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

RE: L. W. Haynes, Inc. by
Timothy J. O'Connor, Jr., Esq.
P.O. Box 532
Brattleboro, VT 05301

Findings of Fact,
Conclusions of Law
and Order
Declaratory Ruling #192

On June 2, 1987, a petition for a Declaratory Ruling was filed with the Environmental Board (Board) by Ellen and Dan Darrow through their attorney, Raymond P. Perra, Esq. The Darrows requested that the Board affirm the Coordinator's Advisory Opinion #2-30, dated May 14, 1987. This opinion concluded that the Haynes gravel extraction operation in Marlboro, Vermont, has exceeded the historic extraction rate and that an Act 250 permit is required for the "substantial change" which has taken place. On June 11, 1987, Lincoln W. Haynes, through his attorney, Timothy J. O'Connor, Jr., Esq., also petitioned the Board for a Declaratory Ruling. Mr. Haynes maintained that an Act 250 permit is not required for his gravel extraction operation.

On June 15, 1987, the Board notified the parties of its intention to use an Administrative Hearing Panel to take evidence in this proceeding and prepare a proposed decision pursuant to Board Rule 41. Having received no objection, a public hearing was convened on July 8, 1987, in Newfane, Vermont with Board Member Jan S. Eastman, presiding.

The following parties participated in the hearing with no objections from either of the petitioners:

Lincoln W. Haynes, Inc. by Timothy J. O'Connor, Jr., Esq.
Town of Marlboro, by Roger Campbell and Robert Elliott
Town of Newfane, by Richard Gale
Newfane Planning Commission, by Richard Gale
Windham Regional Planning Commission by Joan Price
Town of Dover, by Robert Miller, Chairman Board of Selectmen
Town of Wilmington, by Mr. Polumbo

Adjoining landowners represented by Raymond P. Perra, Esq.:

Earl and Virginia Cabana
Richard Foye
Paul and Maryanne Kaemmerlen
Peter and Tana Lilienthal
Bob and Nancy Linberg
Vincent Panella
Heidi Kendrick Soucy
Robert G. Soucy

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The hearing was recessed on July 8, 1987, pending the preparation of the proposed decision, possible oral argument before the Board, a review of the record, and deliberation by the full Board. Oral argument was heard by the Board on September 16, 1987. The record was deemed complete on September 16, 1987, and the case was adjourned on that date. This matter is now ready for decision. The following findings of fact and conclusions of law are based upon the record developed at the hearing. To the extent that the Board agreed with and found necessary findings proposed by the parties, those findings have been incorporated herein, otherwise, said requests to find are denied.

A. Issues in the Declaratory Ruling Request

The Petitioners Ellen and Dan Darrow claim that a substantial change has occurred at the pit since 1970 due to 1) a higher level of extraction from the pit, 2) the addition of on-site processing equipment, and 3) the addition of a mobile office building. They claim that these changes have had a significant impact under a number of criteria of Act 250, including Criteria 1 (air and water pollution), 4 (soil erosion), 5 (traffic congestion and safety), 7 (municipal services), 8 (aesthetics), 8(a) (wildlife habitat), and 10 (conformance with local or regional plans). They also requested the Board to seek a temporary injunction preventing further extraction during the pendency of the Declaratory Ruling process.

Mr. Haynes denies that any changes which may have occurred at the pit have had a significant impact under any of the Act 250 criteria, and, therefore, no Act 250 permit is required. He also asks the Board to make rulings on the following five questions:

1. What party bears the burden of proving that an activity of a person subject to the jurisdiction of Act 250 has increased more than 10% over its 1970 level?

2. By what measure is the "increase" of activity to be determined?

3. What party bears the burden of proving that the "increase" of activity has one or more "potential impacts" cognizable under the ten criteria of Act 250?

4. Does the party bearing the burden of proving "potential impacts," in order to meet the burden, have to demonstrate impacts which meet the statutory standards ("undue," "unreasonable," "undue adverse," etc.) of the respective criteria under which the impacts are alleged to occur?

5. In the event that it is demonstrated that (i) the "increase" in the activity complained of results in large part from demands for that activity by Vermont municipalities and the State of Vermont, under the mandate of Title 19 V.S.A., and (ii) that, if the current activity at this location is reduced, the municipalities and the State will not be able to reduce their demand and will cause similar activity to be increased at another location, and (iii) that the increase in activity at another location will have "potential impacts" cognizable under Act 250, can the Board order such a reduction of current activity for public use at this location without considering the "potential impact" of that increased activity in other locations, under 10 V.S.A., § 6087(a)?

