

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

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

MEMORANDUM OF DECISION AND ORDER

This decision, dated August 6, 1992, pertains to a stay request filed by Nancy Lubeck (the Appellant) with respect to a condition of a permit issued for a gravel pit owned and operated by Robert and Barbara Barlow (the Applicants) located in Pownal. As is explained below, the Environmental Board stays Condition #6 of the permit, in part until such time as a final decision is reached on this appeal. The condition is stayed to the extent that it allows operation beyond pre-existing levels of yearly extraction, truck trips, and truck loads. The Applicants may continue to operate provided those levels are not exceeded. In addition, the matter is recessed until such time as the Supreme Court renders a decision on an appeal filed by the Applicants of an earlier Board ruling that the gravel pit needs an Act 250 permit.

I. BACKGROUND

On September 20, 1991, the Environmental Board issued Declaratory Ruling #234, concluding that an Act 250 permit was and is required for the operation of a gravel pit by the Applicants located off Dean Road in Pownal. The Applicants filed an appeal with the Vermont Supreme Court which is still pending. Subsequently, the Applicants filed an application for an Act 250 permit.

On April 14, 1992, the District #8 Commission issued Land Use Permit #8B0473, authorizing the continued operation of the gravel pit. The District Commission's decision states that the Appellant was granted party status on 10 V.S.A. § 6086(a)(5) (traffic) and revokes an earlier grant of party status on other unspecified criteria.

On May 14, 1992, the Appellant filed an appeal of the permit with the Board. The appeal includes a request to stay Condition #6 of the permit. The appeal seeks to have the Board review the project's compliance with the following criteria of 10 V.S.A. § 6086(a): 5 (traffic), 7 (municipal services), 9(D) (earth resources), 9(E) (extraction of earth resources), 9(H) (costs of scattered development), 9(K) (public investments and facilities), and 10 (conformance with local and regional plan).

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On June 2, 1992, the Appellant filed a supplement to her stay request and a memorandum in support of her appeal. On June 16, the Appellant filed a request for party status on all criteria under appeal.

On June 17, 1992, Assistant Executive Officer Aaron Adler convened a prehearing conference in Pownal, Vermont. On June 24, the Applicant submitted a response to the stay request and a list of potential witnesses at a hearing on the merits. On June 26, the Appellant submitted a letter regarding her stay request.

On June 30, 1992, the Assistant Executive Officer issued a prehearing conference report and order. On July 1, the Appellant submitted a transcript of the District #8 Commission's proceeding in this matter, an additional request for party status, and lists of potential witnesses and exhibits. On July 15, the Applicant filed a response to the Appellant's party status requests, a supplemental response concerning the stay request, and an additional list of witnesses.

On July 17, 1992, the Applicant filed a letter regarding the stay request. On July 20, the Board received a copy of a letter sent to the Applicant by the Town of Pownal Board of Selectmen. On July 21, the Board received a copy of a letter sent to the Selectboard by the Applicant. On July 23, the Appellant filed a motion for clarification. On July 27, the Applicant filed a response to that motion. The Board deliberated on July 29.

II. DISCUSSION

A. Issues before the Board

The prehearing order places two preliminary issues before the Board: a stay request filed by the Appellant and requests by the Appellant to expand her party status beyond Criterion 5 (traffic) so that appeal may be heard on other criteria. In addition, the Appellant has filed a motion for clarification.

B. Stay Request

The Appellant's stay request concerns Condition #6 of Permit #8B0473, which states:

The project is limited to 30 loaded trucks per day leaving the site, up to a maximum of 30,000 cubic yards of sand and gravel per year.

Condition #6 therefore authorizes up to 30 loaded trucks per day and up to 30,000 cubic yards extracted per year, and authorizes truck loads of any amount.

Concerning stay requests, Board Rule 43 provides:

No decision of the board or a district commission is automatically stayed by the filing of an appeal. Any party aggrieved by a final order of the board or a district commission may request a stay by written motion filed with the board identifying the order or portion thereof for which a stay is sought and stating in detail the grounds for the request.

In deciding whether to grant or deny a stay, the board may consider the hardship to parties, the impact, if any, on the values sought to be protected by Act 250, and any effect upon public health, safety or general welfare. The board may issue a stay containing such terms and conditions, including the filing of a bond or other security, as it deems just.

