Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-521

NOVEMBER TERM, 2006

In re McLean Enterprises, Corp.	}	APPEALED FROM:
	}	
	}	Environmental Board
	}	
	}	Declaratory Ruling # 428

In the above-entitled cause, the Clerk will enter:

Petitioner William Hunter appeals from the Environmental Board=s declaratory ruling that applicant McLean Enterprises, Corp. (MEC) did not need to include a certain112-acre parcel of land in its application for an Act 250 permit to operate a quarry in Cavendish, Vermont. Petitioner argues that the Board=s key findings are clearly erroneous, and that its findings do not support its conclusions. We affirm.

In January 2001, MEC purchased a large tract of land in Cavendish, Vermont. On August 10, 2001, it conveyed 112 acres of this land to Brian and Kelly Weymer (Weymer parcels). At some point, MEC discovered a potentially valuable vein of stone on its property. In September 2002, it applied for an Act 250 permit to operate two quarriesCthe ANorth Quarry@ and a second quarryCon its land. The district commission issued a permit for the second quarry in February 2003, and this decision was appealed to the Environmental Board.

In July 2003, petitioner requested a jurisdictional opinion from the district commission, asking it to decide

if it had Act 250 jurisdiction over the Weymer parcels due to MEC=s Adevelopment@ activities prior to the August 10, 2001 conveyance. The district commission concluded that there had been no development for a commercial or industrial purpose on MEC=s property prior to August 10, nor had there been any jurisdictional activity during this period. It thus concluded that there was no jurisdiction over the Weymer parcels, and that the land subject to jurisdiction under the Act 250 permit noted above was the 325 acre parcel owned by MEC. Petitioner appealed this decision to the Board.

In July 2005, the Board issued its declaratory ruling, similarly concluding that no Act 250 jurisdiction existed over the Weymer parcels. The Board made the following findings. MEC is a Vermont corporation owned solely by Ian and Kathryn McLean. The corporation was originally formed to administer real estate holdings. It acquired real property in Cavendish with the intent of developing the land as residential lots. In May 2001, MEC began logging the property as part of a silvicultural management plan. In late May or early June 2001, loggers encountered a stone deposit on the parcel. In the summer of 2001, MEC began exploring the stone deposit.

The first activity occurred on July 25, 2001 to determine what quantity and quality of stone was present. This included pulling stumps and clearing ledges to explore exposed rock on what would eventually become the ANorth Quarry@ site. On August 9, 2001, a hammer and excavator were used at the site but these efforts were unsuccessful. Exploratory blasts occurred on August 24 and 28, 2001. The stone that resulted from the August 2001 excavation and blasting was trucked to Pennsylvania for use in constructing the McLeans= private home. There was no price paid nor consideration given for this stone. No stone from the August 2001 excavation was sold, offered for sale, or conveyed for consideration to a third party. The Board found that the planning for a commercial quarry did not begin until September 2001. It explained that it was only through the excavation and first exploratory blasting that MEC became aware of the nature of the stone present on the quarry parcel, which then led to its plans for a commercial quarrying enterprise.

MEC entered into a purchase and sale agreement with the Weymers on June 29, 2001. On August 10,

2001, it conveyed 112 acres of its land to them. The Board found that MEC=s activity on the Weymer parcels prior to the conveyance was limited to logging and a survey conducted in connection with the sale. No activity, construction of improvements, or earth disturbance took place on the Weymer parcels related to the quarry later proposed by MEC.

Based on these findings, the Board turned to the key question before it: whether MEC had triggered jurisdiction on the quarry parcel before it conveyed the adjacent Weymer parcels in August 2001. The Board concluded that jurisdiction had not been triggered. It rejected petitioner=s contention that MEC had started to extract dimensional stone from the ANorth Quarry@ site in June 2001, finding this assertion unsupported by the record. The Board explained that, while MEC hired contractors with heavy machinery to work on the involved parcel beginning in May/June 2001, the activities were limited to logging. Because the logging occurred below 2500 feet elevation, it was exempt from Act 250 jurisdiction.

The Board next addressed whether MEC had Acommenced development@ or Acommenced construction on a development@ prior to August 10, 2001. As the Board explained, Adevelopment@ meant Athe construction of improvements . . . for commercial and industrial purposes.@ 10 V.S.A. ' 6001(3)(A)(i), (ii). The Board found no evidence that any stone removed from the quarry parcel prior to August 10, 2001 was quarried for a Acommercial purpose.@ It explained that the stone excavated or blasted on the parcel in August 2001 was used by the McLeans, the sole owners of the corporation, for their personal residence. The Board similarly found no evidence that MEC had commenced construction on the development of the quarry parcel before August 10, 2001, reiterating its finding that planning for the commercial quarrying enterprise did not begin until September 2001. Up to that time, the Board explained, MEC intended to use the land for residential purposes. The Board acknowledged the difficulty in determining when Aexploratory activities@ constituted the Acommencement of construction,@ but it concluded that, in this case, the Afinality of design@ to use the quarry parcel as a commercial quarry had not been achieved as of August 10, 2001. It thus concluded that Act 250 jurisdiction was not triggered before August 10, 2001, and thus, there was no Act 250 jurisdiction over the Weymer parcels. Petitioner moved for reconsideration, and the Board denied his request in a written order. This appeal followed.