Petitioner Haynes also filed a Motion to Dismiss based on the following four allegations:

1. That the notice published for purpose of requesting statutory parties and/or interested parties to attend the prehearing conference to be held on June 15, 1987, provided that those not able to attend said hearing should notify the Board by June 12, 1987, but said notice of publication was printed in the Brattleboro Daily Reformer on June 13, 1987, thereby denying anyone unable to be present the right to notify the Board in writing by June 12, 1987.

2. That the gravel pit in question is not a development under the terms and conditions of Act 250 and the definition of development as defined in 10 V.S.A. 6001(3); without specific reference to the extraction of gravel in said definition, the State Environmental Board has no authority since the within extraction is not an improvement as defined.

3. That under the terms of 10 V.S.A. § 6081 the gravel pit is not an excepted development and therefore there can be no filing as to whether or not a substantial change has occurred since the within gravel pit was never under the terms and conditions of Act 250.

4. That the subsequent provisions adopted by Amendment No. 85 in 1973 apply only to new excavations not in existence at the time of the effective date of the Act 250, namely, April 4, 1970.

The Board denies Petitioner Haynes' Motion to Dismiss on the following grounds: A proper notice of hearing was issued, and a hearing held on July 8, 1987. As no prejudice was shown as a result of the prehearing notice publication date the Board need not dismiss this action. The Board further finds that commercial gravel extraction operations fall within the definition of development as defined in 10 V.S.A. § 6001(3) as explained by Board Rules 2(A)(2) and (5), and 2(D), (G), (L) and (O) and are therefore subject to all of the applicable provisions of Act 250.

B. Findings of Fact

1. In 1953, L. W. Haynes, Inc. purchased a 30 acre parcel of land located in Marlboro, Vermont bordering the Town of Newfane. This parcel contained a gravel pit which had been operated as early as the 1930s. There is little evidence available regarding the operation of the pit prior to its purchase by L. W. Haynes, Inc.

2. After its purchase, in 1953, 1954, and 1955, Deerfield Crushing Co. brought a portable crusher into the pit, and operated it for approximately two weeks each summer. The crusher was fed by a power shovel and produced about 2000-4000 cubic yards per year. Removal of the gravel from the pit was in trucks with four or five cubic yard capacity. The gravel was sold to the towns in the area. There is no evidence available regarding any other gravel extraction during those years although it is presumed that some other extraction did occur during the period.

3. In the summers of 1960 and 1961, another portable crusher and a power shovel were located in the pit for periods of two to three weeks to crush gravel for local towns. Approximately 2000 to 3000 cubic yards were produced and removed from the pit. There is no evidence available regarding other gravel removed from the pit during these years or during the period between 1955 and 1960, although again it is presumed that other extraction occurred.

4. In 1962, another crusher with a larger capacity was located in the pit for about one month during the summer. It is estimated that this machine crushed up to 10,000 cubic yards of gravel. There is no evidence that all this gravel was removed from the pit during the same year it was crushed.

5. There is no evidence available about extraction activities in the pit in 1963 and 1964.

6. Between 1965 and 1970, L. W. Haynes, Inc. entered into a contract allowing withdrawal of up to 7500 cubic yards of gravel per year. It is unknown whether extractions under the contract ever approached 7500 cubic yards.

7. In the early 1970s, a portable crusher was again located in the pit for approximately a two week period per year. Approximately 3000 yards per year were produced for the Town of Marlboro.

8. For the period between 1972 and 1982, there is no specific information available about extraction rates from the pit. During these years, area towns and contractors used the pit on an honor system and sent L. W. Haynes, Inc. payment for the amount of gravel extracted. Extraction activities during these years were minimal based on aerial photographs of the pit taken in 1974 and 1980 which indicate that the size of the exposed area decreased during this period from about five acres to about three acres as vegetation grew in.

9. In approximately 1984, extraction activities increased significantly as L. W. Haynes, Inc. began operating this pit. In 1984, 1985, and 1986, approximately 7500, 15,600, and 20,500 cubic yards of gravel respectively were extracted annually. As of June 25, 1987, approximately 16,308 cubic yards of bank run gravel, 357 yards of loam, and 1979 cubic yards of crushed stone had been extracted in this calendar year.

10. With the commencement of the operation of the pit by L. W. Haynes, Inc., the following changes have occurred: The access road has been significantly widened and a locked gate has been installed, a portable crusher has been located on-site for most of the operational period from March through December and a permanent crusher was installed in 1986, employees have been hired to run the pit on a continual basis, an office/ maintenance shop trailer has been located on the property, two fuel tanks of 1000 and 500 gallon capacity have been installed about three to four feet from the Soucy's property on the south, and an earth berm has been pushed up along the front (western) property line.

