



October 5, 2011

Kevin & Dawn Rett
565 Jones Lane
Wolcott Vermont 05680

Re: Jurisdictional Opinion 5-17
Gravel Extractions on Rett Tract, Town of Wolcott

Dear Mr. and Mrs. Rett:

This letter constitutes a Jurisdictional Opinion pursuant to Act 250 Rule 3 and is issued to complete the inquiry on Act 250 jurisdiction which was initiated in June 2010 by project contractor Larry Bohannon. Reference is made to prior correspondence from this office dated July 2, 2010, August 26, 2010 and August 9, 2011. The August 9, 2011 letter from this office to you resulted in your reply dated August 22, 2011. In turn, this office afforded an opportunity for positions by September 9, 2011 from the Town of Wolcott Selectboard and Planning Commission. No positions were filed by the municipal parties. A proposed Jurisdictional Opinion was then circulated for comment on September 12, 2011 and comments were welcomed until October 3, 2011. No comments were received from the landowners, the project contractor or the statutory parties. As explained below, a land use permit was, and is, required for the ongoing extraction of gravel from this site.

FACTS

1. Kevin & Dawn Rett own a tract of land approximately 21 acres in size and located off Arnold Lane/Jones Lane in the Town of Wolcott.
2. The District 5 Environmental Commission first became aware of gravel extractions on this site in June 2008 when an Environmental Enforcement Officer from the Agency of Natural Resources visited the site.
3. On June 29, 2010 a meeting was held at the site by Larry Bohannon, the Wolcott Zoning Administrator and the District 5 Environmental Coordinator. Mr. Bohannon outlined a proposal to extract gravel from the site. During the site visit, observations were made that extractions had been made at the site in the past.
4. In a letter to Mr. Bohannon dated July 2, 2010, the District Coordinator provided guidance under Act 250 statutory and regulatory provisions relative to definitions of "pre-existing development", "abandonment" of pre-existing extraction projects and "substantial changes" to pre-existing developments. The letter indicated a need to focus on relevant fact finding details.
5. Mr. Bohannon telephoned the District 5 office on August 13, 2010 to discuss the July 2, 2010 letter and the result of that telephone conversation was an August 26, 2010 letter from the District 5 Coordinator providing further guidance on proof necessary to establish "pre-existing development" status and suggesting that it might be best to focus on the preparation of an application for a land use permit.

6. On April 15, 2010 Mr. Bohannon filed an application with the Town of Wolcott Development Review Board for approval to "reopen an existing gravel pit" involving approximately 3.4 acres of the Rett tract.
7. In a submittal to the Wolcott Development Review Board dated June 1, 2010, Mr. Bohannon provided the following project description:

The site plan for the gravel pit is to cut off the knoll that is 400Wx500Lx200H and there is close to 650,000 yards of gravel or more. When this is all done there will be a field and a small pond. There also will be trees planted around. As for the hours of operation it will be from 7:00 - 4:00 and by calls only. There will be no more than five trucks a day going in and out of the pit. At some point I would like to have a crusher come in and crush gravel. They will do this from 7-5 Monday-Friday for about two weeks.
8. The Wolcott Development Review Board issued its decision on September 8, 2010 approving the application.
9. On August 9, 2011, the District 5 Coordinator corresponded with Mr. and Mrs. Rett noting that extractions continued at the site and that it was necessary to resolve Act 250 jurisdictional issues. In that letter, the Coordinator referenced recent telephone conversations with Mr. Bohannon in which Mr. Bohannon described the work underway, and planned for the site, as being the construction of a pond for the personal use of the landowners. The Coordinator requested a reply by August 26, 2011.
10. In a reply dated August 22, 2011, Kevin Rett stated that there was "no desire to run a commercial gravel pit". Instead, the agreement with Mr. Bohannon was that Mr. Bohannon would construct a pond for the use of the Rett family and that Mr. Bohannon "gets gravel to haul."
11. The Town of Wolcott has duly adopted both permanent zoning and subdivision bylaws.

CONCLUSIONS

The extraction of earth resources for a commercial purpose requires a land use permit as "development" under Act 250 [10 V.S.A. 6001(3)(A) and 6081(a): Agency of Natural Resources vs. Duranleau 159 Vt. 233 (1992)]. Exempt from this statutory requirement are developments commenced prior to June 1, 1970 unless the development has undergone a "substantial change" [10 V.S.A. 6081(b)]. The burden of proof is upon the person claiming an exemption from jurisdiction to provide adequate facts in support of a claim to a pre-existing earth extraction project and that contemporary extractions are not "substantial changes". [See In re: Big Rock Gravel, LLC Docket No. 174-8-08 Vtec (October 19, 2010)].

Except for assertions of an "existing gravel pit" on this tract, no information was provided regarding the commencement date of the alleged pre-existing development or the extraction rates prior to 1970. In addition, no proof was provided that the alleged extractions have been ongoing and that the alleged pre-existing extraction areas had not been abandoned due to non-use after 1970. Therefore, the facts in this matter do not support a claim for a continuously operating pre-existing development on the tract.

