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

RE: Champlain Construction Co. by Memorandum of Decision
William H. Meub, Esq. Declaratory Ruling #214
Keyser, Crowley & Meub
26 Court Street
Middlebury, VT 05753

On August 30, 1989, a petition for a declaratory ruling was filed with the Environmental Board by Champlain Construction Co. as an appeal from an Executive Officer Opinion that concluded that the Petitioner must obtain an Act 250 permit for activities at a gravel pit owned by the Petitioner in Middlebury. A prehearing conference was convened on October 11. Because the Petitioner and other parties were not available during the winter, a hearing was tentatively scheduled for April, 1990.

On October 19, 1989, Olin R. McGill, Esq., attorney for the Petitioner, /1/ submitted a letter in which he raised a number of preliminary legal issues. On November 18, 1989, the Board deliberated on these issues and made the following decisions. The issues raised by the Petitioner are addressed in the order they were presented in the October 19 letter.

1. The Petitioner contends that the only issues for the Board's resolution in this proceeding are facts in the Executive Officer Opinion with which the Petitioner disagrees.

The Board disagrees with the Petitioner. The purpose of an advisory opinion or a declaratory ruling is to determine "the applicability of any statutory provision or of any rule or order of the board." Board Rule 3(C) and (D). In this case, the Executive Officer, acting pursuant to Rule 3(C), ruled that an Act 250 permit is required for operation of the Petitioner's gravel pit because of substantial changes at the pit since 1970. The Petitioner believes that an Act 250 permit is not required. The issue, then, is whether an Act 250 permit is required. As explained in the Executive Officer Opinion in this matter, a development which was in operation as of June 1, 1970 is considered a "pre-existing" development. 10 V.S.A. § 6081(b). A pre-existing development need not obtain an Act 250 permit as long as a "substantial change" does not occur at the development. "Substantial change" is defined in Rule 2(G) as any change in a development which may result in significant impact with

/1/On May 15, 1990, an entry of appearance was filed substituting William H. Meub, Esq. for Olin McGill.

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respect to any of the ten criteria specified in 10 V.S.A. § 6086(a). If the gravel pit operation has substantially changed, within the meaning of Act 250, the Board's rules, and Supreme Court case law, then a permit must be obtained before any further activity at the pit.

The Executive Officer determined that a substantial change has occurred and that a permit must be obtained. The Board will hold a hearing to determine what changes have occurred in the gravel pit operation since 1970 and what potential impacts these changes may have. The Board will therefore need information on the nature of the operation prior to and since 1970, including the best available records on the annual amount of gravel extracted, and all other activity at the gravel pit that began since 1970.

2. The Petitioner contends that the opinions of other state agency representatives that no permits were required and that no impacts existed should be binding on the Environmental Board.

The Board disagrees. Activities that do not require other permits may require an Act 250 permit, and the only legally binding determination of Act 250 jurisdiction is that of the Environmental Board. In re McDonalds Corporation, 146 Vt. 380, 386 (1985).

3. The Petitioner contends that a state inspector and a district coordinator both determined that no permits were needed, and that their determinations should be binding on the Board.

The Board disagrees for the reasons explained in paragraph 2, above.

4. The Petitioner contends that the burden should not be on him to prove that an Act 250 permit is not needed and that the Vermont Rules of Civil Procedure should apply to these proceedings.

The Board disagrees. A permit is required for development on more than one acre in municipalities with permanent zoning and subdivision regulations and on more than 10 acres in municipalities without permanent zoning and subdivision regulations. 10 V.S.A. § 6081(a). The only exemption is for developments that existed prior to 1970, when a substantial change has not occurred. 10 V.S.A. § 6086(b). The burden of proof to establish an exemption is on the party claiming the exemption. Re: L.W. Haynes, Inc.

Declaratory Ruling #192 at 7-8 (Sept. 25, 1987). Since the Petitioner is claiming that its gravel operation does not require an Act 250 permit, the Petitioner has the burden of so proving.

