VERMONT ENVIRONMENTAL BOARD

RE: Rick Harootunian
Route 100
Plymouth, VT 05056

Findings of Fact, Conclusions of Law, and Order
Declaratory Ruling #198

On August 26, 1987, a petition for a declaratory ruling was filed with the Environmental Board by Rick Harootunian concerning the applicability of Act 250 to his gravel extraction operation in Plymouth, Vermont. Mr. Harootunian objects to Advisory Opinion #2-32 issued on July 29, 1987 by Jeffrey Powers, Assistant District Coordinator, that required Mr. Harootunian to apply for an Act 250 permit due to a substantial change in the operation of his gravel pit. A cross-appeal was filed by Susanna Longo on August 31, 1987. She agrees with the Advisory Opinion issued by Mr. Powers, and believes that an Act 250 permit is required.

A prehearing conference in this matter was held on September 22, 1987 with Environmental Board Chairman Leonard U. Wilson presiding. A prehearing conference report and order was issued by the Chairman on October 7, 1987. This order included a ruling on party status with the following admitted as interested parties: Landowners Rick and Mina Harootunian; adjoining property owners Michael and Susanna Longo, Roger and Dorothy Pingree, Virginia Ewald, and Isabelle Fish; and the Plymouth Board of Selectmen.

The public hearing was convened on November 19, 1987 in Plymouth, Vermont, before an Administrative Hearing Panel with Leonard U. Wilson presiding. The following parties participated in the hearing with no objection from any party: Rick and Mina Harootunian, Michael and Susanna Longo, Roger and Dorothy Pingree, and the Plymouth Board of Selectmen. The hearing was recessed on November 19, 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. Having received no request for oral argument, the Board conducted a deliberative session and deemed the record complete on February 24, 1988. The case is now ready for decision. The following Findings of Fact and Conclusions of Law are based on the record developed at the hearing,::

I. ISSUES IN THE DECLARATORY RULING

The substantive issue to be decided is whether the gravel pit owned by Rick Harootunian in Plymouth, Vermont, is subject to the jurisdiction of Act 250. An Advisory Opinion was issued by the Assistant District Coordinator which concluded that there has been a "substantial change" in the operation of the gravel pit since 1970, and that an Act 250 permit is therefore required.

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Those parties who believe that an Act 250 permit must be obtained have the burden of establishing that this gravel pit is subject to Act 250 because the current operation qualifies as "development" as defined in 10 V.S.A. § 6001(3) of Act 250. Those parties who assert that the pit does not need a permit have the burden of proving that the pit is exempt because the nature of the operation has not "substantially changed" from the pre-1970 type and levels of operation.

II. FINDINGS OF FACT

1. Rick Harootunian is the owner of a tract of land in Plymouth, Vermont of about 75 acres in size. Mr. Harootunian's father purchased the tract in 1962, and the Harootunians have since at various times operated a store, a restaurant, a campground and a gravel pit on the property.

2. Prior to the purchase of the land by the Harootunians, the property was owned by Ellery and Alice Bradley from approximately 1952 to 1960. Mr. Bradley operated an agricultural limestone business on this property in 1957 and 1958. This operation consisted of a limestone crusher housed in a small building and a limestone quarry. Quarried limestone was brought to the crusher building where it was crushed and ground into agricultural limestone, bagged, and trucked away to customers. It is estimated that Mr. Bradley sold over 700 tons of limestone from this facility in 1958. Mr. Bradley's operation of this business ceased in 1958 after the building was destroyed by excessive blasting in the adjacent limestone quarry. There is no evidence that Mr. Bradley ever sold any gravel from this property.

3. There is some evidence that prior to the Bradleys' ownership of this property, gravel was removed from the site in 1938 to repair flood damage. However, no records exist that document the amount of gravel removed at that time.

4. In 1961 some gravel was removed from the property for the reconstruction of Route 100. This gravel was not removed from the same area of the site from which Mr. Bradley quarried limestone. Again, no evidence is available to establish the amount of gravel that was removed at that time.

5. After the Harootunians purchased the property in 1962, they did not sell any gravel from the site until 1973. In 1969, a large portion of a gravel hill located

behind the Harootunians' house was leveled to expand the campground area. This leveling operation moved the exposed bank a few hundred feet to the west.

6. In 1973, the Harootunians sold some gravel from the property to Truman Bates for repair of flood damage in the area. Mr. Bates removed this gravel from an exposed bank towards the rear of the site near the ruins of a very old lime kiln. There is no evidence that the Harootunians sold any gravel from the property between 1974 and 1978.

