VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§6001-6092

Re: Vermont Verde Antique International, Inc.
Declaratory Ruling Request #387

DISMISSAL ORDER

Vermont Verde Antique International, Inc. ("Petitioner") has requested a declaratory ruling, pursuant to 10 V.S.A. § 6007(c), Environmental Board Rule ("EBR") 3(D), and 3 V.S.A. § 808, on whether an Act 250 permit is required for the quarry it operates on Quarry Hills Road in the Town of Rochester, Vermont ("Project"). As set forth below, this matter is dismissed pursuant to EBR 18(D) for Petitioner's failure to meet its burden of producing evidence.

I. FINDINGS OF FACT

Based upon a review of the Record, the Board finds the following facts:

1. On February 11, 2000, District #2 Environmental Commission Assistant Coordinator Patrick M. Dakin ("Coordinator") issued Jurisdictional Opinion #3-74 ("JO") in which he determined that the Project requires an Act 250 permit because it is a pre-existing development that has undergone a substantial change.

2. On May 12, 2000, the District #3 Environmental Commission Coordinator Julia Schmitz denied Petitioner's request for reconsideration of the JO.

3. On June 8, 2000, Petitioner filed a petition for a Declaratory Ruling ("Petition") with the Vermont Environmental Board ("Board") pursuant to 10 V.S.A. §6007(c) and EBR 3, appealing the JO and contending that there has been no substantial change to Petitioner's pre-existing development.

4. On July 11, 2000, Board Chair Marcy Harding convened a prehearing conference and, on July 13, 2000, issued a Prehearing Conference Report and Order ("PHCRO"). Among other things, the PHCRO suggested that the Board would rely on the Coordinator's findings because it did not appear that the extraction rates were being contested on appeal.

5. On July 18, 2000, Petitioner filed objections to the PHCRO, and the matter was referred to the full Board. Among other things, Petitioner objected that it had not waived its right to an evidentiary hearing, thereby rejecting the suggestion in the PHCRO that the Board rely on the Coordinator's findings.

6. On September 6, 2000, the Board deliberated.

7. On September 15, 2000, the Board issued a Memorandum of Decision ("Memorandum of Decision I"), noting that Petitioner's right to an evidentiary

hearing and Petitioner's constitutional objections are not waived, denying all other objections, and ordering Chair Harding to issue a scheduling order setting a hearing date.

8. Chair Harding issued a Scheduling Order on October 12, 2000 ("Scheduling Order"), setting the matter for hearing on January 24, 2001, setting a second prehearing conference for January 22, 2001, and requiring, in relevant part, that prefiled direct testimony, exhibits, lists of witnesses and lists of exhibits, be filed on or before November 7, 2000.

9. The Scheduling Order also required that Petitioner file proposed findings of fact and conclusions of law ("Proposed Findings and Conclusions") by December 12, 2000.

10. The Scheduling Order further provides that:

> 9. **No individual may be called as a witness in this matter if he or she has not been identified in a witness list filed in compliance with this Order and if pre-filed testimony for such witness has not been filed in compliance with this Order.**
>
> 10. **No exhibit may be offered as evidence to the Board if it has not been identified in an exhibit list filed in compliance with this Order and if the exhibit has not been pre-filed in compliance with this Order.**
>
> Scheduling Order at 2 (Oct. 12, 2000)(emphasis in original).

11. On December 13, 2000, counsel for Petitioner filed a written request for leave to file Proposed Findings and Conclusions out of time.

12. Petitioner filed Proposed Findings and Conclusions, and a supporting memorandum of law, on December 15, 2000.

13. On January 3, 2001, the Board issued a Memorandum of Decision canceling the evidentiary hearing and second prehearing conference, and setting the matter for oral argument on the issue of dismissal ("Memorandum of Decision II"). The Memorandum of Decision II also granted Petitioner's request for leave to file Proposed Findings and Conclusions out of time.

14. The Board heard oral argument on January 24, 2001. Petitioner was represented by John Hansen, Esq. At the conclusion of oral argument, the Board commenced deliberations.

