

**VERMONT ENVIRONMENTAL BOARD**  
**10 V.S.A. Ch. 151**

*Re: McLean Enterprises Corporation*

Declaratory Ruling #428

**Findings of Fact, Conclusions of Law, and Order**

This is a Declaratory Ruling on the question of whether an Act 250 application for a quarry on 325 acres (Quarry Parcel) in Cavendish, Vermont, filed by McLean Enterprises Corporation (MEC) must include an adjacent 112-acre tract of land.

**I. History**

On November 18, 2003, the Acting District 2 Environmental Commission Coordinator (Coordinator) issued Jurisdictional Opinion #2-192 (JO), ruling that no construction for a commercial or industrial purpose occurred on the Quarry Parcel prior to the sale of an adjacent 112-acre tract of land<sup>1</sup> to Brian and Kelly Weymer (Weymer Parcels) and, therefore, there is no 10 V.S.A. Ch. 151 (Act 250) jurisdiction over the Weymer Parcels

On December 18, 2003, pursuant to 10 V.S.A. 6007, William Hunter and Suzanne Meaney (Petitioners) filed a Petition for a Declaratory Ruling with the Environmental Board (Board), appealing the JO. The Petitioners contend that the Weymer Parcels should be considered involved land with the Quarry Parcel.

On December 31, 2003, MEC filed a cross-appeal concerning the Petitioners' party status.

The parties jointly requested that a Prehearing Conference not be scheduled until the middle of May 2004.

On May 17, 2004, Petitioners filed a petition for party status.

On May 20, 2004, following a May 17, 2004 Prehearing Conference, Board Chair Patricia Moulton Powden issued a Prehearing Conference Report and Order.

On June 8, 2004, MEC filed a memorandum in opposition to the Petitioners' party status and a motion to dismiss.

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<sup>1</sup> This tract is actually two separate, but contiguous, parcels, a 21.49-acre parcel and a 91.13-acre parcel. For efficiency, these two parcels are referred to as the "Weymer Parcels."

On July 21, 2004, the Board deliberated, and on July 22, 2004, the Board issued a Memorandum of Decision on some of the preliminary issues.

On August 18, 2004, Petitioners filed supplemental information on their request for party status.

On September 16, 2004, MEC submitted a response to Petitioner's supplemental information.

On January 28, 2005, the Board issued a Memorandum of Decision on the remaining preliminary issues.

On May 25, 2005, the Board held a hearing.

On June 22 and July 20, 2005, the Board deliberated. This matter is now ready for decision.

## **II. Issue**

Was there commercial or industrial activity on the Quarry Parcel prior to the time MEC sold the Weymer Parcels, such that the Weymer Parcels should be considered part of the Quarry Parcel for the purposes of the MEC's application for an Act 250 Permit?

## **III. Findings of Fact**

To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. *See, Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation*, 167 Vt. 228, 241-42 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

### *MEC*

1. MEC is a Vermont Corporation owned by Ian and Kathryn McLean, who own 100% of MEC and are its sole officers and directors. MEC was originally formed for the purpose of administering real estate holdings.

2. Beginning in 1998 and until the late summer/early fall of 2001, MEC was involved exclusively in developing single family residential subdivisions.

*MEC's purchase of the Cavendish parcels*

3. On January 31, 2001, MEC acquired 400+ acres in ten separate, but contiguous, parcels of land in Cavendish, Vermont (Cavendish parcels). MEC intended to develop these parcels as residential lots for eventual sale to third parties.

4. The Weymer Parcels and the Quarry Parcel were three of the ten Cavendish parcels.

*Logging activity on the Cavendish parcels*

5. In the spring of 2001, MEC hired a forester to lay out a plan for logging on the Cavendish parcels which would comply with Vermont's silvicultural regulations. The forester's plan was completed in May 2001, and logging began shortly thereafter.

6. The logging on the Cavendish parcels did not involve clearcutting; it involved only selective logging that was undertaken under the auspices of the forester's plan.

7. The logging on the Cavendish parcels was not intended for the purposes of clearing for a quarry, nor was it undertaken in preparation for planning for a quarry. The logging was part of general silvicultural management of the property.

8. No logging on the Cavendish parcels took place above 2,500 feet above sea level (asl).

9. Heavy equipment, including trucks and excavators to build roads and a landing area on the Cavendish parcels, was used in the logging operations.