Thus, there are three types of factors the Board considers in reviewing stay requests: (a) the hardship to parties, (b) the impact on the values Act 250 protects, and (c) any effect on public health and safety or the general welfare.

1. Hardship to Parties. If the condition were stayed, a hardship to the Applicants would occur in that they would not have permission to extract up to 30,000 cubic yards of gravel per year or to haul up to 30 loads of gravel per day out of the pit. Effectively, the pit would not be able to operate. This undoubtedly will create hardship for the Applicants, although they have filed no information as to the magnitude of the hardship.

In any case, the hardship to the Applicants is mitigated somewhat by the fact that they own another gravel pit which they can operate. Pursuant to 3 V.S.A. § 810, the Board takes notice of its decision in Re: Robert and Barbara Barlow, Declaratory Ruling #222 (Dec. 26, 1990). In that

decision, the Board concluded that an Act 250 permit was not required for a different gravel pit located in Stamford and owned and operated by these same Applicants.

2. Impact on Act 250 Values/Effect on Public Safety.
As the basis for her stay request, the Appellant alleges concern for impacts on the values which Act 250 protects and the public safety. She makes a number of allegations, including the following ones which do not appear disputed by the Applicants: (1) that trucks associated with the gravel pit operation must cross Town Bridge #41 to reach the gravel pit; (2) that Bridge #41 is in serious need of repair; (3) that there has been extensive discussion between the State of Vermont Agency of Transportation and the Pownal Selectboard concerning the need for repair of the bridge; and (4) that the bridge has not yet been repaired.

The Appellant has submitted documents from the State and the Town in support of her claims. These documents also show that complete replacement of the bridge is scheduled to occur "within the next few years" but that repairs are needed to the current bridge to make it safe in the interim. The documents also show that the need for repair has been apparent for several years. The documents further show that there are weight limits posted on the bridge and that "overweight permits" have been issued to the Applicants by the Commissioner of Motor Vehicles. By definition, an overweight permit allows operation of a vehicle in excess of weight limits on bridges and highways. See 23 V.S.A. §§ 1392, 1400.

Allowing up to 30 loaded trucks from the pit will mean allowing trucks to cross the bridge up to 60 times per day, since the trucks must enter and exit the pit to obtain the loads. On half of these crossings, the trucks will be loaded with gravel. Given that there is a serious need for bridge repair which cannot wait until the bridge's scheduled replacement, the Board is persuaded that the weight of the trucks and frequency of the trips have the potential to exacerbate unsafe conditions with respect to the bridge.

Thus, there is a potential impact on the values Act 250 protects as well as on the public safety. Act 250 permits may not be issued without a finding that a development will not create "unsafe conditions with respect to use of the highways ... and other means of transportation" 10 V.S.A. § 6086(a)(5). With respect to evaluating whether a development will create such conditions, the Supreme Court

has stated that the Board may review the exacerbation of an existing unsafe condition. In re Pilgrim Partnership, 572 A.2d 909 (1990).

The Board notes that other governmental entities, including the Town and the Agency of Transportation, have authority with respect to bridge safety. The Board is disappointed that it must exercise its own jurisdiction with regard to this issue.

3. Effect on General Welfare. The Board believes that the public has a welfare interest in the integrity of the Act 250 application process and the Board's appeal process. There are limited resources available to hear and review applications and appeals. Therefore, the public has an interest in ensuring that the Board and district commissions do not waste their time but rather use it efficiently.

The Board believes that a significant potential for waste of time is present if the Board proceeds with this appeal. As parties are aware, in Re: Robert and Barbara Barlow, Declaratory Ruling #234 (Sept. 20, 1991), the Board concluded that a permit is required for this gravel pit. The Applicants have appealed that decision to the Supreme Court and that appeal is pending.

Despite their appeal to the Court, the Applicants also filed an application to the District #8 Commission which has resulted in this appeal. Both the decision of the District Commission and any reached by this Board will be moot if the Court decides that no permit is required. This will mean that the District Commission and the Board both wasted time on this application, time which could have been spent processing other applications and other appeals.

