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

Re: Drown Gravel Pit
George and Marjorie Drown
Declaratory Ruling Request #277

MEMORANDUM OF DECISION

This decision pertains to a request for a continuance of this declaratory ruling proceeding while the Respondents George and Marjorie Drown apply to the District #7 Environmental Commission for a land use permit for their gravel pit operation. For the reasons explained below, the Board has determined to grant the continuance.

I. BACKGROUND

On January 10, 1992, District #7 Assistant Coordinator Linda **Matteson** issued Advisory Opinion #7-099 in which she concluded that no Act 250 permit was required for the continued operation of the Drown Gravel Pit because the pit was in operation prior to 1970 and had not substantially changed. That opinion was appealed to the Executive Officer of the Board by Doug and Karen **Noyes**. Because of conflicting evidence, the Executive Officer declined to render an opinion but recommended that the matter be brought to the Board as a petition for a declaratory ruling.

On November 2, 1992, this declaratory ruling petition was filed with the Board by Douglas and Karen **Noyes** and Kevin and Ann Mackay (the Petitioners). On November 30 the Petitioners filed an amended petition for a declaratory ruling.

Hearings in this matter were scheduled for June, 1993. On April 15, 1993, at the request of the Drowns due to health problems, the Board granted a continuance until the fall.

The Board convened the hearings on September 8, 1993, and tentatively scheduled additional hearings for November 17.

On October 18, 1993, the Respondents filed a request for a continuance. On October 21, the Petitioners filed an opposition to the request. On October 25, the Respondents filed a response to the opposition. The Board deliberated by conference call on October 26, 1993.

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II. DISCUSSION

The Respondents have agreed to stipulate that, if a continuance is granted, they will 1) submit to Act 250 jurisdiction and apply to the District #7 Commission for a permit, 2) not challenge any permit granted on the basis of lack of jurisdiction, and 3) not resume any operations at the gravel pit until a decision is issued by the District Commission on their permit application. The Respondents wish to reserve the right to reactivate the declaratory ruling proceeding only in the event that the District Commission denies a permit for the gravel pit operation.

The Petitioners object to the continuance because they believe that the issue of jurisdiction should be decided by the Board without further delay, and they are concerned that there would be a lack of finality concerning jurisdiction so that the Respondents **might** be able to challenge jurisdiction any time in the future.¹ Since the Petitioners filed their objections, however, the Respondents filed a response that clarifies that they will challenge jurisdiction only if a permit is denied.

Based upon the Respondents' representations, the Board believes that granting the continuance would likely result in a savings of resources for all the parties and the Board. The Board will therefore grant the continuance, with conditions.

III. ORDER

1. The declaratory ruling **proceeding** is hereby stayed, contingent upon the **following**:
 - a. On or before December 31, 1993, the Respondents shall file with the District #7 Environmental Commission a

¹The Petitioners argue that based upon the Supreme Court's decision in In re Gallagher, 150 Vt. 50 (1988), the Respondents would be free to contest jurisdiction any time in the future. However, in In re Wildcat Construction, No. 91-523 (Vt. May 3, 1993), the Court would not accept a challenge to Act 250 jurisdiction over a project because the Appellant did not challenge the District Commission's jurisdiction when it obtained an Act 250 permit in 1983 and it did not appeal that permit. The Court stated: "[T]herefore, the attachment of jurisdiction became final." *Id.* at 2. The implication of the Court's statement is that jurisdiction cannot be raised at a later time if it was not raised in connection with the issuance of an Act 250 permit.

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complete application for the operation of their gravel pit that is the subject of this declaratory ruling proceeding.

b. If the District Commission issues a permit for the operation of the Drown Gravel Pit, the Respondents shall not contest the jurisdiction of Act 250 over the pit.

c. The Respondents shall not operate the Drown Gravel Pit until they receive a permit authorizing operation of the pit or a declaratory ruling from the Board that no permit is required.

2. If the Respondents are denied a permit, they shall contact the Board within 30 days of the denial if they wish to reactivate this declaratory ruling proceeding.

Dated at Montpelier, Vermont this 28th day of October, 1993.

ENVIRONMENTAL BOARD

Lawrence Bruce (sk)
Lawrence Bruce, Acting Chair
Ferdinand Bongartz
Lixi Fortna
Arthur Gibb
Samuel Lloyd

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