15. Petitioner has submitted no evidence in this proceeding to date, as required by the Scheduling Order.

II. CONCLUSIONS OF LAW

A. Introduction

Act 250 contains a grandfather clause, which exempts certain, "pre-existing" developments commenced prior to June 1, 1970. 10 V.S.A. § 6081(b). However, this exemption does not apply to any "substantial change" in the pre-existing development. *Id.*

There is no dispute that the Project is a pre-existing development. What Petitioner contests in this declaratory ruling proceeding is the determination in the JO that there has been a substantial change to the Project such that Petitioner must obtain an Act 250 permit under 10 V.S.A. § 6081(b). Petitioner, the only party participating in this proceeding, has produced no evidence from which the Board could determine jurisdiction *de novo*. Instead, Petitioner argues that it does not bear the burden of producing evidence of the quarry's pre-1970 and post-1970 extraction rates. As discussed below, the Board rejects Petitioner's arguments and dismisses the Petition.

B. Law of the Case

In a previous Memorandum of Decision, the Board ruled that Petitioner bears the burden of producing evidence on the substantial change issue. Memorandum of Decision I, at 2-4. This previous ruling constitutes the law of this case. The law of the case doctrine holds that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Morriseau v. Fayette*, 164 Vt. 358, 364, 670 A.2d 820, 824 (1995)(quoting *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816, 108 S.Ct. 2166, 2177, 100 L.Ed.2d 811 (1988)). The Vermont Supreme Court has noted that the doctrine is a rule of practice from which an adjudicator may depart "in a proper case." *Morriseau*, 164 Vt. at 364, 670 A.2d at 824 (quoting *State v. Cain*, 126 Vt. 463, 469-70, 236 A.2d 501, 505 (1967), and citing *Converse v. Town of Charleston*, 158 Vt. 166, 169, 605 A.2d 535, 537 (1992), and *Perkins v. Vermont Hydro-Electric Corp*., 106 Vt. 367, 415, 177 A. 631, 653 (1934)); *see also, Coty v.*

Ramsey Associates, Inc., 154 Vt. 168, 171 (1990)("if all questions are to be regarded as still open for discussion and revision in the same cause, there would be no end to the litigation until the ability of the parties or the ingenuity of their counsel were exhausted"). As set forth below, the Board sees no reason to depart from its prior ruling that Petitioner bears the burden of producing evidence of pre-1970 and post-1970 extraction rates.

C. Discussion

The party claiming that a development is exempt as pre-existing bears both the burdens of production[1] and persuasion on that point,[2] and the party claiming that a permit is required generally bears the burden of proving that a substantial change has occurred.[3] Where the development in question is a quarry, however, the party claiming that the quarry is exempt as pre-existing also has the burden to produce sufficient evidence concerning the scope of the pre-1970 operation and the post-1970 operation for the Board to determine whether a substantial change has occurred.[4] This is consistent with the principle that the party with access to the

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[1] The burden of production is the burden of going forward with evidence. *See, Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267, 272-274 (1994)(discussing burden of production and burden of persuasion).

[2] *Re: Thomas Howrigan Gravel Extraction*, Declaratory Ruling #358, Findings, Conclusions and Order at 9 (Aug. 30, 1999)(citing *Champlain Construction Co.*, Declaratory Ruling #214, Memorandum of Decision at 2-4 (Oct. 2, 1990)).

[3] *Howrigan* , *supra*, at 14 (the burden of persuasion with respect to substantial change lies with those who contend that a permit is required).

