

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

RE: Charles Drown Findings of Fact, **Conclu-**  
RFD sions of Law and Order  
Newport Center, VT 05857 Land Use Permit #7R0644-EB  
and  
A. Michael Richard  
10 Lake Road  
Newport, VT 05855

This decision pertains to an appeal filed with the Vermont Environmental Board (Board) on October 2, 1986 by Gregory P. Howe, Esq. on behalf of Arthur Bonnell, and others from the September 2, 1986 decision of the District #7 Environmental Commission (Commission) issuing Land Use Permit #7R0644-EB (permit) to Charles Drown and A. Michael Richard. The permit authorizes the Permittees to open and operate a 5.5 acre sand and gravel pit off Route 242 in the Town of Jay, Vermont.

At a prehearing conference held on October 29, 1986, all parties to this appeal agreed to waive the 40 day requirement for the convening of the public hearing as set forth in 10 V.S.A. § 6086(b). The parties also agreed that the Board could hear this appeal through an Administrative Hearing Panel pursuant to the procedures set forth in Board Rule 41.

The Administrative Hearing Panel convened the hearing of December 17, 1986 at Newport, Vermont with Board Chairman Darby Bradley presiding. By Stipulation of the parties, the following parties were admitted as adjoining property owners:

Donald McLaughlin, Jr.  
Warren Drown  
Arthur Bonnell

and the following were admitted as parties under Environmental Board Rule 14(B):

Jay Peak, Inc.  
Richard and Elizabeth VanWoert  
Marlow-Chut, Inc.  
Barbara Loux  
Van's Bobcat, Inc.  
Peter Conover  
Anne Turtur  
Jay Peak Lodging Association  
Jay Village Inn  
Mr. and Mrs. Robert LeClerc

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The hearing was recessed on December 17, 1986 and the Hearing Panel took a site visit on that date. The Hearing Panel issued its Proposed Decision on January 14, 1987 and all parties were notified of their right to present oral or written argument to the full Board. After oral argument on February 19, 1987, the Board reviewed this matter on March 18, 1987, determined the record complete and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based exclusively upon the record developed at the hearing.

I. ISSUES IN THE APPEAL

On December 9, 1986, the Board received a written request for a continuance of the hearing from adjoining property owner Jonathan A. Birnbaum so that he would have the opportunity to participate in the hearing. As a resident of Colorado, he maintained that he would not be able to attend the hearing on the scheduled date. Mr. Birnbaum had been notified of the submission of the application to the District Environmental Commission but had failed to participate in the District Commission proceedings. The Board hereby denies Mr. Birnbaum's motion for a continuance because, pursuant to Board Rule 14(B)(3), Mr. Birnbaum failed to demonstrate good cause for his failure to appear on time, and any delay at this stage of this appeal would unfairly delay the proceedings and would place an unfair burden on the Applicants.

On December 8, 1986 the Board received motions by Gregory Howe, Esq. for an extension of the December 5, 1986 filing date set forth in the Board's Prehearing Conference Report and Order, and for a continuance of the scheduled December 17 hearing on the merits of the appeal. Chairman Bradley issued a Preliminary Decision on December 10, 1986, which denied these motions. After hearing arguments by the Appellants regarding the denial of these motions and upon review of an additional submission regarding the testimony of an engineer to be presented by the Appellants, the Board finds insufficient justification to overturn the Chairman's Prehearing Decision and both are hereby denied.

After the public hearing, the Hearing Panel received a topographic map from the Appellants. By previous stipulation of the parties, this map was admitted as an exhibit. Also after the hearing the Board received a motion for a new site visit, and a request for a continuance from the Appellants. Based upon the Board's review of the topographic map submitted and its understanding of the relationship of this project to surrounding properties, the Board concludes that an

additional site visit is unwarranted and the motion is denied. Also, after review of the Appellants' offer of proof consisting of the comments by William E. Shumway, the Board is not convinced that additional testimony is necessary. Consequently, the request for a continuance of hearing is also denied.

