

TOWN OF DUMMERSTON
1523 Middle Road
East Dummerston, Vermont 05346

Development Review Board
Appeal of Permit Requirement
Findings and Decision

In re: Appeal No. 3373 of Zoning Administrator Decision requiring Allard Lumber to receive a permit for a continuing gravel extraction operation at 354 Old Ferry Road

Permit Application No. 3373

INTRODUCTION AND PROCEDURAL HISTORY

1. This proceeding involved an appeal of the Zoning Administrator's decision requiring Allard Lumber to have a Site Plan Review and Conditional Use Permit for the continued use of a Gravel Operation.
2. The Original application for a permit was submitted by Bill Jewel on behalf of Allard Lumber and received by the Zoning Administrator (ZA) on September 15, 2014 following the ZA's letter dated August 21, 2014. (See Exhibit 1)
3. On September 3, 2014, prior to the application for permit being submitted, Robin Stern of Potter Stewart, Jr Law offices submitted a letter to the ZA stating Allard's intent to appeal the ZA's decision to require a permit.
4. On October 3, 2014 the appeal was submitted by Richard Holden on behalf of Allard Lumber.
3. On October 4, 2014 notice of a public hearing was published in the Brattleboro Reformer.
4. On October 4, 2014, notice of a public hearing was posted at the following places:
 - a. The municipal clerk's office.
 - b. Dummerston School
 - c. West Dummerston Post Office
5. Posting Notice Dated October 6, 2014 and list of written Notice is on file at the Dummerston Town Office. (Exhibit 6)

6. The appeal was considered by the development review board at a public hearing on October 22, 2014.
7. Present at the hearing were the following members of the development review board:
 - Hugh Worden (Chair)
 - Alan McBean
 - Patty Walior
 - Beverly Kenney
8. At the outset of the hearing, the development review board afforded those persons wishing to achieve status as an interested person an opportunity under 24 V.S.A. § 4465(b) to demonstrate that the criteria set forth in that statute could be met. A record of the name and address of persons wishing status as an interested person and a record of their participation at the hearing is attached. (Exhibit 7)
9. During the course of the hearing, the following exhibits were submitted to the development review board:
 - Two aerial maps (1, and 2 of 3) dated 1962 (Exhibit 8)
 - One aerial map (3 of 3) dated 1974 (Exhibit 8)

Exhibits are available at: Dummerston Town Office.

FINDINGS

Based on the appeal, testimony, exhibits, and other evidence the development review board makes the following findings:

1. The applicant seeks to appeal the Zoning Administrators decision to require a permit for a continuing Gravel Operation. The appeal was forwarded to the Development Review Board for consideration.
2. The property is located in the Rural Commercial District as described on the Town of Dummerston Zoning Map on record at the Town municipal office and section 225 of the Zoning Bylaw.
3. The DRB recognizes that under 24 V.S.A § 4465 (Appeals of decisions of the administrative officer) the applicant has the right to appeal the permit requirement.
6. The Allard gravel operation was recently required by the Agency of Natural Resources to obtain an Act 250 permit to continue its commercial operation. Based on this requirement the ZA informed Bill Jewel, agent for Allard, that a Town permit would be required due to an expansion of the gravel operation referencing section

241, 245, 246, 660, 720-727 of the Town Zoning By-laws. The ZA has no record of previous permits or applications for a gravel operation as proposed in their Act 250 permit, so concluded a possible expansion of a preexisting non-conforming use was intended. The burden of proving that gravel extraction has been ongoing since pre-zoning was the responsibility of Allard Lumber. (Exhibit 9)

7. The testimony of Robin Stern indicated that the requirement for an Act 250 permit was in fact not needed but the cost to fight the requirement would be too great. Based on review she concluded and advised Allard that nowhere in the Dummerston bylaws is there a requirement to get a permit for the continuous use of the existing gravel operation. She testifies that the only time the operation has stopped was during the ACT 250 process. Further that the nature of the gravel extraction is dependent on the demands so extraction rate will not be at a consistent amount at all times. Additionally, it is implied that the operation will continue within a property as long as the resources are available for extraction.
8. The Act 250 specifically states that there has been a substantial change to a continuing gravel operation. The DRB feels this cannot be interpreted as an expansion.
9. Bill Jewel presented several maps (exhibit 8) that show the gravel operation during the 1960's and 1970's. There also records of gravel extraction leases during the 1950's. Dick Holden who has been working at Allard for 28 years testifies that the gravel operation has been continuous.
10. Additional testimony, though not directly related to the appeal, indicates that the restrictions to extraction, blasting, crushing, hauling, and reclamation contained in the ACT 250 are in line with the type of requirements the Town has placed on permitted gravel operations.
11. The DRB finds that the only way to show an expansion of a preexisting non-conforming use under section 255 would be by a change in the extraction rate. No testimony or other evidence indicates this to be the case. The only way to show an alteration would be if our bylaws differentiated between sand, gravel, and quarry operations, which they do not. Testimony states there has been continuous operation since pre-zoning.

DECISION

Based upon these findings the development review board unanimously upholds the appeal as submitted.

The continued operation as proposed does not trigger any changes to the preexisting non-conforming use, Section 255, due to continuous previous use. The Zoning By-Laws do

not provide the detail to prove an alteration of use. Therefore no permit is required at this time.

Dated at Dummerston, Vermont, this 4th day of November 2014.

Hugh Worden, Chair
For the Board

Alan McBean
Beverly Kenney
Patty Walior

Exhibits:

1. Charlotte's letter dated 8/14/14
2. Letter from Robin Stern dated 9/3/14
3. DRB notice of Appeal
4. Letter from Charlotte to Bill 9/23/14
5. Notice of Public Hearing
6. Posting Notice/Written Notice list
7. Interested persons
8. 3 Maps
9. Email from Charlotte to Bill.

NOTICE: This decision may be appealed to the Vermont Environmental Court by an interested person who participated in the proceeding(s) before the [planning commission/zoning board of adjustment/development review board]. Such appeal must be taken within 30 days of the date of this decision, pursuant to 24 V.S.A. § 4471 and Rule 5(b) of the Vermont Rules for Environmental Court Proceedings.