STATE OF VERMONT

ENVIRONMENTAL COURT

In re: Appeal of LiCausi, et al.	}	Docket No. 203-11-98 Vtec
In re: Appeal of John A. Russell Corp. and Crushed Rock, Inc.	}	Docket No. 77-5-99 Vtec
In re: Appeal of John A. Russell Corp. and Crushed Rock, Inc.	}	Docket No. 230-11-99 Vtec

Decision and Order on Pending Motions

In Docket No. 203-11-98 Vtec, a group of Appellants: Gale LiCausi, Frank LiCausi, John Furneaux, Andrea McCormack, Eric Jensen, Lisa Chapman, John W. Cook, Patricia Cook, William Norton, Eleanor Norton, and Edward B. McCormack, (the Appellant-Neighbors) appealed from the October 9, 1998 decision of the Zoning Board of Adjustment (ZBA) of the Town of Clarendon, granting a conditional use permit to Appellee-Applicants John A. Russell Corporation and Crushed Rock, Inc. to operate a bituminous asphalt (also known as asphalt concrete, bituminous concrete, or hot mix) plant. Appellant-Neighbors are represented by Jon S. Readnour, Esq.; Appellee-Applicants are represented by Edward V. Schweibert, Esq.; the Town of Clarendon has not entered an appearance in Docket No. 203-11-98 Vtec.

In Docket No. 77-5-99 Vtec, Appellant-Applicants John A. Russell Corporation and Crushed Rock, Inc. appealed from the March 29, 1999 decision of the Planning Commission of the Town of Clarendon, denying Applicant's application for site plan

approval for a bituminous asphalt plant. Appellant-Applicants are represented by Edward V. Schweibert, Esq. and Mary Grady, Esq. In Docket No. 77-5-99 Vtec, neither the Town nor any other party has entered an appearance.

In Docket No. 230-11-99 Vtec, Appellant-Applicants John A. Russell Corporation and Crushed Rock, Inc.[1] appealed from the October 27, 1999 decision of the Zoning Board of Adjustment (ZBA) of the Town of Clarendon, reversing a decision of the Zoning Administrator to issue a zoning permit to Applicants and denying Applicant's application for a zoning permit to operate an asphalt plant. Appellant-Applicants are represented by Edward V. Schweibert, Esq. and Mary Grady, Esq.; Ms. Marjorie Southard entered her appearance as an interested party and represents herself; Ms. Ilse Vergi entered her appearance as an interested party, but later withdrew her appearance, as her interest is only to "sit in on the hearing" and not to voice any opinion in the matter. Mr. Monty James, Butterfield (the comma appears in both his letterhead and his written signature) filed a purported entry of appearance on behalf of Mr. Henry A. Vergi; Mr. Butterfield is not an attorney. Mr. Vergi has not filed his own entry of appearance, but has filed a statement that he has appointed Mr. Butterfield to participate in the hearing on his behalf, as he is unable to attend a hearing. The Town of Clarendon has entered an appearance in Docket No. 230-11-99 Vtec, and is represented by John D. Hansen, Esq.

Because the Applicants are Appellees in one case and Appellants in the other two cases, to avoid confusion in these three cases we will refer to the parties by their names or will refer to the Applicants as Applicants. The three cases have not formally been consolidated but may be consolidated for hearing in the future. It is not clear to the Court whether the projects proposed in all three cases are located on the same or different

[1] While the initial notice of appeal mentioned both corporations as appellants, later filings have referred to John A. Russell Corp. as the sole appellant, both in the caption and in the text of the flings. Please advise the court as soon as possible of the correct designation of the applicant, and whether it differs among the three cases.

locations on Applicant's property (as Docket No. 77-5-99 Vtec refers to the project location as in the "Commercial-Industrial" zoning district while Docket No, 203-11-98 Vtec refers to the location as in the "Commercial and Residential" zoning district).

To minimize future confusion, the decisions on the pending motions in each of these cases are being issued together in this single document so that all parties in all three cases are aware of the pending issues, even in those cases in which they have not entered an appearance. In Docket No. 203-11-98 Vtec, the parties have filed cross-motions for summary judgment. In Docket No. 77-5-99 Vtec, Applicants have moved for partial summary judgment on Question 1 of their amended statement of questions. In Docket No. 230-11-99 Vtec Applicants have filed a preliminary motion regarding the party status and representation of Mr. Henry Vergi.