The pendency of the Supreme Court appeal therefore favors recessing this matter pursuant to Rule 13(B) pending receipt of the Supreme Court's decision. However, if the Board were simply to recess the matter without staying the permit or a portion thereof, it would effectively chill the Appellant's right to appeal by delaying the hearing while

allowing operation of the pit in compliance with the permit.¹ Thus, the need to prevent waste of the Board's time supports the stay request.

4. Conclusion on Stay Request. Balancing the various factors cited above, the Board concludes that a partial stay of Condition #6 should be ordered. In this regard, the Board takes notice of the following findings made as part of Declaratory Ruling #234:

8. [A] maximum of approximately 11,200 cubic yards of gravel, sand, and sand and dirt fill was extracted from the pit on the eastern portion in 1969.
10. Prior to and for some time after 1970, [the operator] used three trucks in connection with gravel extraction. These trucks accounted for the majority of the truck traffic in and out of the pit. Their capacity for hauling gravel was seven yards each. On a busy day, the pit would generate 10 to 12 truck trips.
17. [Robert and Barbara Barlow] operate the pit from 8:00 a.m. to 4:00 p.m. Monday through Friday with occasional work on Saturday. They use three trucks in connection with the operation. One of these trucks has a capacity of seven cubic yards. The other two have capacities of 14 cubic yards each. On a busy day, the pit generates approximately 16 truck trips.

The Board also takes notice that in the above declaratory ruling it concluded that the pit is a pre-existing development for which an Act 250 permit is not

¹The Board notes that the Applicants challenge the Appellant's right to appeal Criteria 7, 9(D), 9(E), 9(H), 9(K), and 10. However, if they do not challenge her right to appeal Criterion 5.

required unless a substantial change has occurred or will occur. Id. at 9.²

The above findings provide a basis for a partial stay of Condition #6 which minimizes both the potential hardship to the Applicants and the potential for creation of unsafe traffic conditions discussed earlier. Specifically, the Board will stay Condition #6 to the extent that it allows truck trips, truck loads, and yearly extraction rates in excess of those cited in the above findings. The stay order will be effective until a final decision is reached on the Appellant's appeal and will limit the Applicants:

- (a) to twelve loaded trucks per day, the highest rate found to be pre-existing;
- (b) to a yearly gravel extraction rate of 11,200 cubic yards, the highest rate found to be pre-existing; and
- (c) to no more than seven cubic yards of gravel per truck load.

The limits on the number of loaded trucks and the yearly extraction rate are imposed to reduce the frequency of pit-associated trucks across the bridge.

With respect to the load limitation, we found in Declaratory Ruling #234 that the trucks associated with the pre-existing operation could carry no more than seven cubic yards each and that the Applicants presently use some trucks with twice that capacity. A requirement to go back to seven cubic yards per load will therefore reduce the weight crossing the bridge.

The Board concludes that a stay order containing the above terms is appropriate provided that the integrity of the application and appeals processes is also protected by a recess of this matter pending decision of the Vermont Supreme Court. The Board will therefore indefinitely postpone the hearing date of August 26, 1992 set in the prehearing report.

²The Board also concluded that a permit was required because a substantial change had occurred. Id. at 11-12. See 10 V.S.A. § 6081(b), Board Rules 2(A)(5), (G), and (O).

C. Other Issues

The Applicants challenge the Appellant's request for party status on all criteria under appeal except for Criterion 5. We decline to reach this issue because we have recessed the matter.

We treat the Appellant's motion for clarification as additional legal argument concerning the stay request.

III. ORDER

1. Condition #6 of Land Use Permit #8B0473 is stayed to the extent that it allows truck trips, truck loads, and yearly extraction rates in excess of pre-existing levels as found in Declaratory Ruling #234. The stay shall be in effect until a final decision is reached on the Appellant's appeal. During the pendency of this appeal:

- a. The project is limited to no more than twelve loaded trucks per day.
- b. Truck loads shall not exceed seven cubic yards of gravel each.
- c. The total extraction rate during any calendar year shall not exceed 11,200 cubic yards of extracted materials.

2. This matter is recessed pending a final ruling by the Vermont Supreme Court on the Applicants' appeal to that Court of Declaratory Ruling #234.

3. The hearing set for August 26, 1992 is indefinitely postponed.

Dated at Montpelier, Vermont this 6th day of August, 1992.

ENVIRONMENTAL BOARD

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