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

Re: Dorothy and George Carpenter
Box 2710
Moretown, VT 05660

Memorandum of Decision
and Dismissal Order
Declaratory Ruling
Request #237

This decision pertains to a request for party status and a motion to dismiss filed by adjoining landowners Daniel and Mary-Lou Quinones and Gene and Lisa Winnicki (the Adjoiners). As is explained below, the Environmental Board concludes that the request and the motion should be granted, and dismisses this petition.

I. BACKGROUND

This matter involves a gravel pit which is owned and operated by George and Dorothy Carpenter (the Petitioners). The gravel pit is located on the Petitioners' property on Town Highway #33 in Waitsfield, Vermont.

On February 2, 1988, the Petitioners were notified by the Assistant District #5 Coordinator that they needed to obtain a land use permit pursuant to 10 V.S.A. Chapter 151 (Act 250). On April 5, the Petitioners filed an application for an Act 250 permit. On July 29, the District #5 Environmental Commission issued Land Use Permit #5W0976 to the Petitioners, authorizing the operation of the gravel pit. On January 31, 1989, the District Commission issued a memorandum of decision denying motions to reconsider and alter that permit.

On February 28, 1989, the Petitioners filed an appeal of the permit with the Environmental Board. On March 10, the Adjoiners filed a cross-appeal with the Board. On April 3, the Acting Chair of the Board issued a prehearing conference report and order which granted the Adjoiners party status subject to objection by other parties. No objection was filed and the Adjoiners maintained party status throughout the appeal to the Board. On January 19, 1990, the Board issued Findings of Fact and Conclusions of Law #5W0976-EB, denying the Petitioners' application pursuant to 10 V.S.A. § 6086(a)(10) (conformance with local plan).,

On. February 16, 1990, the Petitioners appealed to the Vermont Supreme Court. On November 14, the Court issued a decision affirming the decision of the Board.

In the spring of 1990, the Petitioners requested an advisory opinion concerning Act 250 jurisdiction from the District #5 Coordinator. On July 23, the District #5 Coordinator issued an advisory opinion finding that there is no Act 250 jurisdiction over the gravel pit because the pit is

part of an exempt farming operation rather than a commercial gravel pit. On July 28, the Adjoiners filed a request for an advisory opinion from the Executive Officer. On August 27, the Executive Officer issued an opinion reversing the opinion of the District #5 Coordinator, concluding that the gravel pit is a commercial operation subject to the permit requirements of Act 250.

On September 20, 1990, the Petitioners filed a request for a declaratory ruling with the Board. On October 30, the Board issued a notice that the request had been filed and a schedule for disposition of preliminary issues which had been identified based on the request and the advisory opinions. On November 21, the Adjoiners filed a motion to dismiss the petition and a request for party status. On December 13, the Petitioners filed an opposition to the motion and the request. The Board deliberated on December 19 and February 21, 1991. On April 23, 1991, the Board determined that this matter is now ready for decision.

II. DISCUSSION

1. The Adjoiners' request for party status is granted. Pursuant to Board Rule 3(C), the Adjoiners have established that they are interested parties. The Board's ruling is based *on* the showing made in the Adjoiners' request for party status and the reasons for granting the Adjoiners party status in the prior proceeding before the Board cited in the above-referenced prehearing conference report.

2. The Board determines to dismiss this petition because the issue of jurisdiction was part and parcel of the issues decided in the prior proceeding before the Board and the Supreme Court. Accordingly, subsequent litigation of this issue is barred by the doctrine of res iudicata unless a strong policy reason exists for not applying this doctrine. In this case, the Board believes that a policy of efficiency in administrative proceedings militates against allowing the petition to proceed.

The doctrine of res iudicata bars the pursuit of a claim where the claim has or could have been litigated in another proceeding, and, in the two proceedings, the parties, subject

matter, and cause of action are substantially similar. Berisha v. Hardy 144 Vt. 136, 138 (1984). The doctrine has been described as follows:

> Res iudicata ensures the finality of decisions. Under res iudicata, "a final judgement on the merits bars further claims by parties or their privies based on the same cause of action. ..."
>
> Res iudicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding . . . .
>
> Res judicata thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes.

Fitzgerald v. Fitzgerald, 144 Vt. 549, 552 (1984), quoting Brown v. Felsen, 442, U.S. 127, 131 (1979).

This Board has previously recognized that the doctrine of res iudicata is relevant to Act 250 proceedings, but has stated that it does not apply where it is outweighed by policy considerations. Rome Family Corporation, Application #1R0410-3-EB, Memorandum of Decision at 4 (May 2, 1989); see also Town of Springfield, Vermont v. Environmental Board, 521 F. Supp. 243 (1981).

In this case, in the context of requests for advisory opinions, the Petitioners have raised the question of whether their gravel pit is a commercial operation requiring an Act 250 permit. That question was determined in the prior proceedings before the Board in the context of the question of whether the gravel pit conforms with the applicable town plan. As the Board concluded in that proceeding, the Waitsfield Town Plan is applicable, and that plan designates the highway on which the pit is located as a scenic road. The plan excludes commercial and industrial developments from being constructed and operated on scenic roads. In construing the conformance of the gravel pit with the Waitsfield Plan, the Board stated:

> **Moreover,** the Capital 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.

Findings of Fact, and Conclusions of Law, and Order #5W0976-EB at 9 (emphasis added).

This language constitutes a clear indication from the Board that it considered itself to have jurisdiction over the gravel pit. Further, it is a determination that the gravel pit is a commercial operation subject to Act 250. That is the question at issue in the current petition. To the extent the Petitioners now raise a claim that, even if their gravel pit is a commercial operation subject to Act 250, it is exempt as farming, that issue is part of the overall jurisdictional question, and could and should have been raised previously.

The Petitioners appealed to the Supreme Court and challenged the Board's determination that the gravel pit is a commercial operation. The Court affirmed the Board, stating:

> The operation of a gravel pit involves the sale of a commodity, clearly a commercial activity, and has many of the attributes that give rise to the regulation of commercial or industrial activity, including increased levels of traffic and noise.

In re Georae and Dorothy Carpenter, No. 90-096, slip op. at 2 (Nov. 14, 1990).

Since the basic question raised by this petition was previously ruled on by the Board, and since the Board's decision was appealed to the Supreme Court, the policies of finality embodied in the doctrine of res iudicata should bar

this petition unless a compelling policy reason exists to allow the petition to go forward. The Petitioners, however, have advanced no such reason.

Further, administrative efficiency favors dismissing the petition. The Petitioners were notified in 1988 that an Act 250 permit was required for their gravel pit. The Petitioners applied for a permit and, following a lengthy process involving appeals to the Board and the Supreme Court, were denied a permit because their gravel pit failed to conform to the Town Plan. Now the Petitioners seek to collaterally attack that denial by filing a petition for a declaratory ruling that no permit is required. Allowing the petition to proceed would render meaningless all of the prior decisions which have gone before.

III. ORDER

1. The Adjoiners are granted party status.

2. The petition is dismissed.

Dated at Montpelier, Vermont this 25th day of April, 1991.

ENVIRONMENTAL BOARD

Elizabeth Courtney, Chair
Ferdinand Bongartz
Rebecca J. Day
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A:MDDR237 (PWP12)