Petitioner first argues that the Board erred in concluding that MEC=s activities prior to August 10, 2001 did not constitute Adevelopment.@ According to petitioner, the Board=s conclusion rested on erroneous findings that the McLeans were the sole owners of MEC, and that their use of quarried stone in the construction of their home did not constitute a commercial activity.[1] Petitioner also asserts that the policy underlying Act 250 Aclearly required@ MEC to obtain an Act 250 permit for the work undertaken during the summer of 2001.

On review, we defer to the Board=s Ainterpretations of Act 250 and its own rules, and to the Board=s specialized knowledge in the environmental field. Absent compelling indications of error, we will sustain its interpretations on appeal.@ In re Audet, 2004 VT 30, & 9, 176 Vt. 617 (mem.) (citation omitted). We find no error in the Board=s decision here.

As the Board recognized, Act 250 jurisdiction is triggered by the commencement of development or the commencement of construction on a development. 10 V.S.A. ' 6081(a). ADevelopment@ is defined in relevant part as the Aconstruction of improvements . . . for commercial or industrial purposes.@ Id. ' 6001(3)(A)(i), (ii). Here, the Board concluded that prior to August 10, 2001, no stone was removed from MEC=s property for a commercial purpose. We need not decide whether, in reaching this conclusion, the Board correctly found that the McLeans were the sole owners of MEC, or that their personal use of the stone did not constitute a commercial activity. The evidence before the Board showed that no stone was removed from the property before August 10, 2001. Thus, petitioner=s arguments have no relevance to the issue of jurisdiction. Even if these arguments were relevant, we would find them without merit. The Board=s finding that the McLeans are the sole owners of MEC is supported by credible evidence in the record. As the Board explained, it based this finding of fact on the prefiled testimony of Jon Gelineau, who had worked with MEC since 1995, as well as the testimony of Ralph Michael, who had worked with MEC since 1999. The Board then reasonably concluded that if the McLeans used stone quarried from their own property in the construction of their home, this did not satisfy the Acommercial purpose@ requirement, as that term is defined in the Board=s rules. See EBR 2(L) (defining Acommercial purpose@ in relevant part as Athe provision of . . . goods . . . by a person . . . to others in

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exchange for payment of a purchase price, fee, contribution, donation or other object having value).

We similarly reject petitioner=s challenge to the Board=s conclusion that there was no Acommencement of construction of improvements for a commercial purpose@ prior to August 10, 2001. The Board has defined Acommencement of construction@ as:

> the construction of the first improvement[2] 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.

Environmental Board Rule 2(C) (emphasis added). The Board recognized that determining whether construction has commenced to the extent that it constituted Adevelopment@ was a highly fact-specific question. Among other things, it required the Board to examine whether the physical action on a site was Adone in accordance with a plan or intention to improve it to facilitate the land=s use for a commercial purpose or subdivision for resale.@

In this case, the Board acknowledged the difficulty in determining the point at which Aexploratory activities@ constituted the Acommencement of construction.@ It concluded, however, that the evidence showed no Afinality of design@ to use the quarry parcel as a commercial quarry as of August 10, 2001. We defer to the Board=s interpretation of its rules, and we note that its conclusion is consistent with our case law. See, e.g., In re Agency of Administration, 141 Vt. 68, 79 (1982) (concluding that definition of Adevelopment@ in Act 250 discloses a well-considered legislative intent to encompass Aonly that activity which has achieved such finality of design that construction can be said to be ready to commence.@). The record shows that, as of August 10, MEC did not yet know if a valuable stone deposit existed on its land. We thus find no basis to disturb the Board=s conclusion that there was no commencement of construction that reached the point of

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development under Rule 2(C). Because the Board s conclusion rested on the absence of a plan pursuant to Rule 2(C), we find it unnecessary to address petitioner=s arguments concerning the proper interpretation of Rule 2(D).

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice

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[1] We do not address petitioner=s argument that MEC constructed improvements for Aindustrial purposes@ because petitioner failed to raise this argument below. In re Merritt, 2003 VT 84, & 7, 175 Vt. 624 (mem.); 10 V.S.A. ' 6089(c).

[2] Rule 2(D) defines Aconstruction of improvements@ as:

> any physical action on a project site which initiates development for any purpose enumerated in [Environmental Board] Rule 2(D). Activity which is principally for preparation of plans and specifications that may be required and necessary for making an application for a permit, such as test well and pits (not including exploratory oil and gas wells), percolation tests, and line-of-sight clearings or 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 [Act

250] criteria will result.