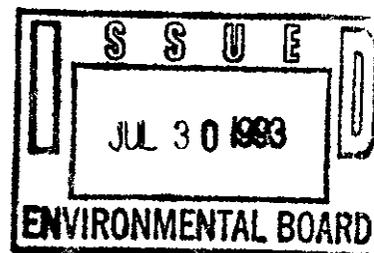


VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151



Re: U.S. Quarried Slate Products, Inc. and
Scotch Hill Leasing Corporation by
James P.W. Goss, Esq.
P.O. Box 578
Rutland, VT 05702

Declaratory Rulings
#279 and #283

Genier Slate Quarry
c/o Victor C. Genier
Fair Haven, VT 05743

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to whether a permit is required pursuant to 10 V.S.A. Chapter 151 (Act 250) for two different slate quarry operations located near each other off Blissville Road in Poultney. As is explained below, the Environmental Board concludes that a permit was and is required for the quarrying activity proposed by U.S. Quarried Slate Products, Inc. (US Slate) and by Victor Genier because such activity constitutes development and because use of the relevant tracts for quarrying was abandoned prior to the effective date of Act 2.50 (June 1, 1970) and such non-use continued until 1992.

I. SUMMARY OF PROCEEDINGS

One of the two operations at issue in this case involves US Slate and Scotch Hill Leasing Corporation (Scotch Hill). US Slate is the quarry operator and Scotch Hill is the landowner. US Slate's quarry operation is located on the site of the former Eagle Quarry off Blissville Road in Poultney. On July 31, 1992, District #1 Coordinator Anthony Stout issued Advisory Opinion #1-165, concluding that no Act 250 permit was required for US Slate's proposed reopening of the Eagle Quarry. In that opinion, the District Coordinator stated that no Act 250 permit will be needed for the reopening because he believed it did not present "a potential for significant impacts." He also stated that an Act 250 permit will be required for a manufacturing facility proposed for the site by US Slate.

The District Coordinator's opinion was appealed by Alfred Locke and Roger and Doreen Bushey, who own property near US Slate's quarry site. On November 5, 1992, Associate General Counsel Aaron Adler issued Advisory Opinion #EO-92-267, concluding that an Act 250 permit was and is required prior to reopening the Eagle Quarry. On November 13, 1992, US Slate filed a petition for a declaratory ruling. Following agreement by the Associate General Counsel to reconsider and a withdrawal request from US Slate, Board Chair Elizabeth Courtney remanded the matter for reconsideration. On January 8, 1993, the

(D.R.'s #279 and #283)

U.S. Quarried Slate Products, Inc.
and Scotch Hill Leasing Corp., D.R. #279
Genier Slate Quarry, D.R. #283
Findings of Fact, Conclusions of Law, and Order
Page 2

Associate General Counsel issued Advisory Opinion #EO-92-267 (Reconsidered), stating that it remains his opinion that an Act 250 permit was and is required. On January 14, 1993, US Slate and Scotch Hill refiled their petition for a declaratory ruling.

The other quarry operation involves extraction by Victor Genier near the site of the former Sbardella Quarry on land located off Blissville Road which he leases and proposes to buy from William P. Lenz II and Katherine Lenz. On December 7, 1992, the District #1 Coordinator issued Advisory Opinion #1-174, concluding that no permit is needed for Mr. Genier's planned extracton activity because the quarry was operating until the early 1970s and resumption of quarry activity on-site will not create new significant impacts. On December 14, 1992, the Busheys filed an appeal of this opinion. Pursuant to 10 V.S.A. § 6007(c), their appeal is being treated as a petition for a declaratory ruling.

On January 21, 1993, the Board issued a notice of a prehearing conference stating that the petitions for declaratory ruling concerning these two quarries will be consolidated due to the proximity of the quarry sites, similarity in issues, and overlap in the parties. On February 2, the Chair convened a prehearing conference.

On February 9, 1993, Mr. Genier filed a motion to dismiss. On February 19, the Chair issued a prehearing conference report and order. On February 22, the Board received both an opposition to the motion from the Busheys and response by Mr. Genier to that opposition. The Board deliberated on February 24. Mr. Genier and the Busheys were orally informed of the Boards decision on February 26.