Specific criteria at issue in this appeal are as follows:

Criterion #1 (air pollution) - dust from the access road and pit area; exhaust from gravel trucks on Route 242. Criterion #1 (water pollution) - runoff from project site and dust control procedures on the access road, which may pose a threat to nearby streams and wells. Criterion #4 (soil erosion) - erosion from project site and access road. Criterion #5 (traffic safety and congestion) - safety of access point onto Route 242; increased traffic on Route 242. Criterion #8 (aesthetics) - noise from trucks and pit operations; visual impact of the pit on the aesthetics and scenic and natural beauty of the area.

## II. FINDINGS OF FACT

1. The proposed sand and gravel pit is to be located south of Vermont Route 242 in Jay, Vermont on a 21.5± acre tract of land. The pit will involve a 5.5 acre portion of the tract located approximately 600 feet from Route 242 at its nearest point. Via the pit's access road, it will be about 800 feet from Route 242.
2. The pit site is entirely wooded, and it is surrounded by wooded lands. Slopes on the site average about 2%.
3. Extraction of sand and gravel will begin at an existing bank at the southeastern end of the pit and will proceed towards the northwest in phases. Only approximately 1.5 acres will be exposed at any one time, and the excavated areas will be reclaimed at completion of each phase. A 100 ft. buffer of existing trees will be maintained around the pit.
4. The Applicants expect to remove up to 100,000 cubic yards of material from the site over a 10 year period. Vehicle traffic is expected to average 3 to 5 truck trips per day during the extraction season from April 1 to December 1.

Criterion 1 - Air Pollution

5. The Applicants propose to control dust on the access road and in the pit by the use of water on an as needed basis.
6. Average daily truck traffic on the access road will be approximately 3 to 5 trucks. Truck traffic could reach up to 75 trips per day for up to 10 days per year.
7. Trucks will only be filled to their rated cubic yard capacities so that sand and gravel will not be spilled on Route 242. The loads in the trucks will not be covered because the type of sands and gravel to be hauled have very little silts or clays that would dry out and cause blowing dust from moving trucks.
8. The normal expected truck traffic from the pits (3-5 trucks per day) will not significantly increase emissions from vehicles on Route 242. Annual Route 242 average daily traffic will only be increased by 1%. Even on peak trucking days (up to 75 trucks per day), the additional truck emissions will not adversely affect overall air quality.
9. All vehicles hauling from the pit will have standard air pollution control **devices**.

Criterion 1 - Water Pollution

10. The pit excavation will be designed so that there will be little if any runoff from the site. The soils are very well drained and a stormwater retention basin sized to accept any possible amount of runoff will be located at the lowest end (southern) of the pit.
11. The existing terrain is such that there is a natural barrier between the pit site and the nearest stream located over 400 feet to the south.
12. The Agency of Environmental Conservation has determined that no Agency permits are required for stormwater runoff.
13. There are no known water supplies in the vicinity of the pit which could be affected by the pit operation.

Criterion 4 - Soil Erosion

14. Given the location of the pit and the proposed extraction plan which includes the stormwater retention basin, there is very little probability of any runoff which would result in soil erosion.
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15. The Applicants will employ the soil erosion control measures outlined on Exhibit #I, Sheet 5 to ensure that erosion will not result.

Criterion 5 - Highway Congestion and Safety

16. The pit access road has been partially relocated to the southwest so that the intersection with Route 242 is about 60 ft. farther away from the sharp turn on Route 242. This revised location improves sight distances so that there is 400 ft. of visibility downhill towards Jay Village and over 550 ft. uphill towards Jay Peak.
17. The access will be designed to Agency of Transportation specifications, and the Agency has issued an access permit (Exhibit #9). The access permit requires the installation of truck entering signs on both sides of the access on Route 242. Although no stop sign is required by the Agency of Transportation at this intersection, the Applicants have agreed to install such a sign if required.
18. The average daily 3 to 5 truck trips to be expected from this pit will not significantly increase traffic on Route 242. Even the addition of up to 75 truck trips per day for the 10 or fewer days per year that these trips can be expected will not result in unreasonable highway congestion or unsafe conditions on Route 242. This additional truck traffic is well within the road's reserve capacity.
19. The access road from Route 242 to the pit will be widened sufficiently to allow two trucks to pass. Route 242 is posted as a 50 MPH highway. However, the panel's site visit revealed that there is a sharp bend in the highway just easterly of the access road. Because of this, westbound traffic heading uphill toward Jay Peak is likely to be traveling at less than the posted speed.