Docket No. 230-11-99 Vtec - Motion re: Party Status

Applicants do not appear to contest that Mr. Henry A. Vergi himself would qualify for party status, but Mr. Vergi should file an entry of appearance in writing. His entry of appearance as an interested party is separate from the question of whether he will be able to attend any hearing[2] if one is scheduled, and whether he will be able to designate a representative for that hearing if he cannot personally attend. Applicants have moved to dismiss Mr. Monty Butterfield as a representative of Mr. Henry A. Vergi, and have moved for a ruling that Mr. Butterfield does not have independent party status separate from that of Mr. Vergi. Neither Mr. Butterfield nor Mr. Vergi has filed a response to Applicants' motion.

The standard for party status applicable in this matter is found in the definition of

[2] Mr. Vergi may not be aware that any hearing would be held in Rutland in an accessible courtroom, that it would be scheduled in consultation with the parties, and that he might be able to testify by telephone if he is out-of-state or cannot come to the hearing at the time it is scheduled. Nothing appears in the file from which the Court can determine whether Mr. Vergi will in fact be unable to attend a hearing if one is scheduled. Further, if he cannot attend or participate by telephone, it may be possible for him to execute a power-of-attorney to designate an individual representative to act on his behalf.

"interested person" in 24 V.S.A. §4464(b)(3). To obtain party status under that section, the person must satisfy two criteria. The person must own or occupy property "in the immediate neighborhood" of the Applicants' project, and the person must take the position that the "decision or act [on appeal], if confirmed, will not be in accord with the policies, purposes or terms of the [Clarendon] plan or bylaw." Mr. Butterfield has filed nothing to suggest that he qualifies for party status on his own behalf. Accordingly, Applicants' Motion is GRANTED as to Mr. Butterfield's party status: he does not appear to qualify for party status independently.

Any individual is entitled to represent himself or herself in court, without an attorney. However, non-attorneys may not act as attorneys for other individuals and may only represent corporations or associations in exceptional circumstances. Vermont Agency of Natural Resources v. Upper Valley Regional Landfill Corp., 159 Vt. 454, 458 (1992). At the present stage of this case, there has been no showing that Mr. Vergi cannot participate on his own behalf in the pretrial proceedings, including the filing of any written documents and participation in any pretrial conferences by telephone. Moreover, Mr. Butterfield's has not demonstrated his ability to represent Mr. Vergi at a hearing under the Upper Valley standard. Accordingly, Applicants' Motion is GRANTED as to Mr. Butterfield's representation of Mr. Vergi at this time, without prejudice to their reapplication for that representation at such time as a hearing is scheduled. Mr. Vergi should file his entry of appearance on his own behalf within twenty days of his receipt of this order.

Applicants have also moved to dismiss Ms. Ilse Vergi as an interested party. That motion is moot as Ms. Vergi has withdrawn her entry of appearance.

The parties are also reminded that a copy of any document filed with the Court must be sent to each of the other parties. After Mr. Vargi's appearance has been resolved, we will set a telephone conference to determine whether this should be set for a hearing on the merits together with Docket No. 203-11-98 Vtec.

Docket No. 77-5-99 Vtec - Motion for Summary Judgment

In Docket No. 77-5-99 Vtec, Applicants have moved for summary judgment on Question 1 of their amended Statement of Questions: Whether site plan approval is

required by the Clarendon Zoning Regulations for uses in the Commercial-Industrial District.

Applicants applied for and the Planning Commission denied site plan approval for a bituminous asphalt plant to be located in the Town's Commercial-Industrial[3] zoning district. Applicants now contest that site plan approval is required at all for this project.

