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

Re: McLean Enterprises Corporation Declaratory Ruling #428

Memorandum of Decision

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[1] 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 July 22, 2005, the Board issued Findings of Fact, Conclusions of Law, and Order (Decision), holding that there was no jurisdiction over the Weymer Parcels.

On August 22, 2005, Hunter and Suzanne Meaney (Petitioners) filed a Motion to Reconsider, asking the Board to reconsider its July 22 Decision.

On September 1, 2005, MEC filed a response to the Petitioners' motion. MEC's response raises procedural arguments as to why the motion should be denied and also responds to the Petitioners' particular claims of error.

The Board deliberated on the Petitioners' motion on September 28, 2005.

---

[1] 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."

II. Discussion

A. The timeliness of Petitioners' motion

MEC, citing Environmental Board Rule (EBR) 31, argues that the Petitioners' Motion is improperly fashioned as a Motion to Reconsider, whereas it should be a Motion to Alter, as only an applicant who has been denied a permit can file a Motion to Reconsider. MEC then argues that Petitioners' Motion to Alter is untimely because it should have been filed within 15 days of the Board's July 22 Decision. Arguing that, at best, this gave the Petitioners until August 9, 2005, to file their motion, MEC seeks its denial. [2]

This case, which is a Declaratory Ruling Petition, is governed by EBR 3(D)(2), which allows the filing of a request that the Board "reconsider a declaratory ruling." The motion was thus correctly named.

As to timeliness, Rule 3(D)(2) allows the request to reconsider to be filed "within 30 days from the date of the declaratory ruling…." [3] The Decision was issued on July 22, and that day is not included when counting days. EBR 6. Starting the count on July 23, the 30th day was August 21, which was a Sunday. As time periods which end on Sundays extend to the following Monday, *id.,* and the Petitioners filed their motion on Monday, August 22, the Motion was timely filed.

B. The particular claims of error in the Petitioners' motion

The Petitioners assert several errors in the Board's July 2005 Decision.

1. Challenges to the evidence to support the July 2005 Decision's Findings of Fact 1, 20, 24, 25 and 28

Petitioners contend that there is no evidence to support Findings of Fact 1, 20, 24, 25 and 28 of the Decision. The Board disagrees.

---

[2] MEC argues that the motion should be denied because the Petitioners cannot raise new arguments, did not provide any testimony of their own, and did not satisfy their burden of proof. These are all valid arguments, but they are not ones that go to the heart of the Petitioners' motion.

[3] The 15 day rule applies to motions to alter a decision on the merits of granting or denying a permit. EBR 31(A).

Finding of Fact 1

Finding of Fact 1of the Decision reads:

> 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.

Jon Gelineau's prefiled testimony (Exhibit M1, Answer 2) and Gelineau's prefiled rebuttal testimony (Exhibit M17, Answer 3) provide an evidentiary basis for Finding of Fact 1. Petitioners assert that Gelineau's prefiled testimony was undercut during his cross-examination at the hearing, when Gelineau stated that he *assumed* that Ian and Kathryn McLean owned the shares of MEC, but that he did not *know* this to be a fact, and that he does not keep the corporate books. *McLean2.01 at 48:15 -48:35.*[4]

While Gelineau's hearing testimony may weaken the certainty of his prefiled testimony, when Ralph Michael's testimony[5] is also considered, the Board finds that Gelineau's testimony as to the ownership of MEC is credible, as it is based on information that he obtained in the course of his ten years (Exhibit M1, Answer 2) of dealings with MEC.

Finding of Fact 20

Finding of Fact 20 of the Decision reads:

> 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.

Exhibit M17, Answer 1, and Exhibit M9 provide an evidentiary basis for Finding of Fact 20. Gelineau is clear, in both his prefiled and hearing testimony, that all of the pre-

---

[4] These citations are references to the file and counter numbers of the audio recordings of the hearing in this matter.

[5] At the hearing, Ralph Michael, who has worked with MEC since 1999 (Exhibit M15, Answer 4) testified that the only people he ever met with respect to MEC were Gelineau and Ian and Kathryn McLean. *McLean3 at 10:50 -11:16;* and see, Exhibit M15 Answer 3.