During late February and early March 1993, parties filed lists of witnesses and exhibits and prefiled testimony. On March 4, the Board issued a memorandum of decision denying Mr. Genier's motion to dismiss. That decision is incorporated by reference. On March 25, the Board convened a hearing in Poultney with the following parties participating:

US Slate and Scotch Hill by James P.W. Goss, Esq.
Victor Genier by Joseph A. DeBonis, Esq.
Blissville Community Concerned Citizens Group (the Citizens Group)
by David Newhouse, Esq.
Carol Allard
State of Vermont Division for Historic Preservation by Kurt Janson, Esq.

After taking a site visit and hearing testimony, the Board recessed the matter pending reconvening the hearing.

In early May, parties filed prefiled rebuttal testimony and lists of witnesses and exhibits. The Board reconvened the hearing on May 12, 1993, with all of the same parties participating except for the State, which did not appear. After hearing further testimony, the Board recessed the matter pending filing of proposed findings of fact and conclusions of law, review of the record, deliberation, and decision.

On June 11, 1993, the Citizens Group filed proposed findings of fact and conclusions of law. On June 14, US Slate and Mr. Genier each filed proposed findings and conclusions.

The Board deliberated concerning this matter on June 16 and July 28, 1993. On July 28, following a review of the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. 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

- a. Whether, pursuant to 10 V.S.A. §6001(3) and Board Rule 2(A)(2), either of the two quarry operations at issue constitute development.
- b. For such of the two quarries at issue as may constitute development, whether the grandfathering exemption for pre-existing developments applies. As part of this issue, the Board will address the question of abandonment briefed by the parties. See Section IV.B., below.
- c. For such of the quarrying operations that qualify for grandfathered status, whether a substantial change has occurred or is proposed with respect to those quarrying operations.

III. FINDINGS OF FACT

1. The lands relevant to this matter are in the vicinity of Blissville Road in the Town of Poultney, near that town's northern boundary with the Town of Castleton.

2. The Town of Poultney has permanent zoning and subdivision bylaws.
3. Three tracts of land containing quarry sites, located on the western side of Blissville Road, are of particular relevance to this case. Those tracts consist of:
 - a. An approximately 9.9 acre tract presently owned by Victor Genier that contains most of a quarry hole known generally as the "Sbardella Quarry" (the Sbardella Tract). The Sbardella Tract's eastern boundary is the Blissville Road.
 - b. A tract exceeding ten acres presently owned by Vermont Structural Slate Co., Inc. (Vermont Structural) that is north of and adjoins the Sbardella tract and which contains the northern portion of the Sbardella Quarry and approximately two-thirds of a separate quarry hole known generally as the Pedro Quarry (the Pedro Tract). The Pedro Tract's eastern boundary is the Blissville Road.
 - c. An approximately 136 acre tract presently owned by Scotch Hill Leasing Corporation (Scotch Hill) that contains a quarry hole generally known as the Eagle Quarry (the Eagle Tract). Most of the eastern border of the Eagle Tract lies about 600 to 750 feet west of Blissville Road. The Board will refer to the portion of the Eagle Tract west of this border as the Main Portion. The Main Portion contains the Eagle Quarry site and another hole that does not have a name (Unnamed Hole #1). A portion of the Eagle Tract juts out eastward and touches Blissville Road, (the Eastern Portion). The Eastern Portion forms the northern boundary of the Pedro Tract. and contains approximately one-third of the Pedro Quarry and another quarry site that also does not have a name (Unnamed Hole #2).

All of the above-referenced corporations are Vermont corporations with offices in Fair Haven. All of the above-mentioned quarries are on the same vein of slate. The Board will examine the pertinent history of each of these three tracts.