[4] *Howrigan, supra*, at 9; *see also*, *Re: John Gross Sand and Gravel*, Declaratory Ruling #280, at 3-4 (Dec. 2, 1993). The Board has considered this burden of producing evidence of substantial change as part of the burden of proving that the quarry is exempt as a pre-existing development. *See, Gross, supra*, at 3-4. Generally, a party seeking the benefit of a statutory exemption, such as Act 250's grandfather clause for pre-existing developments, should bear the burden of proving that it applies. *See also, United States v. First City National Bank of Houston*, 386 U.S. 361, 366 (1967)(citing general rule that the party who seeks the benefit of a statutory exemption must prove that the exemption applies); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 188 n.20 (1985)(White, J., dissenting)(citing *First City*

information should bear the burden of producing it. *See, Green Tree Financial Corp. v. Randolph*, 121 S.Ct. 513, 524-525 (Ginsburg, J., dissenting)(citing *Raleigh v. Illinois Department of Revenue*, 120 S.Ct. 1951, 1955 (2000)(rule placing burden of proof on taxpayer reflects several compelling rationales, including the taxpayer's readier access to relevant information); 9 J. Wigmore, Evidence § 2486 (J. Chadbourn rev. ed. 1981)(where fairness so requires, burden of proof may be assigned to party with peculiar means of knowledge)). In this case, Petitioner is the only party with access to the evidence of its extraction rates.

More important, the Board has ruled that allowing a quarry to avoid Act 250 jurisdiction by not keeping and producing records on extraction rates would be contrary to the stated purpose of Act 250, 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 . . . .

Gross, supra, at 4 (quoting 1969 Vt. Laws No. 250 §1 (Adj. Sess.), codified at 10 V.S.A. Ch. 151, *History, Findings and Declaration of Intent*)). In *Gross*, the Board held 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." *Gross, supra*, at 4. In this case, it would be unfair and contrary to the purpose of Act 250 to make the public bear the unregulated and possibly significant environmental impacts of the failure of a quarry owner or operator to produce records of extraction rates. Unless the burden of production on substantial change is placed on the quarry owner or operator, "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 it could prove it was a pre-existing operation. *Gross, supra*, at 4.

Also, the need for Act 250's exemption for pre-existing development, "to avoid the unfairness of suddenly imposing a permit requirement on existing businesses," diminishes over time. *Gross*, *supra,* at 4. Act 250 has been in force for more than thirty years, so Petitioner cannot claim unfair surprise.

National Bank of Houston, *supra*, and 2A C. Sands, Sutherland on Statutory Construction § 47.11, p.90 (4th ed. 1973)), *reh'g denied*, 470 U.S. 1065.

Petitioner cites *Re: Joseph Gagnon*, Declaratory Ruling #173, Memorandum of Decision (Jul. 3, 1986), and several other cases in which *Gagnon* was cited,[5] in support of its argument on burden of production. (*See* Petitioner's Memorandum of Law, at 3-5.) In *Gagnon*, adjoining landowners claimed that operations at a sawmill constituted a substantial change in a pre-existing development. The Board cited the general principle that the person seeking to change the status quo bears the burdens of proof and production, and assigned these burdens to the neighboring landowners for that reason. *Gagnon*, *supra*, at 5 (citing McCormick, *Evidence* 949).

As Petitioner points out, the Board has cited *Gagnon* in several other cases, including *Re: L.W. Haynes, Inc.*, Declaratory Ruling #192, Findings, Conclusions and Order (Sept. 25, 1987)("*Haynes*"), *aff'd In re Haynes*, 150 Vt. 572 (1988). *Haynes*, the only case Petitioner cites which involves a pre-existing quarry, does