The Vermont Rules of Civil Procedure do not apply in administrative proceedings. Gloss v. The Delaware and Hudson Railroad Co., 135 Vt. 419, 421 (1977).

5. The Petitioner contends that the Board cannot be fair because it both administers and enforces Act 250.

The Board disagrees. Many state agencies both administer and enforce; the Petitioner has cited no authority to support its claim that this structure is fundamentally unfair.

6. The Petitioner contends that the Executive Officer should have nothing to do with this declaratory ruling proceeding because she already decided that the Petitioner needs an Act 250 permit.

The Board does not agree that the Executive Officer will unfairly influence the Board in its determinations in this matter. The Executive Officer is legal counsel for the Board, and therefore offers legal advice when requested, but she does not make the Board's decisions. The Board has decided numerous declaratory rulings. As with all its cases, the Board will hear the evidence and make its own decision about whether the gravel operations require an Act 250 permit, based upon its understanding of the law and the applicability of the law to the facts.

7. The Petitioner claims that the Board should not use prefiled testimony but should hear all the witnesses' direct testimony live.

The Board is authorized by Rule 17(E) to require parties to file their direct testimony in written form prior to the hearing. At the hearing all witnesses are sworn and subject to cross-examination and questioning by Board members. The Board follows this procedure for several reasons: it allows the parties the opportunity to better prepare their cases in the absence of discovery; it allows Board members to familiarize themselves with the case in advance of the hearings); and it requires less time for hearings which enables the Board to better manage its heavy workload. The parties to this proceeding will be required to use prefiled testimony in accordance with the Board's usual procedures.

The hearing in this matter was not held because the Executive Officer was informed that the parties were working on a stipulation. Apparently not all parties will agree to a proposed stipulation, so that a hearing must be held to establish the facts. Accordingly, a hearing will be scheduled.

ORDER

1. A public hearing will be held on Thursday, July 12, 1990 before an Administrative Hearing Panel of the Environmental Board pursuant to Board Rule 41 and 3 V.S.A. § 811. The time and location of the hearing will be announced at a later date.

2. Prefiled testimony for all witnesses to be presented and final lists of witnesses and exhibits shall be filed on or before **June 21, 1990**. Prefiled testimony for any rebuttal witnesses shall be filed on or before July 5. Records of the amount of gravel extracted each year through 1989 shall be filed with the prefiled testimony due June 21.

No individual may be called as a witness in this matter if he or she has not been previously identified or identified in a supplemental witness list. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. If prefiled testimony has not been submitted by the date specified, the witness will not be permitted to testify. Instructions for filing prefiled testimony are attached.

The Board may waive the filing requirements upon a showing of good cause, unless such waiver would prejudice the rights of other parties.

Please note that parties are required to file only lists identifying those exhibits that are too large or burdensome to be reproduced, rather than the exhibits themselves. Exhibits must be made available for inspection and copying by any parties prior to the hearing.

Parties shall file an original and ten copies of prefiled testimony, legal memoranda and any other documents with the Board, and mail one copy to each of the parties listed on the attached Certificate of Service.

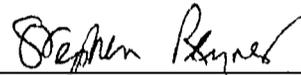
The hearing will be recorded electronically by the Board or, upon request, by a stenographic reporter. Any party wishing to have a stenographic reporter present or a

transcript of the proceedings must submit a request by June 21. One copy of any transcript made of proceedings must be filed with the Board at no cost to the Board.

Pursuant to Board Rule 16, this Order will be binding on all parties who have received notice of the prehearing conference, unless there is a timely objection to, a showing of cause for, or fairness requires that a requirement of this Order be waived.

Dated at Montpelier, Vermont this 5th day of June, 1990.

ENVIRONMENTAL BOARD



Stephen Reynes, Chairman
Ferdinand Bongartz
Elizabeth Courtney
Arthur Gibb
Samuel Lloyd
W. Philip Wagner

Attachment

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