The Eagle Tract

4. The former Eagle Quarry was one of the first slate quarries to be opened in the Town of Poultney. Extraction may have begun in 1848 and definitely was occurring on the Eagle Tract in 1853, when the Eagle Slate Company was organized to manufacture roofing slate on the Tract. From 1853 to 1874, slate extraction was occurring at the Quarry site and at least 20 out-buildings were located there. Slate processing and assembly were performed on the site. It was a large and intensive operation. During that time, much of the extraction was underground. The Eagle Slate Company suspended operations on the Eagle Tract in 1874.
 5. The Eagle Quarry is site no. 111779 on the Vermont state register of historic places. It is the most important archeological site associated with slate quarrying in Vermont. The Eagle Tract presently contains structural remains associated with the Eagle Slate Company's operation on the tract, including standing walls of buildings, foundations, roads, rubble piles, and the Eagle Quarry itself, which is filled with water. The Eagle Tract also likely contains subsurface cultural remains from the nineteenth century operation. Some of the remains from that operation are on land adjoining the Eagle Tract. That adjoining land is owned presently by Robert and Kim Stover. The Stovers' land consists of approximately 10 acres and was part of the Eagle Tract prior to the Stovers' ownership.
 6. There is no credible evidence of actual slate extraction from the Eagle Quarry subsequent to 1874.
 7. In 1946, Walter Metcalf and Ryland Hanger executed a mineral rights lease with the Pedro Brothers Slate Company (Pedro Brothers). The lease concerned the Eagle Tract, which was owned by the lessors. Based on Exhibits #P8, P9, P23, and P39, Pedro Brothers appears to have leased, and extracted from, only the Eastern Portion of the Eagle Tract.
 8. In 1959, Pedro Brothers assigned its lease with Messrs. Metcalf and Hanger to Vermont Structural. In 1960, Vermont Structural signed its own mineral rights lease with Mr. Metcalf and Sylvia Hanger concerning the Eagle Tract. The text of this lease is not in evidence. Based on Exhibits #P23 and #P39, it appears that the leased area under the 1960 lease may have roughly corresponded to the Stovers' property.
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9. Following the lease assignment from Pedro Brothers and the 1960 lease, Vermont Structural extracted slate from the Eastern Portion of the Eagle Tract. Specifically, Vermont Structural extracted slate from the Pedro Quarry, part of which is on the Eastern Portion. Vermont Structural records indicate that its extraction from the Pedro Quarry no later than June 1966, the date of its last payroll for that property. Vermont Structural records also indicate that in 1968 and 1969 it sold some slate from a stockpile at the Pedro Quarry. Vermont Structural records do not indicate that it extracted from Unnamed Hole #2 or from any other portion of the Eagle Tract but the Pedro Quarry.
10. -Exhibit #P13 is a 1964 map, revised through aerial photography in 1972, prepared by the United States Department of the Interior, Geological Survey (USGS). This map shows the Pedro Quarry in purple, meaning that it is a 1972 revision to the 1964 map. This likely means that the Pedro Quarry expanded between 1964 and 1972. The map also shows the Eagle Quarry and Unnamed Hole #2 as filled with water, meaning that no quarrying activity occurred there between 1964 and 1972. The map does not show Unnamed Hole #1.
11. Ceasing extraction at the Pedro Quarry in 1966 is consistent with a map that shows expansion of the Quarry between 1964 and 1972. The credible evidence is that Vermont Structural did not extract from any quarry on the Eagle Tract but the Pedro Quarry and that such extraction ceased no later than June 1966.
12. In 1975, Sylvia Hanger and the Estate of Walter Metcalf conveyed the Eagle Tract to John and Wilma Saltis. At about the same time, Vermont Structural executed a quit-claim deed concerning the tract, conveying all interests Vermont Structural had or may have had to the Saltises. In the quit-claim deed, Vermont Structural states that it renounces all right and title which it has to the Eagle Tract. The deed describes the tract in its entirety.
13. During 1975, a survey was created of the Eagle Tract, referred to on the survey as the "Metcalf Farm." A hole in the approximate location of Unnamed Hole #1 appears on this survey. There is no prior evidence of the existence of Unnamed Hole #1. There is no evidence that Vermont Structural extracted slate from this hole. There is no evidence of who, if anyone, extracted slate from the hole, or when. Unnamed Hole #1 may

have been an old test hole; there are many such test holes in the area.