*MEC's sale of the Weymer Parcels*

10. On June 29, 2001, MEC signed a Purchase and Sale Agreement to sell the Weymer Parcels to Brian and Kelly Weymer.

11. On August 10, 2001, MEC conveyed the Weymer Parcels to Brian and Kelly Weymer.

12. No subdivision was created by MEC's conveyance of the Weymer Parcels in August 2001; MEC conveyed the Weymer Parcels exactly as they had been purchased on January 31, 2001. While the description of the Weymer Parcels as sold differed from its description as purchased, this was the result of a survey that was performed on the Parcels to correct their actual acreage.

*Activity on the Weymer Parcels*

13. Activity on the Weymer Parcels by MEC was limited to the logging that took place as a part of MEC's general silvicultural management of its land and the survey that was conducted in connection with MEC's sale of the Weymer Parcels.

14. The Weymer Parcels presently contain a single family home owned by the Weymers, which was built during the summer/fall of 2001.

15. The Weymer Parcels are separated from, and share no functional relationship, with the Quarry Parcel.

16. No activity, construction of improvements, or earth disturbance took place on the Weymer Parcels relating to the proposed Glimmerstone Granite Quarry.

17. The Glimmerstone Granite Quarry was always planned solely for the 325-acre Quarry Parcel which is noted in MEC's Act 250 application; the Quarry has never involved or concerned the Weymer Parcels.

*Activity on Quarry Parcel*

18. In late May or early June 2001, the loggers who were logging the Cavendish parcels encountered a stone deposit on the Quarry Parcel.

19. In the summer of 2001, MEC began exploring the mica schist deposit on the Quarry Parcel. MEC did not become aware of the quality and quantity of the mica schist on the Quarry Parcel until excavation revealed the vein of stone.

20. The first activity on the Quarry Parcel took place on July 25, 2001, to determine what stone was present on the Quarry Parcel; this activity included pulling stumps and clearing ledges to explore exposed rock on what would become the "North Quarry" site.

21. In early August 2001 more exploratory work at the Quarry Parcel was done.

22. On August 9, 2001, a hammer and an excavator were used at the North Quarry site.

23. Exploratory blasts on the Quarry Parcel took place on August 24 and 28, 2001.

*Conveyance of stone from the Quarry Parcel*

24. The stone that resulted from the August 2001 excavation and blasting on the Quarry Parcel was trucked to Pennsylvania for use in constructing the McLeans' private home. There was no price paid or consideration given for this stone.

25. None of the stone from the August 2001 excavation and blasting on the Quarry Parcel was sold, offered for sale, or conveyed for consideration to a third party.

*Planning for a quarry on the Quarry Parcel*

26. Planning for a commercial quarrying enterprise on the Quarry Parcel did not begin until September of 2001. It was only through the excavation and first exploratory blasting at the Quarry Parcel that MEC became aware of the nature of the stone present on the Quarry Parcel, which then led to MEC's plans for a commercial quarrying enterprise, the proposed Glimmerstone Granite Quarry.

27. In the summer of 2002, MEC submitted an application for an Act 250 permit to extract stone from the Quarry Parcel.

28. In or after May 2003, MEC sold stone that was the product of blasting that occurred at the Quarry Parcel on January 24, 2002.

**IV. Conclusions of Law**

*A. Burden of proof*

The burden of proof is on the party that claims that jurisdiction should attach. *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, Declaratory Ruling #409, Findings of Fact, Conclusions of Law, and Order at 9 - 10 (Dec. 5, 2002), *aff'd, In re Real Audet*, 2004 VT 30 (2004); *Re: Town of Williston Road Improvements*, Declaratory Ruling #381, Findings of Fact, Conclusions of Law, and Order at 4-5 (Jan. 13, 2001); *Re: W. Joseph Gagnon*, Declaratory Ruling #173, Memorandum of Decision at 4 - 6 (Jul. 3, 1986); *Re: Lincoln Haynes Gravel Pit*, Declaratory Ruling #192, Findings of Fact, Conclusions of Law, and Order at 8 (Sep. 25, 1987), *aff'd, In re L.W. Haynes, Inc.*, 150 Vt. 572 (1988). The burden of proof is therefore on the Petitioners.

