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

Re: Robert and Barbara Barlow,
Declaratory Ruling #234

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision, dated September 20, 1991, pertains to a petition for declaratory ruling regarding a gravel pit located in Pownal, Vermont, currently owned and operated by Robert and Barbara Barlow (the Petitioners). As is explained below, the Environmental Board concludes that a land use permit is required for the gravel pit operation pursuant to 10 V.S.A. Chapter 151 (Act 250) because a substantial change has occurred to this pre-existing operation.

I. BACKGROUND

On July 25, 1989, former District #8 Coordinator Anthony T. Stout issued Advisory Opinion #8-068 concerning the above gravel pit. In the opinion, the District Coordinator concluded that an Act 250 permit would be required prior to the commencement of a proposal by the Petitioners to open a solid waste disposal operation at the gravel pit. The opinion states that the gravel pit qualifies as an exempt pre-existing development, and that a permit would be needed for the proposed disposal operation because it poses the potential for significant impacts with respect to the Act 250 criteria.

The Petitioners appealed the Advisory Opinion to the Executive Officer of the Board. On June 8, 1990, Executive Officer Stephanie J. Kaplan issued Advisory Opinion #EO-89-197, which affirmed the District Coordinator's opinion with regard to whether a permit would be required for the proposed disposal operation. The Executive Officer also ruled that the evidence before her did not demonstrate that the existing gravel pit operation was exempt, and that a permit was therefore required for ongoing gravel extraction at the pit.

On July 5, 1990, the Petitioners filed a petition for declaratory ruling with the Board, seeking to overturn that portion of the Executive Officer's opinion which concludes that the gravel pit operation is not exempt and that a permit is required for ongoing gravel extraction. The Petitioners concede that a permit is required prior to commencement of a waste disposal operation, but allege that

the facts demonstrate that the gravel pit was a pre-existing operation, and seek a declaration that the pit was and remains exempt from Act 250.

On August 23, 1990, Nancy Lubeck, Harriet Burdick, and Robert C. and Deborah A. Nicholas filed requests for party status. On August 30, the Petitioners filed an opposition to these requests. On September 17, the Board issued a memorandum of decision denying the requests of Ms. Lubeck and the Nicholases, granting Ms. Burdick's request, and stating that Ms. Lubeck could represent Ms. Burdick.

During November 1990, the parties filed lists of witnesses and exhibits, prefiled testimony, and memoranda of law. On December 6, 1990, an administrative hearing panel of the Board convened a hearing in Pownal with the following parties participating:

The Petitioners by Thomas H. Jacobs, Esq.
Harriet Burdick by Nancy Lubeck

After taking a site visit and overview testimony from the Petitioners, the hearing was recessed due to illness of one of the parties' representatives. By agreement of those attending the hearing, the panel was to reconvene the matter in the spring of 1991 so that witnesses could be present who planned to leave Vermont for the winter.

The panel reconvened the hearing on May 16, 1991, with the same parties participating. After taking testimony, the panel recessed the matter pending filing of proposed findings of fact and conclusions of law, deliberation, and preparation of a proposed decision. Proposed findings and conclusions were filed by the Petitioners on June 3 and Ms. Burdick on June 5.

The panel deliberated on June 20, 1991. A proposed decision was sent to the parties on July 5, 1991, and the parties were provided an opportunity to file written objections, and to present oral argument before the full Board. On July 16, Ms. Burdick requested oral argument. On August 1, Ms. Burdick submitted a response to the proposed decision and withdrew her request for oral argument:. On August 5, the Petitioners filed a response to Ms. Burdick's August 1 filing. The Board deliberated concerning this matter on August 22. 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 overall issue in this matter is whether the Petitioners' gravel pit was and remains a pre-existing development which is exempt from Act 250 pursuant to 10,V.S.A. § 6081(b). Questions relevant to this issue include whether the gravel pit qualifies as a pre-existing development pursuant to 10 V.S.A. § 6081(b) and Board Rule 2(O), and if so, whether a substantial change has occurred or is planned at the pit pursuant to 10 V.S.A. § 6081(b) and Rule 2(G). The Petitioners also argue that the Board should not find jurisdiction because they purchased the gravel pit in reliance on a project review sheet which allegedly states that no permit is-required.

III. FINDINGS OF FACT

1. In 1959, Joseph R. and Martha M. Sarkis bought an approximately 122 acre parcel in Pownal located off Dean Road. The parcel was bordered on the east by the Hoosic River.

2. In 1967, the Sarkises sold an approximately four acre portion of the property to Henry and Janet Mae Burdick. The deed from the Sarkises to the Burdicks created an approximately 1,170 foot right-of-way (ROW) running north to south from Dean Road through the Sarkis parcel to the Burdick land. The ROW was for the purpose of ingress and egress to the Burdick land. The Sarkises retained ownership of the land underlying the ROW. The Burdick land is now owned by Harriet Burdick.

