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

RE: McLean Enterprises Corporation — Declaratory Ruling # 428

MEMORANDUM OF DECISION

This proceeding concerns a declaratory ruling whether the McLean Enterprises Corporation (McLean) Act 250 application for a quarry should include an additional tract of land. The quarry is located on 325 acres (Quarry Parcel) in Cavendish, Vermont.

I. PROCEDURAL SUMMARY

On November 18, 2003, the Acting District 2 Environmental Commission Coordinator (Coordinator) issued Jurisdictional Opinion #2-192 (JO) ruling that no development for a commercial or industrial purpose occurred on the Quarry Parcel prior to the sale of the adjacent 112 acre tract of land to the Weymers and therefore, there is no jurisdiction over the Weymer's 112 acre parcel (Weymer Parcel).

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

On December 31, 2003, McLean Enterprises Corporation (McLean) filed a cross appeal concerning the party status of the Petitioners.

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 17, 2004, Board Chair Patricia Moulton Powden convened a prehearing conference and on May 20, 2004 she issued a Prehearing Conference Report and Order.

On June 3, 2004, James and Maryellen Wichelhaus requested party status.

On June 8, 2004 McLean filed a memorandum in opposition to the

Petitioners' party status and a motion to dismiss.

On July 21, 2004, the Board deliberated.

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, McLean submitted a response to Petitioner's supplemental information.

II. DISCUSSION

The Memorandum of Decision issued on July 22, 2004, requested supplemental filings from the parties. The parties provided the requested information. This Memorandum of Decision addresses the following remaining preliminary issues.

1. Whether Petitioner's Petition for a Declaratory Ruling should be dismissed because of the doctrines of collateral estoppel or res judicata?

2. Whether William Hunter and Suzanne Meaney should be granted party status?

McLean's Motion to Dismiss based on Collateral Estoppel

The doctrine of collateral estoppel, also known as "issue preclusion," bars "the subsequent relitigation of an issue which was actually litigated and decided in a prior case between the parties resulting in a final judgment on the merits, where that issue was necessary to the resolution of the action." *Berlin Convalescent Center v. Stoneman*, 159 Vt. 53, 56 (1992), *quoting, American Trucking Ass'ns v. Conway*, 152 Vt. 363, 370 (1989).

The purposes of the doctrine of collateral estoppel are (1) to conserve the resources of the courts and the litigants by protecting them against piecemeal or repetitive litigation; (2) to prevent vexatious litigation; (3) to promote the finality of judgments and encourage reliance on judicial decisions; and (4) to decrease the

chances of inconsistent adjudications.

The Vermont Supreme Court has held that collateral estoppel is appropriate where:(1) [i]t is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair. *Cold Springs Farm Development, Inc. v. Ball*, 163 Vt. 466, 469 (1995), quoting *Trepanier v. Getting Organized, Inc.,* 155 Vt. 259, 265 (1990).

In *The Van Sicklen Limited Partnership*, #4C1013R-EB, Memorandum of Decision (June 8, 2001) the Board relied on the Supreme Court's decision in *In re Carrier*, 155 Vt. 152, 157-58 (1990), and applied the doctrine of collateral estoppel in an Act 250 proceeding.

McLean bases its argument on the following facts. McLean submitted its application for an Act 250 Permit for the Quarry Parcel on September 14, 2002. The District Commission issued a permit for the project on February 19, 2003. The Petitioners filed their request for a Jurisdictional Opinion on July 21, 2003. McLean argues that the doctrine of collateral estoppel should preclude the Appellants from raising the argument concerning the Weymer Parcel because the District Commission's decision was a final ruling on the size of the Project tract.

In the instant case, it likely would have been simpler and more efficient for the Appellants to raise their concerns to the District Commission before the hearings were concluded. However, the Petitioners were not required to raise the argument before the District Commission. In fact, the appropriate venue for asserting jurisdiction over a tract of land is through a request for the District Coordinator to issue a jurisdictional opinion. Although perhaps the Petitioners should have raised this issue to the District Coordinator earlier, they should not be precluded from raising it because the District Commissions ruling on the permit was not the final judgement nor the appropriate venue to fully litigate the matter of jurisdiction. Therefore, McLean's motion to dismiss based on the doctrine of collateral estoppel is denied.

McLean's Motion to Dismiss based on Res Judicata

McLean also argues that the principle of res judicata should prevent the

Appellants from raising their claim."The principle of *res judicata,* or claim preclusion, bars litigation of claims or causes of action which were or might properly have been litigated in a previous action." *Agway, Inc. v. Gray,* 167 Vt. 313, 316 (1997) (internal quotation marks omitted) *(quoting State v. Dunn*, 167 Vt. 119, 125 (1997) (*quoting, Old Springs Farm Dev. Inc. v. Ball*, 163 Vt. 466, 472 (1995))); *and see Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) (a party to an action who has had a full and fair opportunity to litigate an issue determined by the judgment is estopped from relitigating the same issue in a subsequent action).

