

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

RE: Robert and Barbara Barlow Findings of Fact,
(formerly captioned Conclusions of Law,
Patten Gravel Pit) and Order,
by Thomas H. Jacobs, Esq. Declaratory Ruling #222
207 W. Main Street
P.O. Box 226
Bennington, VT 05201

This decision pertains to whether a permit is required pursuant to 10 V.S.A. Chapter 151 (Act 250) for a gravel pit located in Stamford, Vermont. As is explained below, the Board has concluded that an Act 250 permit is not required for continued operation of the pit.

I. BACKGROUND

On November 6, 1989, District #8 Coordinator Warren E. Foster issued Advisory Opinion #8-073. The opinion concluded that a gravel pit located in Stamford, Vermont is a pre-existing development to which no substantial change has occurred or is planned, and that therefore the gravel pit is exempt from the permit requirements of Act 250. The gravel pit was formerly owned by Harry S. Patten and is now owned by Robert and Barbara Barlow. On December 1, 1989, the Stamford Planning Commission filed an appeal of the opinion and requested a public hearing.

On January 25, 1990, Environmental Board Chairman Stephen Reynes convened a prehearing conference in Stamford. At the prehearing, parties agreed to file stipulated facts on which the Board would render a decision. On March 5, the Board issued a prehearing conference report. On March 9, the parties filed a stipulation, and on April 2, the parties filed a further stipulation. On April 18, the Board deliberated, determined to accept the stipulation, and voted that the Chairman should issue a proposed decision.

On November 5, 1990, the Chairman sent a proposed decision to the parties and provided an opportunity for argument and written comment. No party requested argument or filed written comments. The Board deliberated in Shelburne on December 20. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUES

The issues in this matter are:

1. Whether, pursuant to 10 V.S.A. § 6081(b) and Board Rule 2(0), the gravel pit is a pre-existing development and therefore exempt from the Act 250 permit requirement.

2. If the gravel pit is exempt, whether, pursuant to 10 V.S.A. § 6081(b) and Rule 2(G), the pit is no longer exempt because a substantial change to the pit has occurred or is proposed.

III. FINDINGS OF FACT

1. The gravel pit in question is located off Old County Road (Town Highway #11) in Stamford. Old County Road is a dead end road which intersects with Route 100 approximately 800 feet from the pit. A residence is located at the end of Old County Road approximately a half mile from the pit. The pit is between the residence and Route 100. Two corporate office **buildings** and one large parking lot are also located on Old County Road between the pit and Route 100. The tract on which the pit is located is approximately fourteen acres in size. The pit itself is approximately two acres in size. The area around the pit is largely pine and **hardwood** forest.
2. Gravel extraction began on the parcel sometime during the 1940s. Aerial photographs from 1968 prepared for the U.S. Department of Agriculture show the pit.
3. In 1969, approximately 13,650 cubic yards of gravel were extracted from the pit. Much of this yardage was sold commercially; some of it was used for non-commercial purposes. During that year, an average of seven trucks per day hauled gravel out of the pit. Historical noise levels at the site are not known, but noise would have **been** generated by the activities occurring at the pit, which consisted only of extraction of gravel and loading it onto trucks for removal. No specific information is available concerning the scope of activities at the parcel prior to 1969.
4. Harry S. **Patten** purchased the pit in 1971 and sold it to Robert and Barbara Barlow in 1989. During Mr. **Patten's** ownership, extraction rates at the pit varied widely. In some years, as little as 2,000 cubic yards of gravel were extracted. In 1974, 1975, 1983, and 1984, up to 20,000 cubic yards of gravel were extracted per year. Much of this gravel was used by the Town of Stamford. Private entities also purchased gravel from

the pit., Beyond variation in extraction rates, no changes were made during Mr. **Patten's** ownership to the operation of the pit. Truck traffic and noise varied according to the level of extraction.

5. The **Barlows** intend to extract gravel at a rate of 500 to 13,500 cubic yards per year. The operation of the pit will be the same as the pre-1970 operation: gravel will be extracted and loaded onto trucks for removal. Truck traffic and noise will vary with the level of extraction.

IV. CONCLUSIONS OF LAW

1. Act 250 requires that a land use permit be obtained prior to commencing construction on a development. 10 V.S.A. § 6081(a). "**Development**" is defined in relevant part as a commercial project located on a tract of land of more than ten acres in a town with permanent zoning and subdivision bylaws. 10 V.S.A. § 6001(3).

The requirement to obtain a permit does not apply to "development which is not also a subdivision, which has been commenced prior to June 1, 1970, if the construction will be completed by March 1, 1971." 10 V.S.A. § 6081(b).

Board Rule 2(A)(5) provides in relevant part that a project is a development if it consists of "[a]ny construction of improvements which will be a substantial change of a pre-existing development"

Rule 2(0) states:

"**Pre-existing development**" shall mean any development in existence on June 1, 1970, and any development which was commenced before June 1, 1970 and completed by March 1, 1971.

The **Barlows'** gravel pit is a pre-existing development pursuant to Board Rule 2(0). It was in existence as a commercial operation prior to 1970 on a tract of more than ten acres.

2. Having determined that the gravel pit is a pre-existing development, the Board next examines whether a substantial change has occurred at or is planned for the pit.

10 V.S.A. § 6081(b) states that the permit requirement applies "to any substantial change in [an] excepted subdivision or development." Rule 2(G) provides:

"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's substantial change test has been upheld by the Vermont Supreme Court. In re Manosh Corp., 147 Vt. 367, 369 (1986); In re Orzel, 145 Vt. 355, 361 (1985). The Board typically analyzes the issue of substantial change using a two-part test: (1) it determines whether there has been or is planned a cognizable physical change to the project and (2) it determines whether changes to the project have the potential for significant impacts with respect to any one of the ten Act 250 criteria at 10 V.S.A. § 6086(a). Re: Village of Ludlow, Declaratory Ruling #212 at 8 (December 29, 1989).

The **Barlows** plan no changes to the gravel pit operation and will extract no more than 13,500 cubic yards of gravel per year, which is slightly less than the 1969 extraction rate of 13,650 cubic yards. Thus, the Petitioners' plans themselves will not constitute a substantial change.

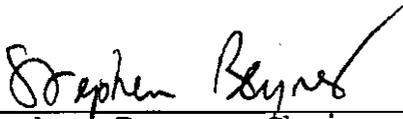
Therefore, the only issue is whether a substantial change has already occurred at the pit. In In re Manosh Corp., supra, the Vermont Supreme Court upheld the Environmental Board's determination of Act 250 jurisdiction based upon substantial change to a pre-existing gravel pit. In that case, the gravel pit owner had subsequently installed a screening plant and stone crusher at the site and those changes were "accompanied by actual and potential impacts under several of the ten Act 250 criteria found in 10 V.S.A. § 6086(a)." Id. at 369. By contrast, in this case, there is no evidence of any such change to the nature of the operation or to the types of machinery in use at the site. Moreover, there is no evidence of demonstrable potential impacts resulting from the prior increase in extraction rates at the pit. Accordingly, an Act 250 permit was not and is not required for the gravel pit provided that the **Barlows** proceed with their plans as described above.

V. ORDER

An Act 250 permit was not and is not required for the Barlows' gravel pit located off Old Country Road in Stamford, Vermont.

Dated at Montpelier, Vermont this 26th day of December, 1990.

ENVIRONMENTAL BOARD



Stephen Reynes, Chairman
Ferdinand Bongartz
Elizabeth Courtney
Arthur Gibb
Samuel Lloyd
Charles F. Storrow
Steve E. Wright

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