacturing facility will be enclosed within their buildings. Noise associated with those operations will therefore mostly be from trucks delivering or picking up. Deliveries will primarily consist of raw materials for the batching plant, to which front end loaders will deliver raw materials to bins. From the bins the materials will be carried inside to a mixing chamber by conveyor belts.
22. All front-end loaders will be equipped with special back-up alarms called Rear **Guard**, which automatically modulate beeps to be just above ambient noise levels near the trucks. Back-up alarms are required by federal and state worker safety laws. The 1991 permit amendment includes Condition 17, which requires that Rear Guard be installed on all front-end loaders.
23. To reduce noise and visibility from Route 116 and nearby residences, the Applicant proposes to build a retaining wall on the west side of the delivery area at the batching plant.
24. The area in which the expanded project is to be located can be characterized as rural-residential and is designated medium-density residential on the land use map incorporated as part of the 1989 **Starksboro** Town

Plan. In considering this rural and residential context, the use of Route 116 as a significant traffic corridor must also be included.

25. The Applicant proposes to close on the following holidays: New Year's Day (January 1), Memorial Day (May 30); Independence Day (July 4); Labor Day (first Monday in September), Thanksgiving day (fourth Thursday in November), and Christmas Day (December 25). Most businesses and working residents in the area have only these holidays off and do not observe the other holidays listed in the District Commission's decision.
26. The Starksboro town plan states at page two that-its land use goal six is to "encourage economic development that will not produce unreasonable air, water or noise pollution."

IV. CONCLUSIONS OF LAW

A. Notice of Prior Decisions

Adjoiner Gilbertson requests that the Board take notice of three prior decisions in this matter: Findings of Fact, Conclusions of Law and Order #9A0082-1 (Sept. 18, 1986); Land Use Permit #9A0082-1 (Recon.) and supporting findings (Aug. 6, 1987); and Land Use Permit #9A0082-1R-1 and supporting findings (Apr. 17, 1989). The Applicant does not object. In addition, at the prehearing conference the parties stipulated that the Board could take notice of the noise findings supporting the 1987 permit amendment.

The Board concludes that all prior decisions by the District Commission and the Board concerning Land Use Permit #9A0082 and amendments thereto should be considered part of the record. While the Board does not believe that taking notice is legally necessary, the Board will do so to ensure that the record is clear. Notice of all those decisions is hereby taken pursuant to 3 V.S.A. § 810.

B. Collateral Estoppel

Ms. Gilbertson argues that the District Commission has already conclusively determined the issue at hand in the decisions regarding the 1987 and 1989 permit amendments, which imposed requirements to close the project on all "legal holidays."

Collateral estoppel is a doctrine which is similar to res judicata. Both doctrines seek to impose finality on litigation. Berisha v. Hardy 144 Vt. 136, 138 (1984). The doctrines apply to administrative proceedings but may be relaxed in the face of important policy or practical considerations. Re: Rome Family Corv., #1R0410-3-EB, Memorandum of Decision at 4 (May 2, 1989). Collateral estoppel specifically bars a party from relitigating an issue decided in previous litigation between the same parties. Berisha, 144 Vt. at 138.

Neither the 1987 nor the 1989 permit amendments states what is meant by "legal holidays." Under this circumstance, the Board declines to apply the doctrine of collateral estoppel.

C. Criterion 8 (Aesthetics ~ Noise)

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: Ouechee Lakes Corv., 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. Id. at 18.

The issue here is whether the noise impacts of the expanded project necessitate closure on the 12 legal holidays listed at 1 V.S.A. § 371 (see Finding #12, above) rather than on six of those holidays as proposed by the Applicant. Accordingly, the Board will evaluate whether operation on the six additional holidays does or does not fit within the project's context.

As a first step in deciding whether such operation has an adverse effect, the Board concludes that no such effect will occur when any of the six additional holidays fall on weekends because Condition 13 already prohibits all operation on Sundays and gravel washing and crushing on Saturdays.

Further, when the six additional holidays fall on weekdays, operation on the holidays will be no different from operation on other weekdays because most working residents in the area work on the additional six holidays and most Starksboro businesses are open. The Board therefore will evaluate whether operation on weekdays generally will have an adverse effect within the project's context.

The project area includes Route 116, a significant traffic corridor and generator of noise. Ambient noise levels approach 70 dba during such times. The Board concludes that, during peak traffic times on weekdays, project noise will not be out of context because traffic noise will tend to mask it.

The area also includes a significant rural and residential context. During times when traffic is off-peak, ambient noise levels can therefore be expected to drop below 70 dba and possibly approach the typical 35 dba found in rural areas. This will make the project's noise more apparent, particularly at night. In an area with a strong rural and residential context, commercial and industrial noise above ambient noise levels does not fit and therefore the project will have an adverse aesthetic effect when traffic is below peak on weekdays, including the six additional holidays.

The Board therefore turns to the next step of analyzing whether the adverse effect is undue. In evaluating whether adverse effects on aesthetics and scenic beauty are undue, the Board analyses 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. 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?
- 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. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?

Quechee at 19-20.

The Board concludes that the Applicant has taken generally available steps which a reasonable person would take to mitigate noise on weekdays. Specific noise reduction measures proposed by the Applicant and imposed by the District Commission include the 35-acre reserve, the siting of the new buildings, the use of special back-up alarms on all front-end loaders, the lowering of the access road, the preservation of the ridge and knoll, the limit on hours of operation, and the limits on truck trips.

The Board also concludes that the project noise, as mitigated, does not violate a clear, written community standard. In this case, that standard is the Starksboro Town Plan, which seeks to promote economic development which does not have "unreasonable" noise impacts. The Board believes that the mitigation measures cited above render the project's weekday noise impacts reasonable.

The Board further concludes that the project noise, as mitigated, will not be shocking or offensive to the average person.

Having concluded that noise impacts on the six additional holidays are no different from weekday noise impacts, and that weekday noise impacts are sufficiently mitigated by other means, the Board concludes that it is not necessary to require closure on the six additional holidays.

V. PERMIT CONDITIONS

The Board has concluded that allowing the Applicant to operate on the six additional legal holidays will not have an undue adverse effect. The Board will therefore modify Condition 13 of the 1991 permit amendment to prohibit operation only the six holidays proposed by the Applicant.

As noted above, the Board's determination is in part based on the noise reduction afforded by the 35-acre reserve. Condition 21 of the 1991 permit amendment appears intended to require **that the Applicant** not develop or cut trees in the reserve without the District Commission's approval but instead uses the phrase "with the District Commission's approval" and addresses only cutting in the reserve and not development. The Board will therefore issue a corrected Condition 21.

VI. ORDER - Corrected

Land Use Permit Amendment #9A0082-1R-2-EB is hereby issued. Jurisdiction is returned to the District #9 Environmental Commission.

Dated at Montpelier, Vermont this 17th day of April, 1992.

ENVIRONMENTAL BOARD



Elizabeth Courtney, Chair
Ferdinand Bongartz
Lixi Fortna
Samuel Lloyd
William Martinez
Steve E. Wright

Member Dissenting:
Terry Ehrich

Member Ehrich concurs with the Board's decisions on the issues of taking notice and of collateral estoppel, but dissents with respect to the conclusion that operation should be allowed on the six additional holidays.

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