

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

CHAIR'S SECOND PRELIMINARY STAY ORDER

RE: McLean Enterprises Corporation

Land Use Permit
#2S1147-1-EB

This is an appeal of the District #8 Environmental Commission's (Commission)¹ grant of Land Use Permit #2S1147-1 (Permit) to McLean Enterprises Corporation (Permittee) authorizing the operation of two open face rock quarries; the construction of one mile of access road to Rt. 131; the construction of a 2,280 s.f. processing shop with a 0.75 acre storage yard, for up to 20 employees, on a 325 acre parcel (Project). This parcel is located between Rt. 131 and Tierney Road, west of Cavendish Village in the Town of Cavendish, Vermont.

I. PROCEDURAL HISTORY

On February 19, 2003, the Commission issued the Permit for the Project.

On April 21, 2003, the Commission issued a Memorandum of Decision on a Motion to Alter.

On May 1, 2003, Suzanne Meaney, Carol Behrman, Chis Kelly, Sean Fitzpatrick, Terrence O'Brien, Deborah Harrison, George Timko, Robin Timko, Howard W. Merritt, Jr. and Jean Stubelek (Appellants) filed an appeal and request for a preliminary and long term stay.

On May 2, 2003, the Chair issued a Chair's Preliminary Stay Order.

On May 6, 2003, the Permittee filed a Motion to Dissolve the Preliminary Stay.

On May 8, 2003, the Town of Cavendish submitted memoranda in support of the stay and the Appellants submitted a Motion in Opposition to Dissolving the Stay.

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District Environmental Commission #8 was assigned this application by the Board Chair due to the en bloc recusal by the DEC #2, precipitated by the participation in this case by DEC #2 staff who live in Cavendish.

On May 8, 2003, the Chair heard oral argument on the Permittee's motion to dissolve the stay.

II. DISCUSSION

Pursuant to Environmental Board Rule (EBR) 42(C), in determining whether to issue a stay, the Board may consider the hardship to the parties, the impact to the values sought to be protected by Act 250, and any effect upon the public health, safety, and welfare.

The May 2, 2003, Chair's Preliminary Stay Order was based solely on the filings from the Appellants. Pursuant to EBR 42, the Chair's Preliminary Stay expires after 30 days. The Chair invited other parties to file memoranda on the preliminary stay should they want the Chair to reconsider issuance of the preliminary stay before the Board deliberated on the long term stay on May 21, 2003.

As a result of the memoranda filed, the Chair scheduled oral argument on the Permittee's motion to dissolve the stay.² After considering the parties' memoranda and listening to the oral argument, the Chair finds that significant concerns about potential irreparable harm to the values protected by Act 250 remain. Of particular concern is the blasting and drilling for the road construction which may damage nearby homes, some of which are buildings of significant historic value. In one instance, the blasting and drilling will occur within 100 feet of a residence. It is not clear based on the parties' memoranda, oral argument and a review of the Commission's file whether the impacts from this blasting were fully considered by the Commission.

² At the oral argument, the Chair took official notice of the Commission's file in this matter.

The Chair also disclosed to the parties that in her prior capacity as executive director of the Springfield Economic Development Corporation she had a professional relationship with some of the individuals who serve on the local governing bodies of the Town of Cavendish and with the South Windsor County Regional Planning Commission. The Chair stated that she did not believe that her prior professional relationship would in any way interfere with her ability to hear this case in an impartial manner. No party present at the oral argument objected to the Chair's participation in this matter.

In addition, the Appellants and the Agency of Natural Resources (ANR) raised issues concerning potential irreparable aesthetic impacts of the Project road construction.³ The views of the hillside from Route 131 and the Black River are particularly scenic. In fact, Route 131 is designated as a scenic highway, and therefore, receives a higher level of aesthetic scrutiny. Even though the Commission considered the aesthetic impacts of the road construction, the Chair concludes that the potential impacts are significant enough that the stay should remain in place until they can be considered by the full Board.

The Chair is aware that this stay may cause the Permittee hardship due to a delay in construction. In an effort to minimize the hardship, the Board will conduct a site visit and hold a hearing on May 28, 2003 in order to determine whether the preliminary stay should be dissolved and whether to grant or deny the request for a long term stay. The Chair believes that the Board will be particularly interested in hearing testimony about the impacts from the blasting and drilling from the road construction on the nearby residences and the historic structures. This testimony could include modeling on the vulnerability of homes due to the proximity of the blasting and drilling or the type of construction, any engineering surveys of the homes within the area of impact, and the relevant hardships that parties may suffer should the Board issue or refuse to issue a stay in this matter.

III. ORDER

1. Permittee's Motion to Dissolve the Stay is denied in part and granted in part. Pursuant to EBR 42, the portion of Land Use Permit #2S1147-1 that authorizes blasting, drilling, and the cutting down of trees for the road construction is stayed. Permittee may undertake all other activities authorized in Land Use Permit #2S1147-1.
2. The Chair will convene a Board hearing on **Wednesday, May 28, 2003, at 9:00 a.m.** The specific location of the hearing will be announced later.

³ The Chair notes that it would have been preferable both for fairness to the parties and in the interest of efficiency, if ANR had raised those concerns before the Commission.

Dated at Montpelier, Vermont this 13th day of May, 2003.

Environmental Board

/s/Patricia Moulton Powden
Patricia Moulton Powden, Chair