8 - Aesthetics and Scenic and Natural Beauty

20. The pit will be located in a remote wooded site at least 800 ft. away from the nearest residence. Because of its remote location and because of the terrain in the area, the pit will not be visible from any residences in the area or from Route 242. The Applicantd will maintain a 100 ft. wooded buffer strip around the pit.
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21. The only area from which the pit would be visible would be the upper elevations of Jay Peak. From this vantage point of many miles, the pit would appear to be a small clearing and individual features of the pit would not be readily discernible.
22. The only residential property to be directly affected by the project is the Bonnell residence which is located adjacent to the pit access road. With the relocation of the access point to Route 242, the access road will be farther away from this residence and it will be partially screened by an existing row of trees. To the southeast of the Bonnell residence there is a gap in this existing tree buffer of approximately 200 ft. Consequently, without the planting of an evergreen buffer in this area, trucks traveling along this section of the access road would be highly visible from the Bonnell residence.
23. Noise from the operation of the pit at surrounding properties will be minimized because of its remote location, the treed buffer strip which will be maintained surrounding the pit, and the 18 to 20 ft. high bank which will be exposed in the pit during extraction operations. The Applicants estimate that noise levels would be 44 db at 800 feet from the pit. Crushing operations in the pit will occur only about 3 to 5 days per year.
24. The Applicants plan to operate the pit from 6:00 a.m. to 6:00 p.m. Monday through Friday except on legal Federal holidays. Early morning operation has the potential to disturb nearby residences.
25. As the site is excavated and each phase is completed, the earlier phase will be reclaimed by grading, replacing the topsoil, and planting evergreen trees. The Applicants estimate that there will be about 4 or 5 different extraction phases. The Applicants indicated that a requirement to file annual reports to the District Commission regarding the status of the reclamation plan would not be unreasonable.

### III. CONCLUSIONS OF LAW

#### A. Criterion 1 - Air Pollution

Based upon the above findings of fact under this criterion, we conclude that this project will not result in undue air pollution. Although it is inevitable that some

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dust will result from this project, we believe that **any** pollution resulting will not be undue because of the mitigating measures which are either designed with the project (i.e., buffer strips) or which will be followed by the Applicants during pit operation (i.e., use of water, care in loading trucks). Given the small relative size of the pit and the few trucks per day expected, paving the access road as suggested by the Appellants would not be warranted. In order to ensure that dust does not become a problem, we will add the following conditions to the permit:

1. The Permittees shall control dust in the pit and on the access road by application of water as necessary. If dust pollution becomes a problem on the haul road or if excessive dirt or silt is tracked onto Route 243 so that dust problems result, the Permittees shall apply calcium chloride as needed on the haul road to control dust.
2. Trucks shall only be loaded to their rated capacities in terms of cubic yards of gravel. The Applicants shall immediately remove any significant amounts of gravel spilled on Route 242.

B. Criterion 1 - Water Pollution

As under Criterion 1 - Air Pollution above, before granting a permit we must find under this criterion that any water pollution resulting would not be "undue." In this case, we have found that this pit will result in very little, if any, runoff and no other types of discharges into any ground or surface waters. Consequently, we must conclude that the project as proposed will not result in any undue water pollution.

C. Criterion 5 - Highway Congestion and Safety

Criterion 5 requires us to conclude before issuing a permit that a project "will not cause unreasonable congestion or unsafe conditions with respect to use of the highways ... and other means of transportation." We have found that Route 242 is able to accommodate the additional truck traffic resulting from this pit without congestion or safety problems. In issuing its access permit for the project, the Agency of Transportation has concluded that the revised access design meets its standards. To improve the safety at this intersection, the Board will require by permit condition the installation of a stop sign.

Based upon all of the above, the Board concludes that the project will not result in unsafe conditions or unreasonable congestion with regard to Route 242 or the pit haul road.

