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ENVIRONMENTAL BOARD

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

Re: John Gross Sand and Gravel
Declaratory Ruling #280

MEMORANDUM OF DECISION

This decision pertains to a motion to alter filed by John Gross and Marion R. Gross d/b/a John Gross Sand and Gravel (the Petitioner) with respect to a declaratory ruling issued concerning the Petitioner's sand and gravel operation located off Route 12A in the Town of Roxbury. As is explained below, the Environmental Board denies the motion.

I. BACKGROUND

On July 28, 1993, the Board issued Declaratory Ruling #280 concerning the above-referenced sand and gravel operation (the Operation). That ruling is incorporated by reference. In summary, the Board reached the following conclusions in that ruling:

(a) The Operation constitutes development that is subject to Act 250 unless the Petitioner meets its burden to prove that the Operation is exempt as a pre-existing development.

(b) The Board proposed to conclude that the Petitioner has nor met irs burden to prove that the Operation is pre-existing because it has not proved an annual extraction rate prior to June 1, 1970.

(c) The Board also proposed to conclude that the Petitioner has not met its burden to produce sufficient information to enable the Board to conclude that a substantial change in the extraction rate has not occurred.

(d) Further, even if the Operation were a pre-existing deveiopment, two substantial changes with respect to the Operation have occurred: (1) the addition and use of a crusher and (2) the creation of a new access road and associated destruction of a berm.

(e) The Board proposed to conclude that an Act 250 permit is required for the entire Operation and must be obtained prior to any continuance of the Operation.

(f) In addition, an Act 250 permit was required prior to the addition and use of a crusher and the creation of a new access road and associated destruction of a berm, and remains required prior to any further use of the crusher and the road, and prior to associated activities as set forth in the

attached order. These activities include the use of trucks larger than seven-cubic yard single-axle trucks in connection with the Operation.

The Board's conclusions were rendered as proposed conclusions with respect to only the following paragraphs listed above: (b) failure to prove exemption as a pre-existing development; (c) failure to produce sufficient information to evaluate the question of substantial change in the extraction rate; and (e) applicability of Act 250 to the entire Operation. The Board stated that the proposed conclusions will become final 60 days from the date of the decision unless the Petitioner submits credible information demonstrating the Operation's pre-1970 and post-1970 extraction rates. The remainder of the Board's conclusions were final.

On August 30, 1993, the Petitioner filed motions to stay, re-open, and alter the 'July 28 ruling. On September 10, the Petitioner filed a motion for extension of time with respect to the 60-day period for submitting information concerning extraction rates. On September 15, the Town of Roxbury Planning Commission filed a response to the motions that included a request for an additional 30 days to respond. On September 16, a joint response was filed by Robert and Henrietta Swann, Marian Baker. Tina Young. Mary Swann, and Patricia Swann.

On September 22, 1993, the Board issued a memorandum of decision and stay order which is incorporated by reference. In summary, the Board granted the Petitioner's motion to stay that portion, and only that portion, of the Board's July 30 order which prohibits the use, in connection with the Operation, of trucks greater that seven cubic yard single axle trucks. The Board also granted the Petitioner's motion to reopen the hearing to take additional evidence concerning the use of trucks in connection with the Operation. The Board further granted a request of the Planning Commission for more time to respond to the motion to alter, which pertains to the Board's decision that the Petitioner is required to prove a pre-existing rate of extraction, and deferred decision on that motion.

On October 19, 1993, the Pianning Commission filed a response to the motion to alter. On October 22, the Petitioner filed a memorandum in reply to the Planning Commission. The Board deliberated on October 29.

II. DECISION

The Petitioner moves that the Board alter its conclusion that the Petitioner must prove a pre-existing rate of extraction in order to meet its burden to prove the Operation is exempt as a pre-existing development. The Petitioner argues

that the Board has not previously required such proof as part of proving entitlement to the exemption. The Petitioner further argues, among other things, that placing such a burden on gravel pit owners and operators is unfair because Act 250 was passed in 1970 and the passage of time has made finding evidence on pre-existing rates difficult.

The Board acknowledges that it has not previously stated that proof of a pre-existing rate is required in order to show that a gravel pit is exempt as a pre-existing development. In fact, the Board is not aware of any other case in which it or the Supreme Court has addressed this precise question.

Having reviewed the motion to alter, the Board continues to believe that its conclusion that such proof is required is a reasonable and fair interpretation of the terms "development," "pre-existing development," and "construction of improvements" as those terms are set out and defined in statute and rule. See 10 V.S.A. §§ 6001(3), 6081(b); Board Rules 2(D), 2(O) and defined. The Board refers parties to its discussion of this interpretation on page nine of its July 28 declaratory ruling.