*B. Analysis*

There is no claim that Act 250 jurisdiction was triggered based on any activity that took place solely on the Weymer Parcels. However, because the Weymer Parcels and the Quarry Parcel are adjacent lands, which were at one time owned by the same "person" (MEC), as that term is defined in Environmental Board Rule (EBR) 2(H)(1), any

activity that MEC took on the Quarry Parcel that triggered Act 250 jurisdiction would also trigger jurisdiction on any adjacent parcel which MEC owned at the time such activity occurred. *Re: West River Acres, Inc, et al.*, Declaratory Ruling #398, Findings of Fact, Conclusions of Law, and Order (Mar. 21, 2002) (all contiguous parcels owned by an EBR 2(H) “person” are part of the project “tract”); see EBR 2(U).

Therefore, the key inquiry in this matter is whether MEC triggered jurisdiction on the Quarry Parcel before MEC conveyed the adjacent Weymer Parcels in August 2001.

1. *Logging on the Quarry Parcel*

The Petitioners contend that MEC started to extract dimensional stone from the “North Quarry” site of the Quarry Parcel in June 2001. The facts do not support this contention. While MEC hired contractors with heavy machinery to work on the Quarry Parcel beginning in May/June of 2001, the activities on the Quarry parcel at that time were limited to logging. Logging below 2,500 feet asl is exempt from Act 250 jurisdiction. 10 V.S.A. §6001(3)(D)(i).<sup>2</sup>

2. *Quarrying stone at the Quarry Parcel*

The Petitioners claim that any stone quarried from the Quarry Parcel prior to the August 10, 2001 sale of the Weymer Parcels by MEC triggers jurisdiction over the Weymer Parcels.

Act 250 requires that a Land Use Permit be obtained prior to commencing construction on a development or commencing development. 10 V.S.A. §6081(a).

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<sup>2</sup> The Board notes that even exempt activities will trigger jurisdiction if they are part of a plan to develop. *Re: Luce Hill Partnership, #5L1055-EB*, Findings of Fact, Conclusions of Law, and Order at 8 (Jul. 7, 1992) (logging which is consistent with clearing land in preparation for creating subdivision triggers Act 250 review); and see, *Re: Capital Heights Associates and Snowfall, Inc.*, Declaratory Ruling #167, Findings, Conclusions and Order at 3 (Mar. 27, 1985); *Re: Agency of Environmental Conservation, Declaratory Ruling #83* (Oct. 13, 1977)(conversion of logging road to subdivision access road requires Act 250 review). Here, while MEC may have purchased the Quarry Parcel with the intention of developing a residential subdivision, MEC first began by logging the Quarry Parcel as part of general silvicultural management of the property. There is no evidence to indicate the road and landing area were constructed for any purpose other than logging.

“Development” is defined in relevant part as “the construction of improvements ... for commercial or industrial purposes.” 10 V.S.A. §6001(3)(A)(i) and (ii).<sup>3</sup>

*a. Commercial purpose*

A “commercial purpose” is “the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object having value.” EBR 2(L); *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 285 (1995), affirming *Re: Spring Brook Farm Foundation, Inc.*, Declaratory Ruling #290, Findings of Fact, Conclusions of Law, and Order (May 20, 1994).

The key date in this matter is August 10, 2001, the day on which MEC sold the Weymer Parcels.

There is no dispute that certain activities occurred on the Quarry Parcel before August 10, 2001. Logging of the Quarry Parcel began in May/June 2001 and exploratory excavation and blasting of the stone discovered on the Quarry Parcel during these logging operations occurred in July and August 2001.

There is, however, no evidence that any stone removed from the Quarry Parcel prior to August 10, 2001, was quarried for a “commercial purpose.” Stone excavated or blasted on the Quarry Parcel in August 2001 was used by the McLeans, the sole owners of MEC, for their personal residence. In this latter respect, this case is distinguishable from *Re: GHL Construction, Inc. and PAK Construction, Inc.*, #2S1124-EB, Declaratory Ruling #396, Findings of Fact, Conclusions of Law, and Order (Dec. 27, 2001). There, however, the Board’s conclusion that a property owner triggered jurisdiction by building an access road and quarrying stone hinged on the fact that the stone was used in his *commercial* office building, “as a display for future sales from the quarry, *evinced a clear plan to use more stone for commercial purposes.*” *Id.* at 12 (emphasis added). Here, no comparable commercial purpose exists.