[5] Petitioner notes, without discussion, that the rule from *Gagnon* has been cited by the Board in other declaratory rulings, including *Re: Town of Williston Improvements*, Declaratory Ruling #381, Findings, Conclusions and Order at 3 (Jan. 13, 2000)(petitioners who sought to change status quo that project was not subject to Act 250 jurisdiction bore burdens of production and persuasion); *Re: Hiddenwood Subdivision*, Declaratory Ruling #378, Findings, Conclusions and Order at 5 (Jan. 12,1 2000)(subdivision residents who claimed that road extension triggered Act 250 jurisdiction bore burden of proof), and in other appeals: *Re: McDonald's Corporation*, #1R0477-5-EB, Findings, Conclusions and Order, at 14 (Dec. 7, 2000)(citing general rule that party seeking to change status quo bears the burden of proof, in case involving an application to amend a permit to allow cosmetic alterations to a restaurant); *Re: Roger and Beverly Potwin*, #3W0587-3-EB, Findings, Conclusions and Order at 7 (Feb. 17, 2000)(citing general rule that parties seeking to change present state of affairs generally bear burden of proof, so applicants bear burden of proving entitlement to permit amendment); *Re: Ronald L. Saldi, Sr.*, #5R0891-16-EB, Findings, Conclusions and Order at 10 (Jan. 13, 2000)(citing general rule that party seeking permit amendment bears burden of proof where applicant sought to convert lots from commercial to residential use); *Re: MBL Associates, LLC*, #4C0948-3-EB, Findings, Conclusions and Order at 11 (Oct. 20, 1999)(citing general rule that party seeking to change the status quo has the burden of proof, in case involving request to amend permit condition requiring perpetual affordability of housing in development); *Re: Bernard Carrier*, #7R0639-1-EB, Memorandum of Decision at 17 (Aug. 24, 1999)(citing general rule that party seeking to change status quo bears burden of proof, in case involving request to amend permit to allow subdivision of undeveloped land). None of these cases involves a pre-existing quarry operation, which would warrant application of a more specific rule.

not support Petitioner's argument because the Board did not reach the burden issue in that case. In *Haynes*, neighboring landowners claimed that increased extraction at a gravel pit constituted a substantial change. The district coordinator's decision found Act 250 jurisdiction, and the gravel pit owner appealed, claiming that there was no Act 250 jurisdiction. The Board noted that there is "no presumption that a substantial change either has or has not occurred," and cited the general rule that the person seeking to alter the status quo carries the burden of production. *Haynes*, at 6 (citing McCormick, Evidence 949). The Board found, however, that "the evidence before us, no matter who provided such evidence, clearly indicates that a 'substantial change' has occurred." *Haynes*, at 6. Thus, burden of production was not at issue in *Haynes* and that case does not apply here.

Petitioner argues that it should not bear the burden of production because there is no party opponent to bear the burden of persuasion on substantial change. However, the lack of a party opponent to bear the burden of persuasion cannot relieve Petitioner of its burden of production. *See*, *In re Quechee Lakes Corporation*, 154 Vt. 543, 553 (1990)("The fact that a party has the burden of proof [persuasion] does not mean that he must necessarily shoulder it alone; it simply means that he, and not the other party, bears the risk of nonpersuasion.").

As the Board stated in *Gagnon*:

> In many Declaratory Ruling cases which come before the Environmental Board, there is no "opponent." In these cases, the Board must make its judgment based solely upon the evidence presented by the petitioner and upon the Board's own inquiry.

Gagnon, *supra*, at 5. Petitioner cannot rely on other parties to carry the burden of production, particularly where strong policy reasons support placement of this burden upon the quarry owner or operator. Moreover, there is no reason for the Board to carry Petitioner's burden when Petitioner refuses to do so. Furthermore, there is no presumption that a substantial change has or has not occurred to a pre-existing development, so Petitioner can rely on no presumption to preserve its pre-existing status. *Re: Lake Champagne Campground*, Declaratory Ruling Request #377, Chair's Preliminary Ruling, at 4 (Feb. 2, 2000); *Haynes*, *supra,* at 6.

The general rule remains that the person seeking to change the status quo bears the burden of proof. However, special considerations have led the Board to modify this general rule in cases involving pre-existing quarries, as discussed above. *Gagnon* and its progeny have been modified by *Gross* and *Howrigan*,

insofar as these more recent decisions hold that the quarry owner or operator bears the burden of production of sufficient evidence of pre-1970 and post-1970 extraction rates for the Board to determine the issue of substantial change. The quarry owner or operator must produce this evidence, regardless of whether another party is participating in the proceeding.

