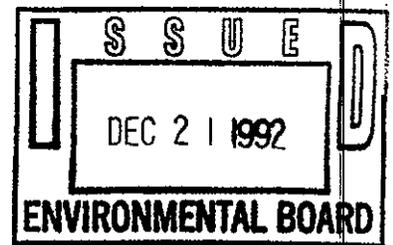


VERMONT ENVIRONMENTAL BOARD  
10 V.S.A. Chapter 153



RE: Robert and Barbara Barlow  
Application #8B0473-EB

MEMORANDUM OF DECISION

This decision pertains to an appeal of a permit issued to Robert and Barbara Barlow (the Applicants) for a gravel pit located in the Town of Pownal. The decision specifically pertains to a motion to alter filed by the Applicants with respect to an earlier decision by the Environmental Board to partially stay a condition of the permit that allows up to 30 truck trips per day and to recess this appeal pending a determination by the Vermont Supreme Court on whether a permit is required for the gravel pit. As is explained below, the Board decides to lift the stay and to set the appeal for hearing.

I. BACKGROUND

In Declaratory Ruling #234, the Environmental Board concluded that this gravel pit constituted a pre-existing development under 10 V.S.A. § 6081(b) which was exempt from the Act 250 permit requirement unless and until a substantial change had occurred or was proposed. The Board also concluded that such a change had occurred and therefore that a permit was and is required.

The Applicants appealed Declaratory Ruling #234 to the Supreme Court. Subsequently, the Applicants filed a permit application which was approved by the District #8 Commission with conditions. See Land Use Permit #8B0473 (April 14, 1992). Nancy Lubeck (the Appellant) filed an appeal of the District Commission's decision with the Board.

On August 6, 1992, ruling on a motion by the Appellant, the Board issued a memorandum of decision in which it took two actions. First, it partially stayed Condition #6 of Land Use Permit #8B0473. This condition allows the Applicants' operation up to 30 loaded truck trips per day, all of which will cross a nearby bridge. Based in large part on documents showing that the Vermont Agency of Transportation (AOT) has identified a serious need for repairs to that bridge, and that the Applicants may be sending overweight trucks over the bridge, the Board stayed the condition to the extent that it allows more truck trips than the gravel pit operation's pre-existing rate of 12 truck trips per day. Additionally, in accordance with the pit's pre-existing rates, the Board limited truck loads to seven cubic yards each, and annual extraction while the appeal is pending to a rate of 11,200 cubic yards per year. These limits were to be in place until the Board decided the appeal.

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Second, the Board recessed this matter pending a determination by the Supreme Court of the appeal filed by the Permittees concerning Declaratory Ruling #234.

On September 2, 1992, the Permittees filed a motion to reconsider the decision pursuant to Board Rule 31(A). On September 21, permitted party Nancy Lubeck (the Appellant) filed a response.

On October 23, 1992, the Board issued a decision concerning the Applicants' motion. The Board decided to hold oral argument on the motion and directed the Applicants to file affidavits substantiating various claims made in their motion, particularly the claim that the repairs advised by AOT had been made.

The Applicants filed various affidavits on November 13, 30, and December 1, 1992. The Board convened oral argument in Jamaica on December 2, 1992, with the following parties participating:

The Applicants by Thomas Jacobs, Esq.  
Nancy Lubeck

After hearing argument, the Board recessed the matter and conducted a deliberative session.

## II. DISCUSSION

**There** are two issues before us: the stay and the recess. We conclude that we should reconsider both of these issues and, on reconsideration, we conclude that we should lift the stay and set the matter for hearing.

With respect to the stay, Rule 42 allows us to consider the hardship to parties, the impact on the values protected by Act 250, and the potential effect on public health, safety, and general welfare. **In** this regard, our August 6 decision was strongly influenced by the need to protect the traffic safety values embodied in Act 250, and of necessity the public safety, by ensuring that heavy loaded trucks did not frequently travel over a bridge in serious need of repair. Based on the **affidavits** that have been filed, we are persuaded that there is a reasonable likelihood that the needed repairs have been made. Thus, an important reason for the stay no longer appears to exist. Further, we are also persuaded that the Applicants will comply with posted weight limits for the bridge and we encourage the Applicants not to deviate from this intention.

During oral argument, the Appellant objected to the timing of one of the affidavits, stating that it came so close to the hearing that she was deprived of the opportunity to file a counter-affidavit. The Appellant is hereby advised that she is not precluded from filing a counter-affidavit to the effect that the needed repairs have not been made and on that basis renewing her stay motion. We are not, however, waiting for such a counter-affidavit before making a decision because the Appellant did not allege at oral argument that the repairs have not been made.

Concerning our decision to recess, we take notice, pursuant to 3 V.S.A. § 810(4), of a recent decision issued by the Supreme Court concerning the appeal of Declaratory Ruling #234. In re Robert and Barbara Barlow, No. 91-491 (Oct. 27, 1992). In that decision, the Court stated that it would defer decision on all matters at issue in that appeal until such time as the Board has rendered a decision in this appeal. Consequently, the Applicants are faced with a situation in which we have stated that we are waiting for the Court, and the Court has stated that it is waiting for us. Such a situation presents a significant hardship to the Applicants.

Accordingly, we will set this matter for a hearing. In this regard, we note that in our August 6 decision we deferred reaching a decision on preliminary issues raised regarding party status. Consequently, the following order contains a schedule for deliberation on those issues and the subsequent filing of testimony and a hearing date.

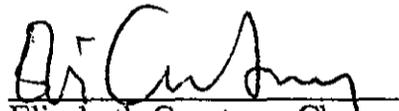
III. ORDER

1. The Board will deliberate concerning preliminary issues raised concerning party status during its meeting scheduled for January 13, 1993, and issue a written decision thereafter.

2. On or before **March 3, 1993**, parties shall file final lists of witnesses and exhibits and prefiled testimony for all witnesses they intend to present. Parties shall submit an original and ten copies of all filings.

3. Pursuant to 3 V.S.A. § 811 and Board Rule 41, an administrative hearing panel of the Board will convene the hearing in this matter on **March 17, 1993**, the exact time and location to be contained in a subsequent notice. Any objection to the use of a hearing panel shall be filed no later than **January 20, 1993**, or the objection shall be deemed waived.

ENVIRONMENTAL BOARD



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