*b. Commencement of construction of improvements for a commercial purpose*

There is no dispute that stone from the Quarry Parcel was sold in or after May 2003 and thus the Quarry Parcel became a “development” at that time. The question is whether commencement of construction on the development at the Quarry Parcel

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<sup>3</sup> Whether Cavendish does or does not have permanent zoning and subdivision bylaws (and is therefore a “ten acre town,” 10 V.S.A. §6001(3)(A)(i), or a “one acre town,” 10 V.S.A. §6001(3)(A)(ii)) is irrelevant to this analysis, as the Quarry Parcel is 325 acres.

occurred (and Act 250 jurisdiction over the Quarry Parcel was thereby triggered) before August 10, 2001, by virtue of the non-logging activities that occurred on the Quarry Parcel in July and August 2001.

"Commencement of construction" means

the construction of the first improvement<sup>4</sup> on the land or to any structure or facility located on the land including work preparatory to construction such as clearing, the staking out or use of a right-of-way or *in any way incidental to altering the land according to a plan or intention* to improve or to divide land by sale, lease, partition, or otherwise transfer an interest in the land.

EBR 2(C) (emphasis added).

In discussing when construction has "commenced" to the extent that it may constitute "development," the Board has written:

Accordingly, determining whether the "commencement of construction" constitutes development subject to Act 250 involves "a highly fact-specific inquiry and analysis." *Re: Johnson Lumber Company*, [Declaratory Ruling #263, Findings of Fact, Conclusions of Law, and Order at 12 (July 10, 1997)]. Among other things, it entails a determination whether the physical action on a site has been done in accordance with a plan or intention to improve it to facilitate the land's use for a commercial purpose or subdivision for resale. Mere *recommendations* or *proposals* regarding the manner in which a landowner might proceed in the future concerning the use of its land is not enough, there must evidence of a "plan" "so

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<sup>4</sup> EBR 2(D) defines "construction of improvements" as:

any physical action on a project site which initiates development for any purpose enumerated in Rule 2(A). Activity which is principally for preparation of plans and specifications that may be required and necessary for making application for a permit, such as test wells and pits (not including exploratory oil and gas wells), percolation tests, and line-of-sight clearing for surveys may be undertaken without a permit, provided that no permanent improvements to the land will be constructed and no substantial impact on any of the 10 criteria will result. A district commission or the board may approve more extensive exploratory work prior to issuance of a permit after complying with the notice and hearing requirements of Rule 51 herein for minor applications.



settled in intention and purpose that it can be called ready to commence.”  
*In re Agency of Administration*, 141 Vt. 68, 82 (1982). *Accord*, *In re Vermont Gas Systems*, 150 Vt. 34, 39 (1988); *Re: Johnson Lumber Company* at 10-11 and cases cited therein.

*Re: Aaron and Sons, Inc.*, Declaratory Ruling #359, Findings of Fact, Conclusions of Law, and Order at 9 (Oct. 29, 1998) (emphasis in original).

The Vermont Supreme Court decisions cited in *Re: Aaron and Sons* give further guidance. The Court has held that Act 250 jurisdiction is triggered when “the activity [is] about to impinge on the land” and attaches to “activity which has achieved *such finality of design* that construction can be said to be ready to commence.” *In re Agency of Administration, supra*, at 78-79 (emphasis added), cited in *In re Real Audet*, 2004 VT 30, ¶16 (Vt. S. Ct. 2004); *In re Vermont Gas Systems, Inc., supra*, at 38 (Act 250 jurisdiction does not attach until construction is about to commence); *and see, In re Wildcat Constr. Co., Inc.*, 160 Vt. 631, 632 (1993).

Here, planning for a commercial quarrying enterprise on the Quarry Parcel did not begin until September of 2001; up to that time, MEC had intended to use the Cavendish parcels for a residential purposes. While the Board recognizes the difficulty in determining when “exploratory activities” constitute the “commencement of construction,” it must conclude, based on the evidence before it, that the “finality of design” to use the Quarry Parcel as a commercial quarry had not been achieved as of the August 10, 2001 sale of the Weymer Parcels, and thus jurisdiction over the Quarry Parcel (and thus the Weymer Parcels) did not arise before that date.

## V. Order

There is no Act 250 jurisdiction over the Weymer Parcels.

Dated at Montpelier, Vermont this 22nd day of July 2005.

ENVIRONMENTAL BOARD

    /s/Patricia Moulton Powden      
Patricia Moulton Powden, Chair  
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