

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

RE: Weston Island Ventures by Declaratory Ruling #169  
John A. Kelley, Esq.  
Drawer 669  
Middlebury, VT 05753

On February 26, 1985, a petition for a Declaratory Ruling was filed with the Environmental Board by the Board of Selectmen of the Town of Weston, from Executive Officer Advisory Opinion EO-84-61 dated January 28, 1985, concerning the applicability of Act 250 to the expansion of gravel pit operations, road construction, addition of a mobile home and site preparation for a subdivision in Weston, Vermont.

On March 11, 1985, the Board notified the parties of its intent to designate its Chairman to act as administrative hearing officer in this matter pursuant to Board Rule 41 and 3 V.S.A. § 811. Having received no objection to use of this procedure, the Board convened a public hearing on the Petition on March 28, 1985, in Weston, Vermont, with Chairman Darby Bradley acting as hearing officer. The following participated as interested parties at the hearing:

Weston Island Ventures ("WIV") by John A. Kelley, Esq.;  
Town of Weston by William Simonds, Chairman of the Board of Selectmen;  
Weston Planning Commission by Nicholas Nowlan, Member.

The hearing officer conducted a site visit on March 28, and the hearing was recessed on that date, pending preparation of a proposed decision, review of the record and deliberation by the full Board. The Board conducted a deliberative session concerning this matter on May 8, and adjourned the hearing on May 29. The following findings-of fact-and conclusions of law are based upon the record developed at the hearing.

I. ISSUES PRESENTED BY THE PETITION

The Petition raises three discrete issues:

- 1) Is the gravel extraction operation conducted by WIV the first step in a plan to subdivide or develop a residential project?
- 2) Is the WIV gravel pit a pre-existing development as defined by Board Rule 2(0)?
- 3) If the pit is pre-existing, has there been a "substantial change" to the pit, triggering Act 250 jurisdiction under the final clause of 10 V.S.A. § 6081(b)?

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II. FINDINGS OF FACT

1. In October, 1983, WIV purchased the 150 acre "Woodcock Property," all but six acres of which lies directly north of the Weston-Londonderry town line. Route 100 forms a portion of the westerly boundary of the tract but swings in an easterly direction, dividing the parcel into two pieces. The West River forms the easterly boundary of the northern piece of the tract and then, after passing under Route 100, the River travels a snake-like path through the middle of the southern piece. The northern tract consists of approximately 20 acres while the southern piece consists of 124 acres (plus a six acre portion at the extreme south end of the tract which lies in Londonderry). Exhibit #1.
2. Three distinct pit areas are located on the Woodcock Property: the "Cemetery Pit" located in the eastern portion of the southerly tract, the "Orchard Pit" located adjacent to Route 100 on the western side of the southerly tract, and the "Schmidt Pit" --the pit at issue in this appeal--located on the 20 acre tract north of Route 100. There are an additional six gravel pits in close proximity to the Woodcock Property which are operated by others. The WIV lands appear to be part of a single, continuous gravel deposit which includes other near-by pits.
3. Prior to purchasing the property, WIV evaluated the quantity and quality of gravel available at the site; **WIV's** primary goal in purchasing the property was to commercially extract gravel. The Orchard Pit was opened in or around 1948 by a Mr. Fabreze and the Cemetery Pit was also opened long before June 1, 1970.
4. The evidence is mixed in respect to the opening and operation of the Schmidt Pit. Hearsay evidence suggests that the Pit was opened either in the early 1940s (according to a conversation between Bob Waite, a WIV partner, and Mr. Woodcock) or in 1954 (according to hand-written notes, prepared by an unidentified individual, entered on a Vermont Department of Highways "Report on Sample of Aggregate" dated October 30, 1983 - see Exhibit #2-D). Because the author of these statements was not present at the hearing, we are reluctant to rely heavily on this evidence. In contrast, William Simonds, a long-time Weston resident and the State Highway Maintenance Patrolman responsible for the segment of Route 100 passing through Weston, testified that all gravel extraction which occurred on the Woodcock Tract was performed at sites south of Route 100. Mr. Simonds does not recall any excavation north of the roadway prior to 1974.