The state zoning enabling act allows towns to adopt zoning regulations that may include a requirement for site plan approval, as follows: "[a]s a prerequisite to the approval of any use other than one- and two-family dwellings, the approval of site plans by the planning commission or development review board may be required." 24 V.S.A. §4407(5). This statutory enabling language gives towns the option to include such provisions in their zoning regulations, but such provisions are not mandatory. Compare, 24 V.S.A. §4406. Because the provisions are not mandatory, the state statute does not provide authority for a town to act on site plan approval for any category of uses, unless site plan approval is required for that category in the town's own zoning regulations. The town must exercise this grant of authority in its zoning regulations for the requirement to apply to any category of uses or any zoning district within the town.

The Court has thoroughly reviewed the Clarendon Zoning Regulations. The only section which requires site plan approval is §430, under which site plan approval is required for non-residential uses in the "Residential 43,560 -R-" zoning district. Site plan approval is not required for non-residential uses (or any category of uses) in any other district. Moreover, §251, which provides the procedure and standards for site plan approval, does not contain any requirement for site plan approval for any category of uses in any district.

Accordingly, Applicants' motion for summary judgment on Question 1 is GRANTED: the Clarendon Zoning Regulations as written do not require site plan approval for any uses in the Commercial-Industrial (or the "Commercial and Residential") zoning district.

[3] See footnote 1 above. However, the ruling in Docket No. 77-5-99 Vtec is not affected if the project were located in the "Commercial and Residential" zoning district.

Accordingly, the Planning Commission's denial of site plan approval is vacated as beyond the Planning Commission's jurisdiction. This ruling concludes Docket No. 77-5-99 Vtec; it is a final, appealable order in that case.

Docket No. 203-11-98 Vtec - Cross-Motions for Summary Judgment

In Docket No. 203-11-98 Vtec, the parties have filed cross-motions for summary judgment.

In 1976 the Town of Clarendon enacted zoning regulations. Section 420 provided for specific conditional uses in the "Agricultural and Rural Residential Areas," including "light industry" and "gravel pit." Section 421 provided for a list of specific "Commercial Uses Permitted" in the "Commercial and Residential" zoning district, but did not provide for any permitted residential uses, nor for any conditional uses at all. Section 245 provided for the Zoning Board of Adjustment to rule on uses requiring conditional use permits, applying the standards of 24 V.S.A. §4407(2).

The Zoning Regulations were amended generally in 1979. Section 423 was added, applicable only to the "Commercial and Residential" and the "Commercial-Industrial" districts. It allowed the ZBA to approve uses other than the uses specifically permitted for those districts, by applying the conditional use approval procedures and standards set forth in 24 V.S.A. §4407(2).

The 1979 amendments also completely rewrote §421, governing the "Commercial and Residential" zoning district. The amended §421provided in full as follows:

> Uses permitted:
> (a) RESIDENTIAL: as permitted in Residential R district.
> (b) COMMERCIAL: All usage excluding manufacturing.
> (c) AGRICULTURAL: As permitted in Agricultural and Rural Residential A-R district.
> Exceptions: The following are not permitted in the Commercial and Residential district:
> (a) Rendering Plant
> (b) Automobile graveyard
> (c) Junkyard

The amended §421 did not define any uses specifically as conditional uses in the

Commercial and Residential district.

In 1982, Appellee-Applicants' predecessors applied for a conditional use permit (#BZA 4-82) for a "gravel pit and stone quarry" for the use described as "extraction of sand, gravel and quarrying stone." Although the permit findings describe the proposed operation as located "in a designated commercial/residential area," paragraph 3 of the findings cites §420 (Agricultural and Rural Residential) rather than §421, along with §§160 (Extraction of Soil and Gravel) and 245 (Conditional Uses), as providing authority for the conditional use permit for the gravel pit and stone quarry. A conditional use permit was granted in January of 1983 and became final.

In 1986, Appellee-Applicants applied for amendments to the conditional use permit, to allow permanent operation of a secondary stone crusher, to allow temporary operation of a "portable asphalt plant," to extend the Saturday hours of operation, and to allow blasting after 5:00 p.m. The permit amendment was granted to allow the secondary crusher, under certain conditions, but the remaining three requests were denied. The ZBA decision did not discuss the zoning district in which the property was located, and did not discuss whether an asphalt plant (or a gravel pit or stone quarry) would constitute a conditional use or a non-conforming use in the Commercial and Residential zoning district.