11. This increased activity has increased the size of the exposed pit area to about 11 or 12 acres. The face of the pit exposed to Auger Hole Road has increased from about 35 feet in height in 1962 to approximately 190 feet in height in 1987.

12. Over the years of the operation of the pit, the size of the gravel trucks hauling from the pit has increased from about 5 cubic yards capacity to about 14 cubic yards.

13. The increased extraction has resulted in a significant increase in the truck traffic on the town roads which provide access to the pit. Truck trip levels, which before 1970 and even 1984 were insignificant on a daily basis, by 1986 had increased to as many as 80 or 90 loaded trucks per day leaving the pit.

14. Prior to the enactment of Act 250, the operational level of the pit was such that it was tolerable to surrounding landowners. Beginning in 1984, the increased operational level in the pit has become more and more noticeable and disruptive to the adjoining landowners. This increased level of activity has had the following effects on the area in the vicinity of the pit: noise levels have increased dramatically from the increased number and size of trucks hauling from the pit and from the almost continuous operation of the crusher, loaders and other machinery; dust coming from both the exposed pit face and the uncovered trucks on the haul road and Auger Hole Road has increased significantly; diesel fumes from the trucks and the machinery in the pit are much more prevalent; runoff from the pit onto adjoining properties has increased significantly because of the increased size of the exposed pit area; the increase in traffic from the much larger 14 yard trucks has had an adverse effect on the pavement of the town roads over which they must travel to reach State highways; and expansion of the exposed area of the pit without any visible reclamation or screening efforts by the operator has significantly increased the visibility of the pit from Auger Hole Road and surrounding properties.

C. Conclusions of Law

Because the Board has found that commercial gravel extraction operations have been performed at the pit site long before the passage of Act 250 on June 1, 1970, and that operations have continued with few interruptions until the present, the gravel operations on the Haynes property constitute a "pre-existing development" as that term is defined by Board Rule 2(O). 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)."

The Board has previously articulated the two-pronged test which must be satisfied when applying Rule 2(G). The Board must first conclude that there has been a cognizable physical change to the pre-existing development. If such a change is found, jurisdiction attaches only if the Board also concludes that the change has caused or may cause a significant impact under one or more of the ten criteria of Act 250. See Re: Agency of Transportation, DR #153, issued June 28, 1984. The Board concludes that the first prong of this test has been satisfied by the following changes that have occurred: the conversion of this gravel pit from an intermittent operation with no regular employees stationed on the property to a full-time operation with permanent employees stationed at the pit; the installation of a crusher on a permanent basis as opposed to the earlier practice of locating a portable crusher in the pit for only a few weeks a year; the installation of a gate; the doubling of the width of the access road; the installation of the office/shop trailer and the two fuel tanks; and the increase in the amount of gravel extracted since June 1, 1970.

The Board also concludes that the second prong of the "substantial change" test has been satisfied because the change in the pit from a part-time operation with no permanent crusher to a full-time operation with a permanent crusher and the large increase in the amount of gravel extracted annually have both resulted in at least the following significant impacts under the criteria of the Act: Increased dust and noise (Criteria 1 - air pollution, 8 - aesthetics), increased truck traffic with larger vehicles (Criteria 5 - highway congestion and safety, 7 - burden on municipal services), and the conduct of operations which may have an adverse impact on adjacent land uses and the environment (Criterion 9(E) - extraction of earth resources). The Board further concludes that these impacts are associated with the changes the Board has identified and are not attributable solely to the natural operation of the pit at its historic pre-1970 levels, as are some of the impacts experienced by the neighbors to this gravel operation.

Based on all of the above, the Board concludes that this gravel pit operation has been substantially changed and a land use permit must be secured pursuant to 10 V.S.A. § 6081.

In reaching its conclusion the Board reviewed the five questions posed by counsel for L. W. Haynes, Inc. and concluded as follows:

1. The question of "burden of proof" raised by questions #1 and 3 is not a new one for this Board. In prior declaratory rulings the Board has reviewed the question and it was discussed in a Memorandum of Decision issued by the Board in W. Joseph Gagnon, Declaratory Ruling #173. In that case the Board concluded:

When addressing the issue of burden of proof, it is helpful to distinguish between the burden of going forward and producing evidence and the burden of proof. The person who raises the question of jurisdiction has the burden of <u>production</u>; that is, he must provide sufficient evidence to the Board for the Board to be able to find that the particular activity in question meets the definition of "development" or "subdivision" under 10 V.S.A. § 6001 so that it requires an Act 250 permit under 10 V.S.A. § 6081(a). In many Declaratory Ruling cases which come before the Environmental Board, there is no "opponent." In these cases, the Board must make its judgment based solely upon the evidence presented by the petitioner and upon the Board's own inquiry.