3. The ROW was and is an unpaved road which runs nearly the length of the Sarkis parcel. That land which is east of the ROW, and owned by Sarkis at the time the ROW was created, will herein be referred to as the "eastern portion" and that land which is west of the ROW will be referred to as the "western portion." The eastern portion, near the Hoosic River, contains. approximately 23 acres; the western portion, which is further away from the Hoosic River, contains approximately 95 acres.

4. Gravel extraction on the Sarkis parcel occurred as early as sometime during the 1940s. Prior to 1970, gravel extraction on the parcel occurred only at a pit located on the eastern portion. A continuous vein of gravel runs west from that portion of the site under the ROW to and under the western portion of the site. Sand and dirt, but no gravel, were extracted prior to 1970 from the western portion.

5. John W. Patterson, Sr. is the most reliable source of information in terms of the history of gravel extraction at the site. He took gravel from the Sarkis parcel from 1966 through 1978. He used a portable screening device in connection with his extraction.

6. The Sarkises did not extract gravel themselves from the pit on the eastern portion. Instead, independent contractors such as Mr. Patterson and the Town of Pownal came and removed gravel from the pit and paid the Sarkises for it. Mr. Patterson removed by far the most gravel from the pit. No crusher was used at the pit prior to 1970.

7. Based on Mr. Patterson's oral testimony, a maximum of approximately 5,800 cubic yards of gravel, sand, and sand and dirt fill was extracted from a pit on the eastern portion each year from 1966 through 1968.

8. Based on Mr. Patterson's oral testimony, a maximum of approximately 11,200 cubic yards of gravel, sand, and sand and dirt fill was extracted from the pit on the eastern portion in 1969.

9. Based on Mr. Patterson's oral testimony, a maximum of 7,700 cubic yards of gravel, sand, and sand and dirt fill was extracted from the pit on the eastern portion in 1970.

10. Prior to and for some time after 1970, Mr. Patterson used three trucks in connection with gravel extraction. These trucks accounted for the majority of the truck traffic in and out of the pit. Their capacity for hauling gravel was seven yards each. On a busy day, the pit would generate 10 to 12 truck trips.

11. The pit was not used on a daily basis prior to 1970. It was used sporadically depending on whether a contractor needed gravel.

12. Extraction from the pit during the years 1971 through 1977 continued in much the same manner and at approximately the same rate as in 1969 and 1970.

13. In 1978, Harwood D. and Lauretta F. Moore bought the parcel from the Sarkises. On May 3.8, 1978, Gordon Gianninoto, "Acting for District 8 Coordinator Robert Brown," signed a project review sheet issued to Mr. Moore. The review sheet states:

> [TENTATIVE AS OF 5-18-78] PURCHASE OF EXISTING, CONTINUOUSLY USED GRAVEL PIT FROM JOSEPH SARKIS FOR IDENTICAL USE BY HARWOOD D. MOORE CURRENTLY 2+ ACRES ARE OPENED AND POSSIBLY 15-20 ACRES OF THE 100 CONTAIN SALEABLE EARTH RESOURCE. NEW OWNER WOULD PROBABLY BE REMOVING 100-200 CU. YD PER DAY FOR SALE IN MASSACHUSETTS NO A250 PERMIT REQUIRED UNLESS OPERATION SUBSTANTIALLY CHANGES

14. The Moores increased the extraction rate at the pit to an average of approximately 26,000 cubic yards per year from 1978 through 1982. A few months after their purchase, they opened up a gravel extraction area on the western portion because the extraction area on the eastern portion was nearly exhausted. They extracted from the pit themselves and had approximately six to eight trucks involved in their operation. They did not crush or screen gravel on-site. They allowed independent contractors, including Robert Barlow, to extract gravel from the site.

15. In 1982, the eastern portion was sold to the Pownal Tanning Company. By that time, gravel extraction had ceased on the eastern portion. Subsequent to the sale to the tanning company, the site was used for a landfill which is now defunct.

16. In 1983, the Petitioners bought the western portion of the original Sarkis parcel, including the ownership rights to the land underlying the ROW. They continued extraction on the western portion. Their extraction rates have been as follows, in cubic yards:

1983 - 21,109	1987 - 26,398
1984 - 26,000 (approx.)	1988 - 25,343
1985 - 55,562	1989 - 14,727
1986 - 26,000 (approx.)	1990 - 18,000 (approx.)

17. The Petitioners operate the pit from 8:00 a.m. to 4:00 p.m. Monday through Friday with occasional work on Saturday. They use three trucks in connection with the operation. One of these trucks has a capacity of seven cubic yards. The other two have capacities of 14 cubic yards each. On a busy day, the pit generates approximately 16 truck trips.