14. During the time that the Saltises owned the Eagle Tract, they did not extract slate from the Tract.
 15. US Slate has been in the business of extracting and selling slate in western Vermont since 1989. US Slate is presently the mineral rights lessee of the Eagle Tract. Scotch Hill acquired the Tract from the Saltises in August 1992.
 16. At the time that Scotch Hill acquired the Eagle Tract, the Eagle Quarry and Unnamed Hole #1 were generally filled with water. In places, the Eagle Quarry and Unnamed Hole #1 had trees growing in them.
 17. At the time of Scotch Hill's purchase, some old quarrying and logging roads existed on the Eagle Tract. To make these roads usable for quarrying, US Slate filled in soft spots and layered them with slate.
 18. Sometime during August 1992, US Slate re-opened the Quarry. US Slate's plan was and is to extract by encroaching into the existing Quarry face. US Slate has blasted and extracted slate there. US Slate represents that it stopped such blasting and extraction in November 1992. Subsequently, US Slate commenced blasting and extraction from Unnamed Hole #1.
 19. US Slate's planned hours of operation for the Eagle Quarry are 7:00 a.m. to 5:00 p.m. and 8:00 a.m. to noon on Saturday. US Slate plans to extract slate for commercial purposes by using explosives to remove the overburden from the top of the Quarry face and then to use further explosives to remove slate from the face. Pillars of slate will then be trimmed and split and loaded into trucks for transport to an off-site mill. US Slate represents that an average of five truck trips into and five truck trips out of the Eagle Tract will occur per day.
 20. US Slate represents that the number of overburden shots at the Eagle Quarry will be two to four per year and pillar shots will be two to three per week.
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21. US Slate plans to construct a commercial slate manufacturing facility on the Eagle Tract. An Act 250 permit will be required prior to such construction. US Slate concedes the applicability of Act 250 to the facility and will be applying for a permit for the facility.
22. US Slate plans to extract approximately 830,000 cubic feet per year of slate from the Eagle Quarry. US Slate represents that this extraction rate is within the yearly rate of extraction that occurred between 1964 and 1972 at the Pedro and Sbardella Quarries, which US Slate represents averaged approximately 1,105,000 cubic feet. This representation is based in large part on the USGS map described in Finding 10, above. Specifically, US Slate reads the map to show approximately how much expansion occurred at those quarries between 1964 and 1972. The Board finds that the map is not sufficiently clear to provide a sound basis for such a reading.
23. Joe Howard owns property north of the Eagle Tract that adjoins the Tract. Starting in October 1992, at a time when blasting was occurring at the Eagle Quarry, he began experiencing various problems at his property that he had not experienced before. These problems included the loss of a well, cracking of his fireplace, cracking in the sheetrock of his house, and pictures falling off the walls. Mr. Howard's sister lives in a residence that is nearby and is directly north of Unnamed Hole #1. Prior to a blast by US Slate that occurred in early 1993 at Unnamed Hole #1, none of the walls in his sister's kitchen was separated from the remainder of the house. After that blast occurred, one of the walls in the kitchen was so separated.
24. Until early May 1993, Kim Stover resided on the Stover property described above. One Saturday during the period that US Slate was blasting on the Eagle Tract, she heard a blast while she was on her way out of the house. The blast came from behind her house, in the direction of the Eagle Quarry and Unnamed Hole #1. She returned later that day to find her basement flooded with water that had come through her foundation. There was no evidence of water in the basement before that blast. Within a few days, US Slate made an offer to purchase the Stovers' property and the property is now under contract to sell to US Slate.
25. Roger and Doreen Bushey own and reside on land located on the east side of Blissville Road directly across from the Stovers' property. When blasting was occurring in 1992 in the Eagle Quarry, their house shook.

The Pedro Tract

26. As of 1959, Pedro Brothers owned the Pedro Tract and had extracted slate from the Pedro Quarry and that portion of the Sbardella Quarry located on the Pedro Tract. In 1959, Pedro sold the Pedro Tract to Vermont Structural. In 1960, John and Mary Anderson executed a deed conveying the Pedro Tract to Vermont Structural. The description in the Anderson deed is of a tract that is larger than, and subsumes, the tract conveyed by Pedro Brothers to Vermont Structural.
27. The Board incorporates by reference those findings made above in connection with Vermont Structural's operation of the Pedro Quarry.
28. In 1970, Vermont Structural filed a report with the U.S. Department of the Interior, Bureau of Mines (the Bureau), stating that no slate from the Pedro Quarry was sold or used in 1970 and that the operation was closed. In a similar report concerning the Pedro Quarry filed in 1971, Vermont Structural stated that the Quarry had been idle in 1970 and was closed temporarily. In 1972, 1973, and 1974, Vermont Structural reported to the Bureau that the Quarry was idle and temporarily closed. In 1975, Vermont Structural reported to the Bureau that the Quarry was idle and permanently closed.