If the Board finds that a particular activity falls within the definition of "development" or "subdivision," the burden of proof is on the person conducting the activity to show that the activity is nonetheless exempt from jurisdiction under 10 V.S.A. § 6081(b) because it predated the enactment of the law. The person carrying on the activity must establish by a preponderance of the evidence that it was in existence prior to the Act's effective date, or a permit must be secured. See <u>Weston Island Ventures</u>, D.R. 169 (June 3, 1985); <u>Bluto v. Dept. of Employment Security</u>, 135 Vt. 205 (1977).

Once it has been established that a pre-existing development or subdivision is exempt, a permit will nevertheless be required if a "substantial change" has occurred. There is no presumption that a substantial change either has or has not occurred since the enactment of Act 250. In order to assert jurisdiction, the Board must find, by a preponderance of the evidence, that there has been a substantial change.

The party who seeks to change the present state of affairs generally has the burden of proof. McCormick, <u>Evidence</u> 949. The burden of production should likewise rest on the person seeking to alter the status quo.

In the case at hand, the evidence before us, no matter who provided such evidence, clearly indicates that a "substantial change" has occurred.

2. The questions by what measure is the "increase" of activity to be determined and what impacts must be demonstrated were not briefed by counsel. However, the Board notes that in every declaratory ruling where the issue of "substantial change" is before us, the Board looks to the definition of the term and review the activity accordingly. Rule 2(G) defines "substantial change" as any change which "may result in significant impact with respect to any of the criteria . . . ." Consequently, the Board must first determine the nature and extent of the pre-existing activity and the nature and extent of the change, and then compare the two to determine if the change may result in any significant impacts. The Board's two step process for determining if an activity is a substantial change was upheld by the Vermont Supreme Court in In re H.A. Manosh Corporation, 147 Vt. ___ (1986).

3. L. W. Haynes also suggests that if the activity in question does not occur here it will move elsewhere and consequently the Board must review the potential impact of the activity at other locations. The Board disagrees. That question assumes that by this decision the Board can deny or approve the activity in question. In fact, the Board's determination at this time, as part of a declaratory ruling, simply means that the Board will determine whether an operation will or will not be required to obtain an Act 250 permit. Whether or not such a permit can be granted, and any conditions to be attached, can be determined only after a complete application has been filed by the operator and a thorough review made by a district commission.

The question posed by L. W. Haynes seems to assume that if the activity does not occur here, it will move to another location where potential impacts have never been reviewed. It is, of course, possible that the activity would move to a previously permitted site and fall within the accepted level of activity. Furthermore, if new or increased activity occurs at other locations, a review can be made in accordance with the procedures set forth in Board Rule 3 to determine if an Act 250 permit is required.

Finally, L. W. Haynes suggests that the Board's decision should to some extend depend on the nature of the beneficiary of an activity. Again, the Board disagrees. The Board is mandated to review activities to determine whether or not an Act 250 permit is required. Commercial as well as municipal or state activities are subject to jurisdiction depending upon the amount of involved land. However, if an activity is commercial in nature, the identity of the beneficiary of the activity is not a relevant or appropriate consideration. In any case, the amount of involved land here would justify the Board's decision if the ownership, control and use of the product were limited to a municipality or the State of Vermont.

D. Oral Argument

During oral argument before the Board on September 16, 1987, L. W. Haynes argued that the Board must find that the impacts are undue or adverse. This decision, however, is to be determined by a District Commission upon application for a permit and not by the Board in a Declaratory Ruling proceeding. A declaratory ruling simply states that the activity is significant enough to require a permit. A careful reading of Board Rule 2(G) clarifies the standard the Board must apply in determining whether a "substantial change" has taken place: "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)." (Emphasis added) The Vermont Supreme Court has specifically affirmed the Board's interpretation of "substantial change" in In re Manosh Corporation, 147 Vt. ____ (1986) and In re Orzel, 145 Vt. 355 (1985). The Board has no reason to change its interpretation in this particular case.

L. W. Haynes also requested that the pit be allowed to operate until December 1, 1987 in order to furnish gravel to several towns in the area. The Board hereby denies this request.

E. Order

In view of the Board's conclusion that a substantial change has occurred, a land use permit pursuant to 10 V.S.A. § 6081(a) must be secured from the District #2 Environmental Commission and all extraction operations on this property shall cease until such a permit is obtained. The gate shall be locked immediately upon receipt of this decision and no further activity related to the operation of the gravel pit shall be permitted until an Act 250 permit is secured.

Dated at Montpelier, Vermont, this 25th day of September, 1987.

ENVIRONMENTAL BOARD

Jan S. Eastman

Jan S. Eastman, Acting Chairman
Ferdinand Bongartz
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