

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 11-1-11 Vtec

Land Use Panel of the
Natural Resources Board,
Petitioner,

ASSURANCE OF DISCONTINUANCE

v.

Hazel Mohan and Markowski Excavating, Inc.,
Respondents.

VIOLATION

Commencement of development without a Land Use Permit. 10 V.S.A. § 6081(a).

ASSURANCE OF DISCONTINUANCE

Pursuant to the provisions of 10 V.S.A. § 8007, the Land Use Panel of the Natural Resources Board (Panel) and Hazel Mohan and Markowski Excavating, Inc. (Respondents) hereby enter into this Assurance of Discontinuance (Assurance), and stipulate and agree as follows:

STATEMENT OF FACTS AND DESCRIPTION OF VIOLATIONS

1. Respondent Hazel Mohan owns an approximately 113 acre parcel located off of Blackberry Lane in the Town of Brandon, Vermont (the "Project Tract").
2. There is a currently a commercial gravel and sand extraction and processing operation on the Project Tract which has been in existence on the site since approximately 1944.
3. The Project Tract is leased to Sundown Sand and Gravel, Inc., which in turn subleases it to Markowski Excavating, Inc., a Vermont corporation with its principal place of business in Florence, Vermont. Markowski Excavating, Inc. took over operations of the gravel and sand extraction operation in 2001.
4. Approximately 96,000 cubic yards of material were extracted from the Project Tract in 2006, 86,000 cubic yards in 2008 and 52,000 cubic yards in 2010. There are no detailed extraction records memorializing pre-1970 extraction rates.

Assurance of Discontinuance

Land Use Panel, Natural Resources Board v. Hazel Mohan and Markowski Excavating, Inc.

Page 2 of 7

5. The gravel and sand extraction operation presently includes the use of crushers on the site; crushers and related equipment have been regularly used at the Project Tract since 2001 and were used periodically prior to that time. Screeners and wash stations have always been used at the Project Tract. The use of the crushers is a substantial change.

6. No 10 V.S.A. Ch. 151 Land Use Permit (Act 250) has been obtained for the gravel and sand extraction and processing operation on the project tract.

7. Respondents have commenced development at the project tract without a Land Use Permit in violation of 10 V.S.A. § 6081(a).

AGREEMENT

Based on the aforementioned Statement of Facts and Description of Violations, the parties hereby agree as follows:

A. No later than 30 days following the entry of this Assurance as an Order by the Superior Court, Environmental Division, the Respondents shall pay the following:

1. pursuant to 10 V.S.A. Ch. 201, a civil penalty in the amount of **Six Thousand Five Hundred (\$6500.00) Dollars (U.S.)**, for the violations noted herein, by check made payable to the "Treasurer, State of Vermont".

2. pursuant to 10 V.S.A. § 8010(e)(2), the amount of **Eighty (\$80.00) Dollars (U.S.)**, to reimburse the Natural Resources Board for the costs of this enforcement action, by check made payable to the "Treasurer, State of Vermont".

3. the amount of **Ten (\$10.00) Dollars (U.S.)**, for the purpose of paying the recording fee for the filing of a notice of this Assurance in the Town of Brandon land records, by check made payable to the "Town of Brandon."

All payments shall be by check sent to:

Denise Wheeler, Business Manager
Land Use Panel of the Natural Resources Board
National Life Records Center Building
National Life Drive
Montpelier, Vermont 05620-3201

Assurance of Discontinuance

Land Use Panel, Natural Resources Board v. Hazel Mohan and Markowski Excavating, Inc.

Page 3 of 7

- B. On or before July 1, 2011, the Respondents shall apply for and diligently pursue an Act 250 Permit for the sand and gravel extraction and processing operation at the Project Tract (the "Project").