The Sbardella Tract

29. The Andersons also once owned the Sbardella Tract. When they owned it, it was part of a larger tract that exceeded ten acres in size. In 1953, the Andersons executed a mineral rights lease concerning their tract with Domenic Sbardella. Mr. Sbardella extracted slate from the Tract at a site that became known as the Sbardella Quarry.
 30. The Board incorporates by reference those findings made above with respect to the Sbardella Quarry.
 31. In 1961, Mr. Sbardella assigned his lease from the Andersons to Vermont Structural. Vermont Structural extracted slate from the Sbardella Quarry until April 1969. In a report to the Bureau dated October 19, 1971, Vermont Structural stated that its operation at the Sbardella Quarry was closed permanently.
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32. There is no credible evidence of actual slate extraction from the Sbardella Quarry between April 1969 and 1992.
33. Carol **Allard** owns and resides on land located directly across Blissville Road from the Sbardella Tract. When she moved onto her land in 1978, the Sbardella Quarry was full of water and vegetation had grown up around it. Rusted-out equipment could be seen at the Quarry site.
34. In 1987, William D. **Lenz II** and Katherine **Lenz** bought the Sbardella Tract. At that time, it remained part of a larger tract consisting of more than ten acres.
35. On December 22, 1992, the Lenzes and Victor Genier executed a deposit receipt and sales agreement concerning the Sbardella Tract. The agreement describes the Tract as consisting of approximately ten acres located on Blissville Road. At the time, the Tract was part of a larger tract owned by the Lenzes consisting of 92 acres. The agreement refers to a lease between the parties concerning the property and requires that the property is to be conveyed by August 30, 1993.
36. Starting no later than the date of the agreement, Mr. Genier leased the Sbardella Tract from the Lenzes for the purpose of re-opening the Sbardella Quarry. This lease continued until the Lenzes conveyed title to the property to Mr. Genier on March 31, 1993.
37. Prior to receiving title to the Sbardella Tract, Mr. Genier dug a 50- to 60-foot long ditch from the Sbardella Quarry to the Pedro Quarry and began pumping water out of the Sbardella Quarry. The ditch runs through a culvert that Mr. Genier installed under an existing road on the Tract. During this time, in order to improve an existing access road into the Sbardella Quarry, Mr. Genier cut trees, removed stumps, and put slate down on the access road.
38. Mr. Genier owns a separate tract of land consisting of 35 acres located off Bolger Road in Fair Haven. This tract is within five miles of the Sbardella Tract. Mr. Genier's residence is on the tract along with buildings in which he stores equipment and machinery he uses in connection with a concrete business that he owns and operates. Mr. Genier has not used and does not plan to use his Fair Haven tract in connection with slate quarrying at the Sbardella Tract.

39. Since mid-April 1993, Mr. Genier has been engaged in commercial quarrying activities on the Sbardella Tract. He has been quarrying there two to three days per week. His main business is concrete and he intends to operate the quarry on a part-time basis to fill in when the concrete business is slow. When operating, there will be one to three workers at the Sbardella Quarry and two to five trucks leaving the premises per day. Mr. Genier plans to send extracted slate from the Sbardella Quarry to a mill in New York.

Mine Safety and Health Administration Records

40. There is a federal program of mandatory registration and regulation of mines. This program was and is administered by the U.S. Department of Labor, Mine Safety and Health Administration (MSHA). The MSHA is separate from the Bureau discussed above.
41. MSHA records show that Vermont Structural registered a slate quarrying operation located in Poultney with the MSHA in February 1971. The records list the operation as "abandoned" in July 1976. The name the MSHA assigned to this operation was and is the Sbardella Quarry.
42. If several quarry sites are near each other and operate by the same entity, the MSHA considers them one operation. A mining operation listed with the MSHA could consist of several different extraction sites.
43. The MSHA records do not state whether Vermont, Structural was actively quarrying slate at the registered quarry during the period 1971 to 1976. With respect to actual operation, the Board 'finds that Vermont Structural's records are more reliable than the MSHA records because Vermont Structural's records in fact address whether the quarry was operating.

The Slate Industry

44. Demand for slate is cyclical and the cycles may be of long duration such as 20 to 30 years. Long periods of demand are often followed by long periods of no or little demand, to be followed in turn by a period of demand.
45. During a period of no or little demand, it is not unusual for a quarry to suspend operations and allow a quarry hole to fill with water. This does not necessarily mean that the operator intends to cease extraction for all

time. The slate industry does not consider a quarry to be abandoned until all slate has been extracted.