18. Over the last six years, the Petitioners have used a portable crusher at the pit on occasion. They have used the crusher no more than half a dozen times per year and not for more than three hours at a time. Over the six years, they have crushed a total of not more than approximately 1,000 cubic yards of gravel.

19. Stone hardness varies from location to location. Softer stone will make less noise when crushed. The gravel at the pit is relatively soft stone. Noise from the crusher at the pit is not distinguishable off-site from other noise generated by the pit operation.

20. The gravel pit on the western portion has expanded over the years to include an approximately nine-acre area. As it has expanded, it has come closer to the Burdick residence. The edge of the pit is now approximately 150 feet from the closest edge of the Burdick tract. As a result, pit operations have become more audible to persons residing on that tract.

21. Trucks entering and exiting the gravel pit travel down Dean Road in the opposite direction from the Burdick residence. No nearby streams or potential soil erosion problems have been identified.

22. The Petitioners plan to continue extraction at an average rate of 26,000 cubic yards per year in the same manner as they extracted from the pit during the 1980s.

IV. CONCLUSIONS OF LAW

A. Pre-existing Development

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 a "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 imorovements which will be a substantial change of a pre-existing development ...."

Rule 2(O) 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.

With respect to whether the Petitioners' Pownal gravel pit is a pre-existing development, the main question is whether the gravel extraction area on the western portion, which commenced after 1970, should be considered separate from the gravel extraction area on the eastern portion, which pre-dates 1970. The two areas are part of the same gravel vein. They are separated by the ROW to the Burdick land.

The Board has issued several declaratory rulings regarding the expansion of a gravel pit through the continued excavation of a gravel deposit.;' For example, in Re: Clifford's Loam and Gravel, Inc., Declaratory Ruling #90 (Nov. 6, 1978), the Board construed the applicability of Act

250 to a gravel pit which had been operated on a 14-acre tract prior to June 1, 1970. As the operation subsequently continued, the pit expanded to include a larger area of the 14-acre tract, without any other change in operation. Id. at 1.

The Board concluded that the Clifford pit expansion did not constitute a substantial change in part because the nature of a gravel pit "operation is to continue to expand the area from which gravel has been removed." Id. at 2. The Board also stated:

> In accordance with the Board's understanding of Act 250 and the legislative intent, we conclude that when a gravel operation commenced prior to Act 250 is expanded and operated in essentially the same manner as it was prior to Act 250, that only a substantial change in such operation can trigger Act 250 jurisdiction. ...
>
> While jurisdiction over changes in pre-existing gravel operations must be determined on a case by case basis, there are some reasonably clear guidelines for determining when a substantial change has occurred. For example, Act 250 jurisdiction might be asserted over changes in a pre-existing gravel operation for at least the following reasons:
>
> 1. Acquisition of and removal of gravel on additional land;
>
> 2. Opening a new area a substantial distance from the pre-existing area;
>
> 3. Changing the nature of the operation as might occur by the addition of a stone crusher; or,
>
> 4. Removal of gravel in or across a stream or body of public waterway, or across a public highway, where it misht be argued that the intervenina ownership defined the limits of the nre-existing operation.

Id. at 3 (emphasis added).

Subsequent to the Clifford's case, the Board found expansion involving continuous extraction of gravel along a deposit not to be a substantial change in cases where the expansion occurred on the original tract in which the pre-existing pit had been operated, or on tracts which had been joined together prior to 1970. Re: Albert Nadeau, Declaratory Ruling #141 at 2 (June 23, 1983); Re: H.A. Manosh, Declaratory Ruling #163 at 2 (Aug. 29, 1984).

In Re: Weston Island Ventures, Declaratory Ruling #169 (June 3, 1985), the Board explained that there are limits to its ruling that a pre-existing gravel pit may expand along a vein of gravel without requiring a permit. That case concerned a 150-acre parcel in Weston bisected by Route 100. Prior to 1970, all extraction had occurred on one side of Route 100, and after 1970, new extraction areas were opened up on the other side of the highway. The Board concluded that Route 100 constituted an intervening ownership which was sufficient to rule that the new extraction areas were not part of the natural expansion of the original operation. Id. at 5-6.

Based on the above facts and authorities, the Board concludes that the extraction area on the western portion should be considered as part of a pre-existing gravel pit which began on the eastern portion. While the eastern and western parcels are now under separate ownership, they were part of the same parcel on June 1, 1970, the effective date of Act 250. The two extraction areas are on the same gravel vein. The intervening residential ROW does not constitute a sufficient intervening ownership interest and the land underlying it is owned by the Petitioners. The operation otherwise meets the definition of "pre-existing development." Accordingly, the extraction area on the western portion is part of a pre-existing development, and no Act 250 permit is required unless a substantial change has occurred or will occur.