"Diligently pursue" shall mean that Respondents shall (a) respond to any and all requests for information from the Commission, or the Coordinator for the Commission, or other state or local agency by the date set by the Commission or Coordinator or agency; and (b) in good faith meet the above schedule and comply with all scheduling or other orders or memoranda issued by the Commission or other state or local agency. Respondents shall not be responsible for delays outside their control, including those caused by the Commission or state or local agency or by any other parties to its application(s) and the Panel shall consider reasonable requests for extension of the foregoing deadline upon request of Respondents.

Should Respondents fail to diligently pursue said application(s), the Panel may issue an order requiring Respondents to cease all operations.

Provided that no imminent threat of significant environmental harm develops, Respondents may continue to operate the Project within the following restrictions pending receipt of the Act 250 permit,

Extraction Rate: Up to 7000 cu. yards of extracted sand and gravel product per month.

Hours/Days of Operation: Monday - Friday 7:00 AM – 5:00 PM; Sat 7:00 AM to noon; closed Sundays and holidays

Trucks. No trucks larger than triaxle dump trucks owned by the operator, municipalities, the State of Vermont or private contractors, excluding occasional service trucks. All haul trucks shall use the truck route prescribed by the Town of Brandon and shall observe VTrans or Town of Brandon weight limits.

On-site Equipment:

Primary Crusher: Used intermittently between 7:00 AM and 5:00 PM.

Secondary Crusher: Used intermittently between 7:00 AM and 5:00 PM.

Hydraulic Rock Hammer: Used intermittently between 7:00 AM and 5:00 PM.

Diesel Generator : Used during regular business hours

Screeners and Conveyor System/Wash Station: On site at all times, used between 7:00 AM and 5:00.

3 Loaders

1 Excavator

1 Bulldozer

2- 3 Haul Trucks to move material to screen plant and crushers on site

- C. The operational restrictions in Paragraph B of this Assurance are for purposes of interim operation under this Assurance of Discontinuance and are not intended to reflect maximum historic or maximum permissible levels of extraction or operation at the Project Tract. It is specifically understood that Respondents may apply for a greater extraction rate and higher or different operational parameters as part of its initial Act 250 application or any subsequent amendment. Respondent understands that the District Commission may impose a lower extraction rate and different operational restrictions and that this Assurance of Discontinuance shall not be allowed as evidence of an appropriate extraction rate or operational restrictions before the District Commission or any appellate body. Further, Respondents agree that the extraction rate and operational restrictions herein reflect the acceptance of an offer to compromise.

Should the District Commission deny the permit application all of the operating allowances in Paragraph B shall terminate, and Respondents shall immediately cease operations upon the issuance of a denial by the Commission.

- D. Any payment by the Respondents pursuant to this Assurance is made to resolve the violations set forth in this Assurance and shall not be considered to be a charitable contribution, business expense, or other deductible expense under the federal or state tax codes. See Internal Revenue Code §162(f); Treasury Regulation §1.162-21. Respondents shall not deduct, nor attempt to deduct, any payments, penalties, contributions or other expenditures required by this Assurance from Respondents' state or federal taxes.
- E. The State of Vermont and the Land Use Panel reserve continuing jurisdiction to ensure future compliance with all statutes, rules, and regulations applicable to the facts and violations set forth herein above.
- F. Nothing in this Assurance shall be construed as having relieved, modified, waived or otherwise affected the Respondents' continuing obligation to comply with all other applicable state or local statutes, regulations or directives applicable to the Respondent.
- G. This Assurance shall become effective only after it is signed by all parties and entered as an order of the Superior Court, Environmental Division. When so entered by the Superior Court, Environmental Division, this Assurance shall

Assurance of Discontinuance

Land Use Panel, Natural Resources Board v. Hazel Mohan and Markowski Excavating, Inc.

Page 5 of 7

become a judicial order pursuant to 10 V.S.A. § 8007(c). In the event that such order is vacated, the Assurance shall be null and void.