Residential Growth and Quarrying Activity in the Area

46. Blissville Road runs north from the Sbardella Tract for approximately 1.1 miles before it reaches Blissville Four Corners in Castleton.
47. Along this 1.1 mile stretch of Blissville Road, the number of residences has significantly increased since the 1960s. During the same period, a mobile home park consisting of at least 45 houses was built near the northwest corner of the Eagle Tract.
48. There are presently active slate quarries in the general vicinity of Blissville Road. The Town of Poultney has designated quarrying as a permitted use in the area.
49. Exhibit #P23 is a map that shows the active quarries closest to the Sbardella, Pedro, and Eagle Tracts. None of the active quarries possesses an access from Blissville Road and therefore trucks from those quarries are less likely to adversely affect residential pedestrian and vehicular traffic on Blissville Road than all the proposed projects. Of the presently active quarries, only the Camara and Amery quarries, located east of Blissville Road, are closer to the Road than the Eagle Quarry. None of the presently active quarries is closer to the Road than the Sbardella Quarry.
50. The potential for negative impacts on a residence from blasting at a quarry increases the closer the residence is to the quarry.

IV. CONCLUSIONS OF LAW

In relevant part, 10 V.S.A. § 6081(a) states that an Act 250 permit is required prior to commencement of construction on, or commencement of, "development."

A. Develonment

The term "development" is defined at 10 V.S.A. § 6001(3) and Board Rule 2(A)(2). To paraphrase the cited statute and rule, development subject to Act 250 includes, in relevant part, the construction of improvements for commercial or

industrial purposes on a tract or tracts, owned or controlled by a person, consisting of more than an acre of land, except that in towns with permanent subdivision and zoning bylaws, the land involved must exceed ten acres. In determining the amount of land involved, the Board counts the tract on which the improvements are located, as well as any other involved land within a five-mile radius. See 10 V.S.A. § 6001(3); Rule 2(A)(2),(F).

Poultney is a town with permanent zoning and subdivision by-laws. Therefore, the definition of development will not apply unless there are more than ten acres of involved land.

With respect to the Eagle Tract, which presently consists of approximately 136 acres and which will consist of approximately 146 acres once the Stovers' property is conveyed, US Slate's proposal to extract slate from the Eagle Quarry and Unnamed Hole #1 constitutes development.

With respect to the Sbardella Tract, Mr. Genier contends that since the Tract is presently 9.9 acres in size, the definition of development should not apply.

In response, the Citizens Group makes three arguments: (a) that Mr. Genier commenced construction on his quarrying project at a time when the Sbardella Tract was part of a 92-acre tract owned by the Lenzes; (b) that Mr. Genier and the people he bought the Tract from, the Lenzes, should be considered one person under 10 V.S.A. § 6001(14)(A)(iii); and (c) that Mr. Genier owns or controls other involved land within five miles of the Tract.

The Board turns first to the "commencement of construction" argument. 10 V.S.A. § 6081(a) prohibits commencement of construction on a development without a permit. The Supreme Court has previously stated that Act 250 jurisdiction attaches immediately prior to the time construction commences. In re Vermont Gas Systems, 150 Vt. 34, 38-39 (1988). The Court also has ruled that, where jurisdiction has attached and a permit has been issued, Act 250 jurisdiction does not disappear upon the occurrence of an event which would bring a project below a jurisdictional threshold. In re Wildcat Construction Co., Inc., No. 91-523, slip op. at 2 (May 3, 1993). Based on Section 6081(a) and the Court's past decisions, the Board has stated that, once construction has commenced on a project subject to Act 250, jurisdiction does not dissolve based on subsequent events. Re: John Rusin, Findings of Fact, Conclusions of Law and Order #8B0393-EB at 4 (June 10, 1993) (appealed to Supreme Court July 8, 1993).

Board Rule 2(C) states that “commencement of construction” means:

[T]he construction of the first improvement on the land or to any structure or facility located on the land including work preparatory to construction such as clearing, the staking out or use of a right-of-way or in any way incidental to altering the land according to a plan or intention to improve or to divide land by sale, lease, partition, or otherwise transfer an interest in the land.

The uncontroverted evidence is that prior to receiving title to the 9.9 acres, Mr. Genier built a ditch to drain the Sbardella Quarry into the Pedro Quarry in preparation for extracting from Sbardella. He also began draining the Sbardella Quarry using a pump. He further cut trees, removed stumps, and put slate down on the access road. These activities are clearly ones that were necessary to further Mr. Genier’s plan to quarry for commercial purposes. They therefore constitute commencement of construction under Rule 2(C).