D. Dismissal

EBR 18(D) authorizes the Board to dismiss a matter *sua sponte* for reasons consistent with the rules, statute or law. The Scheduling Order requires Petitioner to submit prefiled testimony and lists of exhibits and witnesses by November 7, 2000. It also precludes Petitioner from calling witnesses or submitting exhibits not identified in prefiled lists, and from submitting testimony that was not prefiled by November 7, 2000. Therefore, by failing to submit prefiled testimony and lists of exhibits and witnesses Petitioner is precluded from presenting any evidence in this matter.[6] Because Petitioner bears the burden of production on the scope of the Project's pre-1970 operation and its post-1970 operation, the Petition fails as a matter of law.

The Board has dismissed appeals for failure to file prefiled testimony in the past. For instance, in *Re: Bernard and Suzanne Carrier*, #7R0639-EB, Memorandum of Decision and Order Dismissing Appeal (Jun. 22, 1987), the Board noted that it "is within the authority of the Chairman and the Board to impose reasonable requirements on the parties, including the submission of prefiled testimony, in order to ensure that the proceedings will be conducted in a judicious, fair and expeditious manner." *Id.* at 2 (dismissing appeal for failure to file prefiled testimony, and citing EBR 18(D)). The Board found that the use of prefiled

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[6] Although there appears to be no dispute concerning Petitioner's extraction rates, Petitioner has declined to allow the Board to consider the evidence Petitioner submitted to the Coordinator on pre-1970 and post-1970 extraction rates. Because declaratory ruling proceedings are heard *de novo*, the Board cannot consider evidence from the proceedings below unless submitted or requested by a party. *See, generally, In re Petition of D.A.* Associates, 150 Vt. 18, 19 (1988)(citing *In re State Aid Highway No. 1, Peru, Vermont*, 133 Vt. 4, 7 (1974) and cited in *Re: State of Vermont Agency of Transportation (Williston Area Improvements)*, Declaratory Ruling #311, Findings, Conclusions and Dismissal Order at 8 (Jan. 31, 1996); *see also* 10 V.S.A. § 6007(c); 3 V.S.A. § 808; EBR 3(D); PHCRO, at 4. Therefore, evidence of Petitioner's pre-1970 and post-1970 extraction rates is not before the Board.

testimony not only helps "reduce the amount of hearing time required for the presentation of direct testimony, but it allows the parties and the Board members to prepare their cross-examination and questions for the witnesses," and "assists the entire Act 250 process by reducing delay in hearing other appeals." *Carrier*, at 2.

This is not a case in which dismissal would thwart the goals of Act 250. *See, e.g., Re: Jeffrey and Anna Hutchins*, Declaratory Ruling #384, Dismissal Order at 1 (Jun. 29, 2000)(allowing withdrawal of petition where public interest will not be harmed because JO finding jurisdiction would become final). In such a case, independent Board inquiry might be warranted.[7] Here, the Coordinator determined that a substantial change has occurred and, despite ample notice and opportunity, Petitioner has refused to submit any evidence that would allow the Board to decide otherwise. While it would be preferable to resolve this case on its merits, the Board cannot do so without evidence.

Accordingly, the Petition is dismissed.

III. ORDER

The Petition is dismissed with prejudice.

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Dated at Montpelier, Vermont this 2nd day of February 2001.

ENVIRONMENTAL BOARD

__/s/Marcy Harding_____
Marcy Harding, Chair
John Drake
George Holland *
Samuel Lloyd
W. William Martinez **
Alice Olenick
Donald Sargent

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[7] *See, Re: Vermont Agency of Transportation (Rock Ledges)*, Declaratory Ruling #296 (Third Revision)(Mar. 28, 1997)(Board may compel submission of additional evidence needed to determine whether changes to a pre-existing development are substantial). Even if the Board were inclined to carry Petitioner's burden of production, counsel for Petitioner stated in oral argument that Petitioner would object to any effort by the Board to obtain evidence by subpoena.

* CONCURRING IN PART, ABSTAINING IN PART: Board member George Holland concurs that it would be preferable to decide this case on its merits, and abstains from the rest of this decision.

** ABSTAINING: Board member W. William Martinez abstains from this decision.

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