Further, as delineated in the July 28 ruling. the Board previously has stated that gravel pit owners and operators bear the burden to produce information concerning whether a substantial change has occurred. Re: Chamulain Construction Co., Declaratory Ruling Request #214, Memorandum of Decision at 2-4 (Oct. 2, 1990). Such production would necessarily involve establishing a pre-existing rate of extraction. Thus, under the Board's precedents, it is already incumbent on a gravel pit owner and operator to come forward with information on extraction rates prior to 1970.

With respect to the question of fairness, the Board agrees that in some cases it may be difficult, because of the passage of time, to establish a pre-existing rate of extraction. Tbe Board therefore stresses a point already made in the July 28 ruling on page nine:

> *Proof of a pre-existing annual extraction rate does not have to be from documentary evidence* such *as the business records of the owner or operator. While* such *records are preferable and are the most credible, testimony of credible witnesses and records obtained from purchasers may be used. The* Board cannot state that such evidence will always be persuasive, but that depends on the particular evidence.

(Emphasis added.)

In addition, the Board believes that the passage of the 23 years since Act 250 was passed does not necessarily militate in favor of the gravel pit owner or operator seeking to claim an exemption. Given that Act 250 has been around that long, it is likely that a gravel pit owner or operator would be aware of the importance of being able to prove exemption from the statute and of the need to keep documents that provide such proof.

Further, the Board understands that the purpose of "grandfathering" projects that were in existence as of June 1, 1970 was to avoid the unfairness of suddenly imposing a permit requirement on existing businesses. The force of such a purpose diminishes with the passage of time. Specifically, the existence and possible applicability of Act 250 should not be a surprise to anyone involved in commerce in Vermont, since Act 250 has been in effect for over 23 years.

Finally, the issue of proving a pre-existing extraction rate raises a question of who should the bear the burden in situations where the gravel pit owner or operator has not kept records. The Petitioner is arguing, in essence, that the public should bear the burden if such an owner or operator does not keep records. This is because, under the Petitioner's argument, such an owner or operator would be free to operate without obtaining an Act 250 permit at any rate the owner or operator chooses, as long as he or she can show that the gravel pit otherwise qualifies as a pre-existing development.

Such a situation could result in significant impact to the resources protected by the Act 250 criteria at 10 V.S.A. § 6086(a) and therefore would be contrary to the stated purpose of the Act, which is:

> [T]o regulate and control the utilization and usages of lands and the environment to insure that, hereafter, the only usages which will be permitted are not unduly detrimental to the environment, will promote the general welfare through orderly growth and development and are suitable to the demands and needs of the people of this state

1969 Vt. Laws No. 250 § 1 (Adj. Sess.). The Board believes that it would be unfair and contrary to the statutory purpose to make the public bear the burden, in the form of unregulated and possibly significant environmental impacts, of the failure of a gravel pit owner or operator to keep records. Instead, the Board concludes that the owner or operator should bear that burden.

Based on the foregoing, the Board will deny the Petitioner's motion and set this matter for further hearing in accordance with its July 28 ruling and September 22 memorandum of decision.

III. ORDER

1. The Petitioner's motion to alter is denied.

2. In accordance with the Board's September 22 memorandum of decision, the Petitioner may, within 21 days of the date of today's decision, file credible evidence in the form of prefiled testimony and exhibits, and lists of witnesses and exhibits,. and may move to re-open the hearing. Such testimony, exhibits, and hearing shall be limited to: (a) the Operation% pre-1970 annual extraction rate, and annual extraction rate after 1970, and (b) the use of trucks larger than seven-cubic yard single axle trucks in connection with the Operation, both before and after June 1, 1970.

3. As stated in the Board's prior orders in this matter, if the Petitioner does not make the above-mentioned filing within the time prescribed, paragraphs two-and three of the Board's order of July 28, 1993 will become final. In addition, should the above-mentioned filing not be made within the time prescribed, the stay granted in paragraph three of the Board's order of September 22. 1993 'shall be dissolved.

4. If the Petitioner makes the above-mentioned filing, then parties may, on or before February 23, 1994, file rebuttal testimony and lists of rebuttal witnesses and exhibits.

5. If the Petitioner makes the above-mentioned filing, the Board will convene a further hearing in this matter on Wednesday; March 23, 1994, time and location to be announced.

Dated at Montpelier, Vermont this 2nd day of December, 1993.

ENVIRONMENTAL BOARD

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