- H. Pursuant to 10 V.S.A. § 8007(d), the Respondents shall not be liable for additional civil or criminal penalties with respect to the specific facts described herein and about which the Land Use Panel has notice on the date the Court signs this Assurance, provided that the Respondents fully comply with the agreements set forth above.
- I. This Assurance sets forth the complete agreement of the parties, and it may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and incorporated in an order issued by the Superior Court, Environmental Division. Alleged representations not set forth in this Assurance, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall have no legal force or effect.
- J. Any violation of any agreement set forth herein will be deemed to be a violation of a judicial order and may result in the imposition of injunctive relief and/or penalties, including penalties set forth in 10 V.S.A. chapters 201 and/or 211.
- K. This Assurance is subject to the provisions of 10 V.S.A. § 8007.
- L. The Administrative Order in this matter, dated January 3, 2011, is dismissed.

SIGNATURES

The provisions set forth in this Assurance of Discontinuance are hereby agreed to and accepted.

Dated at Brandon VT 4-20-2011, Vermont, this 26 day of APRIL, 2011.

Hazel Mohan PS 13
For Hazel Mohan
Hazel Mohan

STATE OF VERMONT
COUNTY OF Rutland, ss.

BE IT REMEMBERED that on the 20th day of April, 2011, personally appeared Hazel Mohan signer of the foregoing instrument who is known to me or who satisfactorily established her identity to me and acknowledged the same to be her free act and deed.

Assurance of Discontinuance

Land Use Panel, Natural Resources Board v. Hazel Mohan and Markowski Excavating, Inc.

Page 6 of 7

Before me,

Melissa Case

Notary Public

My Commission Expires: 2/10/15

The provisions set forth in this Assurance of Discontinuance are hereby agreed to and accepted.

Dated at _____, Vermont, this _____ day of _____, 2011.

Markowski Excavating, Inc.

By: _____
Its duly authorized agent

STATE OF VERMONT
COUNTY OF _____, ss.

BE IT REMEMBERED that on the _____ day of _____, 2011, personally appeared _____, as the duly authorized agent of Markowski Excavating, Inc., signer and sealer of the foregoing instrument who is known to me or who satisfactorily established his identity to me and acknowledged the same to be the free act and deed of Markowski Excavating, Inc., and that he has the authority to contract on behalf of Markowski Excavating, Inc., and that he has been duly authorized to enter into the foregoing Assurance on behalf of that entity.

Before me,

Notary Public

My Commission Expires:

Assurance of Discontinuance

Land Use Panel, Natural Resources Board v. Hazel Mohan and Markowski Excavating, Inc.
Page 6 of 7

Before me,

Notary Public

My Commission Expires: 2/10/15

The provisions set forth in this Assurance of Discontinuance are hereby agreed to and accepted.

Dated at Florence, Vermont, this 15th day of April, 2011.

Markowski Excavating, Inc.

By: Gregory Markowski
Its duly authorized agent

STATE OF VERMONT
COUNTY OF Rutland, ss.

BE IT REMEMBERED that on the 15th day of April, 2011, personally appeared Gregory Markowski, as the duly authorized agent of Markowski Excavating, Inc., signer and sealer of the foregoing instrument who is known to me or who satisfactorily established his identity to me and acknowledged the same to be the free act and deed of Markowski Excavating, Inc., and that he has the authority to contract on behalf of Markowski Excavating, Inc., and that he has been duly authorized to enter into the foregoing Assurance on behalf of that entity.

Before me,

Tim Flood

Notary Public

My Commission Expires: 2/10/15

Assurance of Discontinuance


Land Use Panel, Natural Resources Board v. Hazel Mohan and Markowski Excavating, Inc.

Page 7 of 7

The provisions set forth in this Assurance of Discontinuance are hereby agreed to and accepted.

Dated in Montpelier, Vermont, this 26th day of April, 2011.

LAND USE PANEL
NATURAL RESOURCES BOARD

By: 
Ronald Shems., Chair