7. In 1978, Mr. Bates again began commercial gravel extraction operations on the property. This time the gravel was extracted from the front bank located behind the Harootunians' house. For this operation Mr. Bates brought a screener onto the site and used two or three trucks to haul gravel. Mr. Bates removed a large bu undetermined amount of gravel from the property during 1978. He continued to haul gravel from the pit during 1979 and 1980.

8. Between 1980 and 1987 the pit was used by at least two different contractors. However, no evidence is available about levels of extraction or the type of equipment used in the pit during this period, except it is clear that no crusher was involved in pit operations.

9. In May of 1987, Sailer Bros. Construction, Inc. began operating the pit. A 25' x 40' crusher was moved onto the site as was a 10' x 36' screener. Crushing operations began on approximately June 29, 1987 and ended on about July 29, 1987. During this period about 8-10,000 cubic yards of gravel were crushed and removed, and about 4,000 cubic yards of bank run gravel were hauled from the pit.

10. The operation of the pit during the summer of 1987 resulted in a number of environmental impacts which exceeded any experienced in the past. These included additional air pollution from dust from trucks and noise from the crusher, and an effect on the overall aesthetics of the area resulting from the additional truck traffic and noise from pit operations.

11. Mr. Harootunian intends to operate a gravel pit on this property until the remaining 15-20,000 cubic yards of gravel have been removed, after which he intends to level the area and incorporate it into the campground. At 1987 levels of extraction, this could be accomplished in one to two years.

III. CONCLUSIONS OF LAW

Based upon the above facts, the Board is unable to find that this gravel extraction operation qualifies as a pre-existing development that is exempt from the permit requirements of 10 V.S.A. § 6081(a). Extraction on this property cannot be considered to be exempt because the evidence indicates that gravel was only removed on a very intermittent basis before 1970, the effective date of Act 250. The facts indicate that significant amounts of gravel were removed only during two years prior to 1970: in 1938 and 1961. There is no evidence that any gravel was removed between the 1961 extraction and 1970. Consequently, the Board must conclude that this gravel pit was not operated consistently enough to obtain an exemption from the permit requirements of the act. It is the Board's opinion that there must be evidence of regular commercial operation of the pit from a property before 1970 for a gravel extraction operation to qualify as pre-existing. The significant modification of the site in 1969 to expand the level area for the campground cannot be used to determine a pre-existing level of extraction because no gravel was removed or sold from the site at that time.

Even if the Board concluded that the pit was a pre-existing operation that qualified as an exempt pre-existing "development" pursuant to § 6081(a), based on the evidence before it the Board must also conclude that the gravel extraction operations that occurred during the summer of 1987 were a "substantial change" to this property that would require a permit pursuant to § 6081(b). The term "substantial change" is defined by Environmental 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. § 6086(a) (1) through (a) (10).

The Board previously articulated the two-pronged test which must be satisfied when applying Rule 2(G). The Board must first find 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 any of the ten criteria of Act 250. See In re H.A. Manosh Corporation, 147 Vt. 367 (1986); Re: Agency of Transportation, D.R. #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 addition of the crusher to the property in 1987 when there is no evidence that a gravel crusher had

been used in the pit before, and the significant increase in the level of extraction that occurred during 1987 when compared to the earlier levels of extraction before 1970.

The Board also concludes that the second prong of the "substantial change" test has been satisfied because the change in the pit from an intermittent operation with no crusher, and the large increase in the amount of gravel extracted annually above any identified pre-existing rate, have both resulted in at least the following significant impacts under the criteria of the Act: Increased dust and noise (criteria 1 - air pollution and 8 - aesthetics), increased truck traffic (criterion 5 - highway congestion and safety), 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 operation of the pit at any known pre-1970 level.

Based on all of the above, the Board concludes that gravel extraction operations on the Harootunian property cannot be considered to be pre-existing "development" and a permit must be obtained prior to the resumption of extraction operations for a commercial purpose. In addition, this gravel extraction operation at 1987 levels must also be considered to be a "substantial change" even if the Board could find that the pit operation was exempt as pre-existing development.

IV. ORDER

Prior to the resumption of any gravel extraction operations on this property for commercial purposes, the owners of the land must apply for and obtain a land use permit from the District #3 Environmental Commission.

Dated at Montpelier, Vermont this 2nd day of March, 1988.

ENVIRONMENTAL BOARD

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