Res judicata only bars a subsequent action if there was a final judgment in the previous action, by an administrative agency acting in judicial capacity, and parties, subject matter, and causes of action are identical or substantially identical; two causes of action are the same if they can be supported by the same evidence. *Unifirst Corporation*, DR #348 Memorandum of Decision (Jan. 30, 1998). For the same reasons that collateral estoppel should not apply, the principle of res judicata do not apply to this matter. Therefore, McLean's motion to dismiss based on the doctrine of res judicata is denied.

Petitioner's Request for Party Status

Pursuant to 10 V.S.A 6007(c) and EBR 3(C)(3) a jurisdictional opinion may be appealed by "... individuals or entities who may be affected by the outcome of the opinion..."

The Board has held that the "standard by which the Board determines whether a person is 'affected by the outcome' pursuant to 6007(c) is identical to the standard by which it determines whether to grant party status to a person under EBR14(B)(1)." *Putney Paper Company, Inc*. DR# 335 Findings of Fact, Conclusions of Law, and Order at 6 (May 29, 1997). EBR 14 (B)(1) has been superseded by EBR 14 (A)(6).

The Board hears appeals from party status determinations *de novo*, applying the standards for party status set forth in EBR 14. *Re: Old Vermonter Wood Products and Richard Atwood*, #5W1305-EB, Memorandum of Decision at 2 (Feb. 3, 1999)(citing *Re: Cabot Creamery Cooperative, Inc.*, #5W0870-13-EB, Memorandum of Decision at 3 (Dec. 23, 1992)); *see Also, Re: Northeast Cooperatives And L & S Associates*, #2W0434-11-EB, Memorandum of Decision at 2 (Jan. 29, 1999)(citing *Re: Pico Peak Ski Resort, Inc.*, # 1R0265-12-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Mar. 2, 1995); *Re: St.*

*Albans Group and Wal*Mart Stores, Inc.*, # 6F0471-EB, Memorandum of Decision (Apr. 15, 1994)); *Re: Gary Savoie d/b/a WLPL and Eleanor Bemis,* #2W0991-EB, Findings of Fact, Conclusions of Law, and Order at 7 (Oct. 11, 1995)).

The Petitioners claim that the Project will cause excessive noise and that it is contrary to the provisions of the Cavendish Town Plan. The Petitioners reside near the Quarry Parcel and claim that they have an interest under Criteria 5, 8, 9(K), and 10. The Petitioners add that they were already granted party status by the Board in the permit appeal of the McLean Quarry.

McLean argues that the Petitioners reside over a mile away from the Weymer tract and there is a ridge separating the Petitioners from the Weymer tract. Accordingly, McLean argues the Petitioners should not qualify for party status because they will not be affected by the outcome of *this* declaratory ruling proceeding.

The Petitioners' request for party status turns on whether the Petitioners must demonstrate that they may be impacted by the outcome of the jurisdictional question in the declaratory ruling or the quarry itself. In *Peter and Carla Ochs*, DR #7 Memorandum of Decision at 3 (Nov. 22, 2004) the Board stated:

> The Board has read the party status rules in declaratory ruling proceedings to turn on whether the project could impact an Act 250 interest of the adjoining landowner, not whether the outcome of the jurisdictional issue could impact that person's interest. See, Re: *Dennis Demers and NE Central R.R.*, Declaratory Ruling #429, Memorandum of Decision on Party Status at 3-4 (Apr. 26, 2004)(interpreting similar language in EBR 14(A)(6) and citing Re: *Catamount Slate, Inc., d/b/a Reed Family Slate Products, and Fred and Suellen Reed*, Declaratory Ruling #389, Memorandum of Decision at 11-12 (Jun. 29, 2001)(Board looks to whether party may be affected under Act 250 criteria, rather than under jurisdictional determination, to decide party status in declaratory ruling proceeding); *Re: GHL Construction, Inc. and PAK Construction, Inc*., #2S1124-EB, Declaratory Ruling #396, Memorandum of Decision at 3 (Jul. 5, 2001)(holding that the plain language of EBR 14(A)(5) requires that the Board look for possible impacts under one or more Act 250 criteria in determining party status, even where the sole merits issue is jurisdictional and the Board will not be reviewing a proposed development for compliance with Act 250 criteria)). 'Although declaratory rulings involve

procedural and jurisdictional matters, it is appropriate to grant interested party status to those persons who may be directly affected by the project under an Act 250 criterion.' *Demers*, Memorandum of Decision at 4.

Thus, Board precedent dictates that the issue is whether the Petitioners qualify for party status in relation to the Project, not the Weymer Parcel alone. Since the Board already granted the Appellants party status in the McLean permit appeal matter, they qualify for party status in this declaratory ruling.

III. ORDER

1. McLean's motion to dismiss is denied.
2. Petitioners have party status in the declaratory ruling.
3. The Board will issue a scheduling order setting forth dates for prefiled testimony and a hearing.

Dated at Montpelier, Vermont this 28th day of January, 2005.

ENVIRONMENTAL BOARD

_/s/Patricia Moulton Powden_____
Patricia Moulton Powden, Chair
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