At the time that Mr. Genier undertook these activities, he had a lease to purchase ten acres out of a larger parcel owned by the Lenzes. Thus, at that time, Mr. Genier was commencing construction on a tract owned by a person (the Lenzes) consisting of more than ten acres. Accordingly, the definition of development applies to Mr. Genier’s quarrying activities, notwithstanding the fact that after commencement of construction he bought the 9.9 acres referred to in the Findings as the Sbardella Tract.

Since the Board concludes that Mr. Genier’s project constitutes development, it need not reach the other arguments raised by the Citizens Group.

B. Pre-existing Development

US Slate, Scotch Hill, and Mr. Genier all claim that their proposed projects constitute pre-existing developments that are exempt from Act 250.

10 V.S.A. § 6081(b) contains an exemption from Act 250 that can be referred to as a “grandfather” clause. The section provides:

Subsection (a) of this section [requiring a permit] shall 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. . . . Subsection (a) of this section shall

apply to any substantial change in such excepted subdivision or development.

Interpreting this provision, the Board has denominated the excepted developments "pre-existing developments," defined at Rule 2(O) to mean:

[A]ny development in existence on June 1, 1970 and any development which was commenced before June 1, 1970 and completed by March 1, 1971.

Concerning pre-existing developments, the Supreme Court ruled in a case concerning a gravel pit:

The petitioners argue that the Board's conclusion that it was unable to determine whether there was an operation in existence as of the enactment of Act 250 is not supported by its findings. . The findings state that the previous owners of the property intermittently had sand and gravel removed from the gravel pit. The findings state that this was done before the enactment of Act 250. No evidence presented, nor finding made, indicates that the operations, although intermittent, were abandoned at any time. Consequently, as the petitioners allege, based on the findings of the Board, it must be concluded that there was a commercial operation in existence as the enactment of Act 250.

In re Orzel, 156 Vt. 355, 359 (1985) (emphasis added).

Further, the Board has previously stated, again concerning a gravel pit:

Because we have found that commercial gravel extraction operations were performed on the [property] long prior to June 1, 1970, the effective date of Act 250, and that those operations have continued to the present, the gravel operations on that property constitute a "pre-existing development" as that term is defined by Board Rule 2(Q).

Re: Weston Island Ventures, Declaratory Ruling #109 at 4 (June 3, 1985).

Based on the above authorities, the Board concludes that it is part and parcel of qualifying for exemption as a pre-existing development to establish that

the particular land use has not been abandoned. This is because a development cannot be considered to have been in existence on June 1, 1970 if the use was abandoned prior to that date. Further, if it is abandoned after that date, then the pre-existing development has ceased to exist.

Based on the foregoing findings of fact, the Board concludes that the use of the Eagle Tract for quarrying was abandoned prior to the effective date of Act 250 and therefore the proposed project put forward by US Slate and Scotch Hill does not qualify for exemption as a pre-existing development. Specifically, there is no evidence that extraction occurred on that Tract after 1874 except for the activities of Pedro Brothers and Vermont Structural in the Pedro Quarry, a small part of which is on the Tract, and US Slate's 1992-93 activities. Further, the last recorded extraction from the Pedro Quarry was in 1966.' While Vermont Structural apparently stored some salable slate at the Pedro Quarry after 1966, in 1975 it quit-claimed all rights it had to extract minerals from the Eagle Tract. The people who received the quit-claim, the Saltises, did not extract slate from the Tract. Vermont Structural also filed a report in 1975 stating that the Pedro Quarry was permanently closed. For the next seventeen years, the Eagle Quarry remained unused, full of water, with trees growing in portions of it. Thus, based on this same set of facts, the Board would find that, if use of the Eagle Tract for quarrying was not abandoned prior to 1970, it was abandoned as of 1975.