D. Criterion 8 - Aesthetics and Scenic and Natural Beauty

Opening and operating a gravel pit in a previously undeveloped area is likely to have an adverse effect on the area. In addition, the trucking along this wooded access road will adversely affect the area. However, in making a finding under this criterion we must also determine whether the adverse effect would be "undue." For guidance in this determination, we turn to the three tests outlined in our analysis in Re: Quechee Lakes Corporation, #3W0411-EB and #3W0439-EB issued November 4, 1985 and as amended on January 13, 1986:

- 1) Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area? Such standards may, for example, be set forth in the local or regional plan, or be adopted in the creation of an historic design district, or be incorporated into a municipal or State scenic road designation. If the Board or Commissions find that such standards do-exist, and that the project as designed would violate those standards, the adverse impact would be undue.
- 2) Does the project offend the sensibilities of the average person? If a project is so out of character with its surroundings or so diminishes the scenic qualities of the area that the Commission or Board finds the project shocking or offensive, the impact may be considered unduly adverse.
- 3) Have the Applicants failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings? If there are reasonable alternatives available to the Applicants that would mitigate the adverse impact of the project, failure to take advantage of those alternatives may, in some circumstances, render undue an otherwise acceptable aesthetic impact.

If the Board finds positively on any of these tests, it must conclude that the effect of this project will be undue and consequently it must be denied.

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Regarding the first test, we know of no written community standard which is intended to preserve the aesthetics or scenic and natural beauty of the area. Nor can we conclude that the pit in its proposed location would be shocking or offensive to the average person. The pit's location is remote from and not obtrusive on adjoining properties.

In terms of the final test, the Applicants have proposed mitigating steps to minimize the impact on surrounding properties such as maintaining a 100 ft. buffer strip of existing vegetation around the pit and preparing a comprehensive site reclamation plan. By permit condition we will impose the following additional measures to further mitigate the impact of the project: 1) hours of pit and hauling operations will be limited to between 7:00 a.m. and 6:00 p.m. Monday through Friday except on Federal holidays; 2) a buffer strip of evergreen trees to be approved by the Board will be planted along the northeastern side of the access road to effectively screen the access road from the Bonnell residence, 3) the existing wooded buffer along the access road near Route 242 will be maintained for the life of the permit, 4) all buffer strips will be marked by flagging prior to the commencement of each phase of the project, and 5) maximum open pit area will be limited to 1½ acres, and all excavated areas will be reclaimed at the end of each phase prior to the opening of the next phase. With these mitigative steps, we find that the Applicants have met the third test of the Quechee Lakes decision, and that the adverse impact of the pit operations will not be "undue."

#### IV. Issuance of Amended Land Use Permit

In accordance with these findings of fact and conclusions of law, we will issue Land Use Permit Amendment #7R0644-EB. The Board hereby incorporates as if fully set forth, and adopts as its own, those findings of fact and conclusions of law issued by the Commission which were not appealed and which were not affected by the Board's proceedings. The amended permit approves the project subject to conditions imposed by the Commission and not addressed in this appeal, and conditions reflected in our findings and conclusions.

Based upon the foregoing findings of fact and conclusions of law, it is the conclusion of the Board that the project described in application #7R0644, if completed and maintained in accordance with the terms and conditions of that application, the exhibits presented to the Commission and the Board by the parties and the conditions

set forth in Land Use Permit #7R0644 as amended by Land Use Permit Amendment #7R0644-EB, will not cause or result in a detriment to the public health, safety or general welfare under the criteria set forth in 10 V.S.A. § 6086(a).

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V. ORDER

Land Use Permit Amendment #7R0644-EB is hereby issued in accordance with the findings of fact and conclusions of law **herein**. Jurisdiction over this matter is returned to the District #7 Environmental Commission except as specified above.

Dated at Montpelier, Vermont this 24th day of March, 1987.

ENVIRONMENTAL BOARD



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Darby Bradley, Chairman  
Ferdinand Bongartz  
Elizabeth Courtney  
Samuel Lloyd III  
Roger N. Miller  
Donald B. Sargent