5. Weighing all the evidence on this issue, we find Mr. **Simond's** testimony to be the more credible. The pit could have been opened in the 1950s or earlier, but, based upon Mr. **Simonds'** personal recollection of the area from regular visits, we find that if opened before 1970 the pit had been abandoned as of that date. Therefore, we find that the **Schmidt** Pit was not in existence as of June 1, 1970.
6. Prior to acquisition by WIV, Mr. Woodcock withdrew an average of between 6,000 and 10,000 yards of gravel annually from the entire tract and somewhat more in flood years. A crusher was used on occasion prior to 1970 at the Cemetery and Orchard Pits under contract with the Town of Weston. Little if any reclamation of the site was performed by Woodcock.
7. In 1984, the first year of **WIV's** operations at the site, the following activities occurred at the Schmidt Pit:
  - a. A new access roadway was constructed beginning at the intersection of Route 100 and the County Road; the new drive replaced an existing drive entering the site from Route 100 which was unsafe because of poor sight distances.
  - b. A mobile home was located on the site and sewer and water were installed to serve the structure; the home is a residence for an agent of WIV responsible for security and counting truckloads.
  - c. A crusher owned by WIV was operated sporadically throughout the summer; because of mechanical problems, WIV will no longer operate its crusher at the site but will instead, contract to have a crusher operate at the site for three to four weeks each year.
  - d. 34,000 cubic yards of gravel, most of which was bank-run, were removed from the pit and sold commercially, predominantly for projects at Stratton Mountain; WIV plans on withdrawing between 40,000 and 50,000 yards over the next few years.
8. WIV has a generalized goal to ultimately use the Woodcock Property for residential purposes. During local public meetings, WIV has discussed the possibility of locating 12 homes on the property at some time in the future. However, WIV has not prepared any development plans, has not retained professional help to assist in this goal, and has not established any timetable for conversion of the site to residential purposes.

9. We find that operations at the Schmidt Pit have in the past or may in the future result in the following significant impacts:
- a. excavation within the pit and the movement of trucks in and out of the pit generate dust which may adversely impact near-by dwellings;
  - b. because WIV plans to excavate to within one foot of the **100-year** flood level of the West River, and because excavation will occur adjacent to the West River, operation of the pit may have an impact on the River and its floodway fringe;
  - c. while the new drive is a substantial improvement over the previous access, trucks entering and leaving the premises and traveling on Route 100 may nonetheless have an impact on traffic safety and congestion;/1/
  - d. portions of the Weston Town Plan speak directly to the question of limiting the adverse impacts of new or expanded gravel operations (see Exhibit #3); the WIV operations have an impact on conformance with the municipal plan.

### III. CONCLUSIONS OF LAW

Because we have found that commercial gravel extraction operations were performed on the Woodcock Property long prior to June 1, 1970, the effective date of Act 250, and that those operations have continued to the present, the gravel operations on that property constitute a "pre-existing development" as that term is defined by Board Rule 2(0). Jurisdiction attaches to such development only if there has been or will be a "substantial change" to the pre-existing development. See 10 V.S.A. § 6081(b). The term "substantial change" is defined by Board Rule 2(G) as follows:

"Substantial change" means any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. section 6086(a) (1) through (a) (10).

Based upon the above findings, we conclude that the operations on the Woodcock Property have changed for several reasons. First, while the evidence is mixed, we conclude, based upon the

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<sup>/1/</sup>WIV indicated that on its busiest day in 1984, 72 truckloads left the Schmidt Pit.

more believable evidence, that the Schmidt Pit was either not opened until 1974 or that the pit had been both opened and subsequently abandoned prior to 1970. While all parties agree that substantial gravel extraction operations took place prior to 1970 in two different areas (Cemetery and Orchard Pits) south of Route 100, the pre-existence of those pits does not extend north of Route 100. We stated in Re: Clifford's Loam and Gravel, Inc., D.R. #90, issued November 6, 1978 that Act 250 jurisdiction could be asserted over changes to a pre-existing pit, including:

Opening a new area a substantial distance from the pre-existing area ... or, removal of gravel in or across a stream or body of public waterway [sic], or across a public highway, where it might be argued that the intervening ownership defined the limits of the pre-existing operation.

A person who **claims to** fall within a statutory exemption carries the burden of proving that exemption. Bluto v. Dept. of Employment Security, 135 Vt. 205 (1977). WIV has failed to meet its burden with regard to the operation of the Schmidt Pit prior to June 1, 1970.

