

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A., CHAPTER 151

RE: Andrew L. and Helen K. Orzel Findings of Fact,
Town of Rutland, Vermont Conclusions of Law and Order
Declaratory Ruling No. 140

On October 25, 1982 Andrew L. and Helen K. Orzel petitioned the Environmental Board (the "Board") for a declaratory ruling requesting the Board to find that 10 V.S.A., Chapter 151 (Act 250) does not apply to a gravel pit owned by them and located in the Town of Rutland, Vermont.

Chairman Leonard U. Wilson held a pre-hearing conference on November 9, 1982 in Rutland, Vermont. The Board convened a public hearing on this petition on November 29, 1982' at the Vermont District Court, Rutland, Vermont.

Parties present at the hearing were the following:

Petitioners by Andrew L. Orzel and Stephanie Lorentz, Esq.;
Town of Rutland by William Thomas; and
Town of Rutland Planning Commission by Edward Hemenway.

The Board recessed the hearing on November 29, 1982 pending receipt of proposed Findings of Fact and Conclusions of Law, memoranda of law, a review of the record, and deliberation. Proposed Findings of Fact were filed by Petitioners on December 22, 1982. On January 6, 1983, the Board determined the record complete and adjourned the hearing. This matter is now ready for decision.

The Board's Findings of Fact and Conclusions of Law are based on the record developed at the hearing. To the extent that Petitioners' requests to find were accepted by the Board, they have been included herein. Otherwise-said requests are found to be unnecessary and are denied.

A. ISSUES IN THE DECLARATORY RULING

This declaratory ruling request raises the issue of whether the gravel pit operation: (1) pre-exists the enactment of Act 250, or (2') is not a substantial change to a previous operation so that an Act 250 permit is not required. See 10 V.S.A. §§6081(b) and 6001(3); Rule 2(A) (2), Rule 2(G), and Rule 2 (L).

In the alternative, Petitioners argue that the Board is estopped from requiring an Act 250 permit because Petitioners relied upon a past representation by an employee of the Agency of Environmental Conservation that the operation of the gravel pit was not subject to Act 250 jurisdiction.

B. FINDINGS OF FACT

1. Petitioners, Andrew L. Orzel and Helen K. Orzel, own certain land and premises in the Town of Rutland, Vermont, near an area known as Maplewood Park, Exhibits #5 and #8. Part of the land owned by Petitioners is an approximately 10-acre parcel "known as the gravel pit" (the "gravel pit"). Exhibit #4.
2. The gravel pit, adjoining other property owned by Petitioners, was acquired by Petitioners on September 18, 1973 from Anne Elizabeth Howe. Mrs. Howe acquired said parcel on December 20, 1962 from Vermont Marble Company. Exhibits #5 and #6.
3. The gravel pit is surrounded by other land, originally used by Vermont Marble Company for the extraction of resources but sold to Horn Realty Corporation in 1956, and subsequently developed as homesites. Exhibit #4.
4. Vermont Marble Company intermittently removed sand and gravel from the gravel pit and the surrounding land. No evidence was presented to show that Vermont Marble Company removed any sand or gravel from the gravel pit after 1956.
5. Sometime between 1960 and 1970 Joseph P. Carrara, Sr. purchased and removed gravel from the gravel pit located near Maplewood Park. Exhibit #10. In 1962 or 1963 John Fodor purchased and removed approximately 30 truckloads of sand and gravel from the gravel pit. Exhibit #11. Said sand and gravel were removed using power shovels, back hoes, and dump trucks.
6. Between 1969 or 1970 and 1978 the gravel pit was used only by people in the general area. No substantial amounts of sand or gravel were extracted and moved offsite by trucks.
7. In 1978 a Mr. Varney purchased and removed approximately 40,000 cubic yards of gravel from the pit. An environmental investigator, after consultation with Mr. Orzel, determined that no Act 250 permit was necessary for the 1978 operation.
8. In 1979 a Mr. Avery of Carroll Construction Company proposed to remove gravel from the pit. At that time, Mr. Orzel was advised by an employee of the Agency of Environmental Conservation that the proposed operation of the gravel pit would require an Act 250 permit.