In 1998, Appellee-Applicants applied for the permit at issue in the present appeal, to "add a bituminous concrete plant to the existing operations." The application was filed as an application for a conditional use permit, citing §§245, 421 and 423 of the Zoning Regulations. The application was warned as a request "to amend" the existing conditional use permit.

In its decision, the ZBA stated as a finding that §280, regulating the expansion of non-conforming uses, "empowers the Board to act on this issue." The ZBA decision did not make findings on the standards for conditional use approval imported into the Zoning Regulations from 24 V.S.A. §4407(2).

Appellant-Neighbors first argue that 24 V.S.A. §4407(2) limits towns to providing for conditional use approval of only those specific uses which have been listed as conditional uses in the zoning regulation. They argue that it prohibits the approach taken in §423 of

the Clarendon Zoning Regulation, which allows the ZBA to approve as conditional uses in the "Commercial-Industrial" and "Commercial and Residential" zoning districts any uses not otherwise specifically permitted.

Nothing about the use of the work "certain" in the state statute requires such a limitation to be placed on town zoning regulations. The state statute allows towns the flexibility to determine whether they are going to provide for conditional uses at all, and if so, to which uses or categories of uses the conditional use process will apply. In the present case, although they may be inartfully drafted, the Zoning Regulations provide in the Agricultural and Rural Residential and in the Residential 43,560 -R- zoning districts for certain listed conditional uses. It is not unreasonable for the Zoning Regulations to allow a wider potential scope for conditional uses in the "Commercial-Industrial" and "Commercial and Residential" zoning districts, subject to their meeting the conditional use standards of the state statute. The safeguard is found in those standards[4]. That is, if a particular proposed use will adversely affect the capacity of existing or planned community facilities, the character of the area affected, traffic on roads and highways in the vicinity, other bylaws (such as performance standards) then in effect, or the utilization of renewable energy resources, then conditional use approval should be denied

Appellant-Neighbors also argue raise the issue of whether Applicants have received approval of the project as a non-conforming use rather than as a conditional use, and whether the ZBA had authority to issue such a non-conforming use "approval."

The action on appeal to this Court de novo is the ZBA's action on an application for a conditional use permit for the plant. The application did not seek approval as an expansion to a non-conforming use. Appellant-Neighbors are correct that the ZBA did not approve the project as an expansion of a non-conforming use, and such an application is not before this Court de novo.

If Applicants wish to have their present application considered as an expansion of an existing non-conforming use, they must apply under §280, the ZBA hearing must be

[4] We note that the ZBA did not make findings on those standards. As the proceeding is de novo before this Court, those standards will be the subject of the hearing on the merits.

warned under §280, and the ZBA must act under §280, before this Court may consider de novo whether the proposal use constitutes an expansion of an existing non-conforming use prohibited by §280(1) or whether it is a change to another non-conforming use allowed with ZBA approval under §280(2). In any event, this issue could not be resolved on summary judgment because material facts are in dispute as to whether a quarry was operated on the site on the effective date of the adoption of zoning in Clarendon in 1976.

Accordingly, based on the foregoing, in Docket No. 203-11-98 Vtec, Applicant's motion for summary judgment is GRANTED in PART and Appellant-Neighbors' motion for summary judgment is DENIED in PART, in that §423 allows otherwise unspecified uses to be considered for conditional use approval under the standards for conditional use approval imported into §245 and §423 of the Zoning Regulations from 24 V.S.A. §4407(2). Further, Applicant's motion for summary judgment is DENIED in PART and Appellant-Neighbors' motion for summary judgment is GRANTED in PART, in that the project is not before this Court on an application for a non-conforming use under §280 of the Zoning Regulations.

In Docket No. 203-11-98 Vtec, the Court will proceed to schedule the hearing on the merits of the application for conditional use approval for the project. If Applicants wish to apply to the ZBA for approval of the project under §280, they should so advise the Court and the other parties as soon as possible, and we will schedule a telephone conference to determine whether this matter should be put in inactive status until the ZBA will have ruled on that subsequent application.

Done at Barre, Vermont, this 5th day of January, 2000.

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Merideth Wright
Environmental Judge