B. Substantial Change

Having determined that the Petitioners' gravel pit is a pre-existing development, the Board next examines whether a substantial change has occurred or is planned at the pit. In making this examination, the Board will not evaluate the

Petitioners' plans for a waste disposal operation at the pit because the Petitioners have conceded that an Act 250 permit will be required prior to commencement of such an operation.

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)(l) through (a)(10).

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

In In re Manosh Corn., 147 Vt. 367, 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. Further, in Re: H.A. Manosh, Declaratory Ruling #163, supra at 6, n.2, the Board stated:

> While we refrain from specifically defining the term "significant," a 10% increase in annual withdrawal volume would most likely be sufficient to constitute a "substantial change" if accompanied by the potential impacts ....

In this case, there are three changes at issue. First, the Petitioners now use a crusher at the pit where no crusher was used before. Second, there has been a significant increase in the pit's yearly extraction. From a range of approximately 5,800 to 11,200 cubic yards per year prior to 1970, yearly extraction has increased to a range of

approximately 14,000 to 55,000 cubic yards in the 1980s, with the yearly rate being most often at or near 26,000 cubic yards. Third, the operation has changed from a sporadic one prior to 1970 to a daily operation.

Insofar as the crusher itself is concerned, the evidence does not show that this change has the potential for significant impacts under the Act 250 criteria. The crusher is used only a few times a year for periods of short duration, it crushes a softer variety of stone, and its noise is not distinguishable from the remainder of the Petitioners* operation.

The Board concludes that the substantial increase in the extraction rate and the change from a sporadic to a daily operation do have the potential for significant impacts. These two changes together indicate the advent of a more intensive operation at the gravel pit. This operation has the potential to have qualitatively different and significant impacts in at least two respects. First, persons residing in the vicinity of the project will be subject to the noise of a more intense operation on a daily rather than sporadic basis. The Board has previously ruled that noise is a cognizable impact under two of the Act 250 criteria: air pollution and aesthetics. 10 V.S.A. §6086(a)(1) and (8); Re: Juster Development Co., #1R0048-8-EB, Findings of Fact, Conclusions of Law, and Order at 24-25, 30 (Dec. 19, 1988).

Second, on a busy day the average number of truck trips has increased, from approximately 10 to 12 prior to 1970 to approximately 16 trips in recent years. The increase itself is slight because the size of the trucks used has increased, thereby allowing one truck to haul more gravel. However, it is clear that a greater number of larger trucks is entering and exiting the pit on a daily instead of a sporadic basis. This situation has the potential for significant impacts with respect to traffic safety and congestion (10 V.S.A. § 6086(a)(5)), and to air pollution and aesthetics due to noise from the trucks.

In making this determination, the Board is examining not whether the impacts actually exist, but whether they potentially exist. The Board is only evaluating whether a permit is required because of the potential for significant impacts, and it is for the District #8 Environmental Commission, following submission of a permit application, to

review the project's impacts in deciding whether to issue a permit. Re: City of Montpelier, Declaratory Ruling #190 at 8 (Sept. 6, 1988).

Since the Board has determined that changes at the Petitioners' gravel pit have the potential for significant impacts, the Board concludes that an Act 250 permit is required.

C. Reliance on Project Review Sheet

Having found that a permit is required, the Board addresses the claim of reliance on a project review sheet. The Petitioners argue that they purchased the gravel pit in reliance on the 1978 review sheet described in Finding 13, above, and that therefore the Board should rule that no permit is required.

The Petitioners' claim appears to raise the doctrine of equitable estoppel, under which a person may be barred from contravening an earlier representation. To prevail on such a claim, the Petitioners must prove the elements of estoppel and must also show that the harm to them outweighs the harm to public policy which might occur if their claim is upheld. In re McDonald's Corp., 146 Vt. 380, 383-84 (1985); Fisher v. Poole, 142 Vt. 162, 168 (1982). The Petitioners have neither proven nor argued these issues.

More importantly, the 1978 review sheet states that the gravel pit was to continue in "identical use" and that "[n]o Act 250 permit [will be] required unless operation substantially changes." The Board has concluded above that, after 1978, use of the pit was not identical, and that substantial changes occurred. Thus, the Board's decision is consistent with, rather than contravening, the representation in the review sheet: The review sheet warned that a permit might be required if the operation were substantially changed, and the Board has found that a permit is required based on a change which occurred after the review sheet was issued.

V. ORDER

An Act 250 permit was and is required for the Petitioners' Pownal gravel pit.

Dated at Montpelier, Vermont this 20th day of September, 1991.

ENVIRONMENTAL BOARD

Stephen Reynes, Acting Chair
Elizabeth Courtney
Ferdinand Bongartz
Rebecca J. Day
Arthur Gibb
Samuel Lloyd
Charles F. Storrow
Steve E. Wright

barlow.dec (awpl)