9. Petitioners have no specific proposal for operation at this time.

C. CONCLUSIONS OF LAW

1. Based upon the evidence presented, the Board is unable to determine whether the Petitioners' gravel pit is a development, i.e., a commercial operation in existence as of the enactment of Act 250, or whether or not it is a substantial change to a pre-existing operation under 10 V.S.A. §6081(b). The information submitted describing the pre-existing operation is far too general in nature to permit the Board to draw a **conclusion** as to the commercial nature and extent of the gravel operation as of the enactment of Act 250. In addition, Petitioners' plans for future use are so tentative that the Board is unable to conclude whether or not these operations would require an Act 250 permit.

2. Petitioners also argue that the Board is estopped from requiring an Act 250 permit because Petitioners relied upon a past representation by an employee of the Agency of Environmental Conservation that the operation of the gravel pit was not subject to Act 250 jurisdiction. The Board disagrees that it is estopped to require an Act 250 permit at this time for future commercial operations of the gravel pit for the following reasons:

- a. The Board, not an employee of the Agency of Environmental Conservation, is the only State entity with the authority to issue declaratory rulings regarding jurisdictional determinations. The Board has never made any representations relative to this particular gravel pit. Consequently, it cannot now be estopped from making a determination that an Act 250 permit may, in fact, be required for the proposed activities.

- b. In addition, Petitioners request the Board to determine whether or not an Act 250 permit is required for future extraction operations at the gravel pit. Any representations made by employees of the Agency of Environmental Conservation related to activities that occurred in 1978. The Board has not and does not take issue with the 1978 determination and the extraction of gravel at that time. The representation in 1978 applied only to the 1978 activities; therefore, arguments of estoppel are not proper at this time.

Even if estoppel were a proper argument in this case, the Board would conclude that it is not estopped to require an Act 250 permit, depending upon the proposed activities. In a recent case, Town of Bennington v. Hansen-Walhridge Funeral Home, 139 Vt. 288, 427 A.2d 365 (1981), the Vermont Supreme Court discussed the issue of estoppel and "vested rights" relative to questions of zoning. In that case the Court reasserted the general elements of equitable estoppel as follows:

- (1) [t]he party to be estopped must know the facts;
- (2) he must intend that his conduct shall be acted on'or must so act that the party asserting the estoppel has a right to believe it is so intended;
- (3) the latter must be ignorant of the true facts; and
- (4) he must rely on the former's conduct to his injury.

Id. at 293-294.

Even if we assume in the case at hand that an appropriate agent of the Board intended his conduct to be relied upon, and Mr. Orzel told this agent the facts as he understood them to be, the Board cannot conclude that Petitioners have a vested right in proceeding with additional operation of the gravel pit without a permit. The Board is unaware of the facts relied upon by the employee of the Agency of Environmental Conservation in reaching his jurisdictional determination in 1978, and it cannot be said that Petitioners relied upon the 1978 representation to their detriment. In fact, Petitioners were able to operate the gravel pit for a period of time to their economic benefit and as set forth above neither, the Board nor any other appropriate State agency has or is-taking issue with the 1978 determination.

D. ORDER

At such time as the Petitioners have developed more precise information on the elements, scope, and nature of the intended operation, they should either apply for an Act 250 permit, or request a jurisdictional review by the District #1 Environmental Coordinator.

Dated at Manchester Center, Vermont this 6th day of January, 1983.

For the Environmental Board:

Board members participating
in this decision:

Dwight E. Burnham, Sr.
Warren M. Cone
Lawrence H. Bruce, Jr.
Ferdinand Bongartz
Roger N. Miller
Priscilla N. Smith

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