Even if the Board were to find that the Schmidt Pit was opened prior to 1970 and operated continuously after that date, an Act 250 permit would be required because WIV has introduced several changes to that pit: constructing a new access roadway, installation of a mobile home, operation of a crusher, and a three-fold increase in the annual volume of extraction. These changes have been accompanied by potential impacts cognizable under the ten criteria of 10 V.S.A. § 6086(a), including: Criterion 1 (air) with respect to dust and noise; Criteria 1(D) and 1(E) with respect to impacts on the West River and its floodway fringe arising during the latter stages of the extraction operation; Criterion 5 with respect to potential safety and congestion on Route 100 associated with heavy truck traffic entering and leaving the site; and Criterion 10 with respect to the operation's conformance with the Earth Resources portion of the Weston Town **Plan./2/**

WIV points to a number of zoning decisions and treatises which state that a mere increase in volume of business does not constitute an enlargement or expansion of a nonconforming use, arguing by analogy that such an increase should not constitute a

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**/2/** This list is not intended to be exhaustive, limiting the scope of District Commission review. Rather the impacts noted here are those which were apparent from the record in this proceeding.

"substantial change" under Rule 2(G). Unlike zoning which seeks to segregate **uncompatible** uses into separate districts, Act 250 is concerned primarily with the specific impacts of development: air pollution, water pollution, traffic congestion, burden on municipal services, etc. The General Assembly intended that if an area had already been experiencing a certain level of impact from a development in existence on June 1, 1970, those impacts could continue at that level without the requirement of an Act 250 permit. However, if the impacts themselves were increased through a substantial change in the operation, then Act 250 review would be appropriate, provided the change is accompanied by a "construction of improvements." See Board Rule 2(A) (5).

The Board agrees with WIV that gravel, quarry and mining operations do present unique realities because, unlike other developments, they will by their nature gradually expand to occupy a larger and larger area. The Board points out that not every change in a pre-existing gravel operation will trigger Act 250 review. Act 250 comes into play only if the change may result in a significant impact with respect to any of the ten criteria. Re: Clifford's Loam and Gravel, Inc. Even if there is a substantial change in a pre-existing operation, review will be only of the actual change, unless there is also a significant change in the rate of gravel extraction. In that case, review may extend to the entire operation. Re: Ronald E. Tucker, D.R. #165 issued February 27, 1985.

We, therefore, conclude that the Schmidt Pit has been substantially changed and that WIV must secure a land use permit pursuant to the final sentence of 10 V.S.A. § 6081(b) in respect to any continuation of its operations at that site.

Prior to the Board's deliberations on the hearing officer's proposed decision, the parties to this matter reached a stipulated agreement. As communicated to the Board on May 8, 1985, the parties agreed:

- 1) That the WIV Schmidt Pit is subject to Act 250 jurisdiction;
- 2) That WIV will apply for and diligently pursue the issuance of a land use permit authorizing the operation of the Schmidt Pit;
- 3) That WIV may continue to operate the pit while it is pursuing issuance of the land use permit;
- 4) That operation of the pit must terminate if a land use permit is denied.

The Board will accept the parties' agreement and enter an appropriate order. However, the Board will direct that operation of the pit terminate if no permit has been secured **within** six months of this decision.

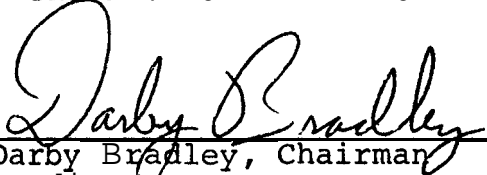
IV. ORDER

WIV's operations at the Schmidt Pit are a substantial change to the pre-existing development on the Woodcock Property and WIV must secure a land use permit pursuant to 10 V.S.A., Chapter 151 for those operations. WIV shall file a complete application for a land use permit with the District #2 Environmental Commission on or before June 14, 1985. WIV shall diligently pursue issuance of a land use permit and must terminate operations at the Schmidt Pit should a permit be denied (unless WIV appeals such denial). WIV may continue to operate the Schmidt Pit (at current levels and using existing methods) for a period of six months from the date of this decision while it is pursuing issuance of a permit. However, notwithstanding the above, WIV shall terminate operations if a permit has not been obtained within that six month period.

Dated at Montpelier, Vermont this 3rd day of June, 1985.

VERMONT ENVIRONMENTAL BOARD

by:

  
Darby Bradley, Chairman  
Ferdinand Bonqartz  
Lawrence H. Bruce, Jr.  
Dwight E. Burnham, Sr.  
Jan S. Eastman