“Commercial purpose” is defined in Act 250 Rule 2(C)(4) as:

...the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object or service having value.

The former Environmental Board had cause to apply the rule on “commercial purpose” to the extraction of earth resources in its Mohr decision [Declaratory Ruling 182 (May 27, 1987)] in determining whether Act 250 jurisdiction applied and a permit was required. In Mohr, the landowner arranged with a contractor to clear and level a 5 acre portion of land. In lieu of monetary compensation to the contractor for this work, the contractor accepted the excavated sand which was usable for various construction jobs such as for building roads or backfilling around foundations. The land owner paid the contractor in cash for sowing seed on the site after it was leveled and loamed. Approximately 1,800 cubic yards were removed and hauled away in the Mohr case.

The Board concluded in the Mohr case that the clearing and leveling of the site, and the sale of the material from the site, met the test of “commercial purpose.” The Board reached this conclusion because “.... it is clear that earth materials are being removed from this site in exchange for something of value.” (at page 4) In Mohr the Board found that the landowner received extensive excavating services in exchange for the sand and that the contractor received money from customers for the materials. In concluding that the landowner required a land use permit because he initiated the extraction operation and ultimately controlled it, the Board stated at page 4:

What is really happening on the ground in this case is no different from a commercial sand and gravel operation of the type which is routinely subjected to Act 250 review. The fact that Mr. Mohr chose to forego any monetary payment for the removal of the sandy material, and was instead paid in the services rendered by Mr. Kindberg, does not alter this conclusion. The impact upon the immediate site and the surrounding neighborhood in terms of noise, dust, traffic, and the other subjects regulated by Act 250 is no different simply because the commercial activity is carried on by a person other than the landowner.

The Board also considered the volume of material removed to not be de minimus and this was material to its decision. The Board summarized its analysis: “It is the commercial nature of the activity, not the person conducting the activity or benefitting therefrom, that triggers Act 250 jurisdiction” (at page 5).

Subsequent to the issuance of Mohr, the Board considered similar circumstances in a case involving the extraction of shale on a site where the result was two areas intended for ponds and a road. In that case [BHL Corporation Declaratory Ruling 267 (February 11, 1993)] the Board relied substantially on the Mohr decision and concluded that a land use permit was required noting that even though the evidence concerning the activities on the subject tract was “ambiguous”, nevertheless the convincing proof was the provision of certain excavating services and the use of heavy equipment in exchange for approximately 700 cubic yards of shale. In its conclusions, the Board stated:

A landowner’s intention to use his property for residential purposes in the future and his choice to forego any monetary payment by a third party for the removal of earth resources from his property do not necessarily remove his extraction activities from Act 250 jurisdiction. Indeed, as the Board noted in Mohr, the impact upon the immediate site and the surrounding neighborhood in terms of noise, dust, traffic, and the other subject regulated by Act 250 is no different “simply because the

commercial activity is carried on by a person other than the landowner.” Id. at 4. In the present case, there is evidence that the activities at Petitioner’s tract resulted in actual impacts upon the site and immediate neighborhood, some of which could be subject to regulation under the Act.

Applying the holdings in Mohr and BHL Corporation to the facts presented by the gravel/sand extractions on the Rett tract, it is concluded that a land use permit will be required prior to any future extractions at the site. The facts at hand reflect that the Retts will benefit from the services provided by Mr. Bohannon, who, in exchange for payment for the construction of a pond, will receive substantial amounts of merchantable gravel/sand. Thus, the extraction of earth resources are for a commercial purpose. In addition, any other future extractions elsewhere on the tract for commercial purposes will also require a land use permit. Should a claim be made that any such future extractions are for a recognized exempt purpose, sufficient proof of qualification for an exemption will be required [See Re: John Gross Sand and Gravel Declaratory Ruling 280 (July 28, 1993)].

Furthermore, a reasonable reading of the project description provided by Mr. Bohannon to the Wolcott Development Review Board and the Development Review Board’s subsequent decision supports a conclusion that the intent of the proposed activity on the Rett tract is the commercial extraction of gravel and that any pond which may then be established at the site will be a component of site reclamation.

In conclusion, an application for a land use permit was, and is, required for the extraction of gravel at the Rett tract.

Please do not hesitate to contact this office with any questions.

Sincerely,

Edward Stanak
District Coordinator

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Natural Resources Board Rule 3(A).

Reconsideration requests are governed by Natural Resources Board Rule 3(B) and should be directed to the district coordinator at the above address. Any appeal of this decision must be filed with the clerk of the Environmental Court within 30 days of the date of issuance, pursuant to 10 V.S.A. Chapter 220. The appellant must attach to the Notice of Appeal the entry fee of \$225.00, payable to the State of Vermont. The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Ctr. Bldg., National Life Drive, Montpelier, Vermont 05620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. The address for the Environmental Court is: Environmental Court, 2418 Airport Rd., Suite 1, Barre, VT 05641-8701. (Tel. # 802-828-1660)