Based on the foregoing findings of fact, the Board concludes that the use of the Sbardella Tract for quarrying was abandoned prior to the effective date of Act 250 and therefore the project proposed by Mr. Genier does not qualify for exemption as a pre-existing development. Prior to Mr. Genier's recent activities, the last recorded date of extraction at the Sbardella Quarry is April 1969. In 1971, Vermont Structural filed a report with a federal agency stating that the Sbardella Quarry was closed permanently. Between 1971 and 1992, no quarrying activity occurred there, the quarry became filled with water, vegetation grew up around it, and rusted-out equipment could be observed on-site. Vermont Structural sold the property to other parties, and it came into the possession of the Lenzes, who did not quarry there. Thus, based on this same set of facts, the

'With regard to extraction on the Eagle Tract, the Board recognizes that Unnamed Hole #1 must have been created at some point. However, there is no evidence of its existence prior to 1975, nor is there evidence of who extracted there. In addition, the Hole may have been a test hole.'

Board would find that, if use of the Sbardella Tract for quarrying was not abandoned prior to 1970, it was abandoned as of 1971.

Concerning the issue of pre-existing status, US Slate, Scotch Hill, and Mr. Genier make three arguments to which the Board will respond. First, they argue that all of the tracts at issue here were under either the ownership or control of Vermont Structural prior to 1970 and that active quarrying occurred on at least one of those tracts as late as 1969. However, even if true, such an argument on its face cannot defeat the above conclusions of abandonment.

Second, they contend that the slate industry experiences 20-30 year cycles of rise and fall in demand, and that the industry does not consider quarries abandoned until the resources are extracted or the holes filled in. While the Board believes that industry cycles and custom can be relevant in determining whether a project has been abandoned, the cycles and custom being argued in this case do not do justice to the legitimate expectations of property owners who reside nearby. Put simply, in 20 to 30 years, quarries can become filled with water and acquire other signs of abandonment, such as vegetation growth and the presence of rusted-out equipment.

Moreover, this contention is not based on an industry custom of seasonal operation, such as with gravel pits or ski areas. Instead, the industry custom being argued here is cessation of operation for a period of time that is the equivalent of one to two generations. Such a period is too long to provide a basis for concluding that a project has not been abandoned.

Finally, US Slate, Scotch Hill, and Mr. Genier argue that there are several operating quarries already in the general area, -which is zoned for quarrying use. However, this fact does not preclude the abandonment of the quarries on the Eagle and Sbardella Tracts. In addition, the Board is not concluding that the area is unsuitable for quarrying, but only that the proposed quarrying activities at issue are subject to regulation.

Because the Board concludes that the proposed quarrying activities are not exempt as a pre-existing development, the Board does not reach the question of substantial change.

U.S. Quarried Slate Products, Inc.
and Scotch Hill Leasing Corp., D.R. #279
Genier Slate Quarry, D.R. #283
Findings of Fact, Conclusions of Law, and Order
Page 18

C. US Slate's Reauest to Continue Operation

In their proposed findings of fact and conclusions of law, US Slate and Scotch Hill request that, if the Board concludes that a permit is required, the Board allow operations to continue on Unnamed Hole #1 pending the filing of an application for a permit and issuance of a decision thereon.

There is no authority for granting such a request. 10 V.S.A. § 6081(a) unequivocally states that a permit is required prior to commencement of construction on a development. The request of US Slate and Scotch Hill is denied.

V. ORDER

1. The project proposed by US Slate constitutes development.
2. The project proposed by Mr. Genier constitutes development.
3. An Act 250 permit was required prior to commencement of quarrying activities, and any associated construction, on the Eagle Tract by US Slate, and remains required prior to any further quarrying or related construction on that Tract, including the property of the Stovers discussed in the Findings, above.
4. An Act 250 permit was required prior to commencement of quarrying activities, and any associated construction, on the Sbardella Tract by Mr. Genier, and remains required prior to any further quarrying or related construction on that Tract.

Dated at Montpelier, Vermont this 30th day of July, 1993.

ENVIRONMENTAL BOARD



Elizabeth Courtney, Chair
Ferdinand Bongartz
Lawrence H. Bruce, Jr.
Rebecca J. Day
Terry Ehrich
Lixi Fortna*
Arthur Gibb**
Samuel Lloyd
Jean Richardson

*Chair Courtney and Member Fortna dissent with respect to the conclusion that Mr. Genier's proposed project constitutes development. They believe that the activities undertaken by Mr. Genier while the Sbardella Tract was under lease do not constitute "commencement of construction" because they may have been exploratory work done to ascertain whether quarrying on the site was viable. They otherwise concur in the decision.

**Member Gibb concurs in the decision but dissents with respect to the denial of US Slate's request to continue operation on Unnamed Hole #1 pending application and decision. Member Gibb would like to find some way to grant the request.

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