August 10, 2001 (before MEC's sale of the Weymer Parcels to Brian and Kelly Weymer) work was "exploratory" in nature, and that, in any case, none of the stone that was removed in August was commercially sold.

Exhibit H5, offered and admitted into the Record at the hearing, *McLean2.01 at 38:24*, is an affidavit written by Gelineau. Paragraph 4 of this affidavit reads "The first excavations that took place around the stone in what is now commonly referred to as the North Quarry site occurred on June 21, 2001." *McLean2.01 at 37:18.* The Board does not find this statement to be inconsistent with Gelineau's prefiled testimony, however, as the phrase "around the stone," not "of the stone" is used. Thus, while there was some clearing in the area *around* the stone in June, the evidence supports a finding that the stone itself was not removed until a later date.

Findings of Fact 24 and 25

Findings of Fact 24 and of the Decision read:

> 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.

Exhibit M1, Answers 16 and 17 and Exhibit M17, Answer 3 provide an evidentiary basis for Findings of Fact 24 and 25.

The Petitioners assert that Gelineau cannot account for all the stone from the August excavations and blasting, the implication being that some August stone was not taken to Pennsylvania but was sold by Gelineau in Vermont. [6]

At the hearing, Petitioners questioned Gelineau about some stone from the quarry that was blasted in August 2001 - - some non-dimensional stone that could not be used in the McLean's Pennsylvania house construction. Gelineau testified that rubble stone from the August blasts (what he refers to as "unsatisfactory product") was used for stone walls at the Pennsylvania house. *McLean2.02 at 5:02 - 5:43.* Thus, all

[6] At the hearing, Gelineau referred to a second blast in November 2001; this stone (not the stone from the August blast) accounts for the stone that was at Gelineau's house that he sold that winter. *McLean2.02 at 4:20 - 5:01.*

of the stone from August activities at the quarry site went to the McLeans in Pennsylvania.

Finding of Fact 28

Finding of Fact 28 of the Decision reads:

> 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.

Exhibit M1, Answer 18, provides an evidentiary basis for Finding of Fact 28.

The evidence does not support the Petitioners' claims that stone excavated before August 10, 2001, was ever sold commercially. Gelineau states that it all went to Pennsylvania, and this testimony was not compromised at the hearing.

2. Challenges to the July 2005 Decision's Conclusions of Law

The Petitioners contend that the exploratory work done in the summer of 2001 is sufficient to trigger jurisdiction, noting that it does not fall within the type of activity that can be considered within the exploratory exception to the "construction of improvements" under EBR 2(D).

The Decision goes to some length to explain that only "construction of improvements" which is for a "commercial purpose" falls within the definition of "development." *See,* Decision at 6 -9. Because the Board finds that the activities on the quarry site did not have a "commercial purpose" until September 2001, when quarrying plans had reached the stage necessary to trigger review, *see, In re Agency of Administration*, 141 Vt. 68 (1982), and *In re Vermont Gas Systems*, 150 Vt. 34 (1988), the Board does not find that the elements of "development" were met before the sale of the Weymer Parcels on August 10, 2001. Thus, even if the work at the Quarry Parcel might be the "construction of improvements" under EBR 2(D), no "development" commenced before September 2001, because the work was not for a "commercial purpose" prior to that date.

The Petitioners state that there is no authority for the conclusion that a corporate owner can use stone for his personal use without having to apply for an Act 250 permit. The question, again, however, is whether personal use of quarry product is 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). The personal use of quarry product by the owner of that product [7] involves no exchange with others; it does not fall within the EBR 2(L) definition.

III. Order

The Motion to Reconsider is denied.

Dated at Montpelier, Vermont this 13th day of October 2005.

ENVIRONMENTAL BOARD

_/s/Patricia Moulton Powden____
Patricia Moulton Powden, Chair
George Holland
Patricia Nowak
Alice Olenick
Karen Paul
Richard C. Pembroke, Sr.
A. Gregory Rainville
Christopher D. Roy

[7] As the Board has found, the McLeans are the sole owners and directors of MEC.