IN THE SUPREME COURT OF THE STATE OF VERMONT

No. 2014-190

IN RE: NORTHEAST MATERIALS GROUP LLC ACT 250 JO #5-21

On Appeal from a Judgment of the
Vermont Superior Court – Environmental Division
Docket No. 143-10-12 Vtec

REPLY BRIEF OF THE APPELLANTS
RUSSELL AUSTIN, PAMELA AUSTIN, JULIE BARRE,
MARC BERNIER, ET AL.
(COLLECTIVELY, NEIGHBORS FOR HEALTHY COMMUNITIES)

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INTRODUCTION

Like the rock crushers that the Appellees are operating without an Act 250 permit, the Appellees' response brief generated clouds of dust but failed to obscure these fundamental truths about this case:

(1) the Appellees admit that Site 1 is not part of the Rock of Ages (ROA) tract. Appellees' Brief at 5 fn.2. Therefore, the evidence that the Appellees submitted concerning rock crushing that occurred at Site 1, and that the Environmental Court erroneously relied on in its Finding of Fact 23, is irrelevant to the issues in this appeal;

(2) the Appellees did not dispute that there was no evidence of rock crushing occurring at Site 4, the site of the current rock crushing operations, in 1970 or, indeed, in the last 90 years;

(3) the Appellees cited no case, from this Court, the Environmental Court, or the former Environmental Board, that applied or upheld a comparably broad or roving exemption under Act 250 for rock crushing or similar activities occurring anywhere on a large tract of land; and

(4) the Appellees did not contradict the long, unbroken line of cases cited in the Appellants' brief holding that the location of improvements and operations matters, and that operations that may be grandfathered at one site on a tract are not grandfathered at a different site.

These fundamentals lead inevitably to the conclusions that the Environmental Court erred in its conclusions of law, in its findings of fact, and in its grant of an unprecedented exemption under the grandfathering provisions of Act 250 for rock crushing operations that occur anywhere on Rock of Ages' 1100-acre tract.

ARGUMENT

The critical error of the Environmental Court, repeated and amplified in the Appellees' brief, is the failure to recognize that the language, purposes, and consistent precedent of Act 250 demonstrate that location matters because improvements and operations can cause different impacts in different locations on the same tract.

I. THE APPELLEES' CURRENT ROCK CRUSHING IMPROVEMENTS AND OPERATIONS ARE NOT GRANDFATHERED.

A. ROA's Grandfathered Development Is Distinct From Its 1100-Acre Tract.

The most obvious expression of this critical error was the Appellees' equation of their pre-1970 "development" with their entire 1100-acre tract of land. Appellees' Brief at 5. To the contrary, under the plain terms of the statute, a development is "the *construction of improvements* . . . on a tract or tracts of land." Vt. Stat. Ann. tit. 10 § 6081(3) (2013) (emphasis added). Thus, the development is distinct from the tract and consists of whatever improvements have been constructed on the tract. To be grandfathered, these improvements must have been "in existence on June 1, 1970." Act 250 Rule 2(c)(8). If different improvements are constructed at a distinct site after 1970, as is the case here, those improvements are not grandfathered.

This plain-meaning application of Act 250 is illustrated by the cases of *Re: Thomas Howrigan Gravel Extraction*, Declaratory Ruling No. 358, Findings of Fact, Conclusions of Law, and Order (Vt. Envtl. Board August 30, 1999) and *Re: Weston Island Ventures*, Declaratory Ruling No. 169, Findings of Fact, Conclusions of Law, and Order (Vt. Envtl. Bd. June 3, 1985).[1] Both of these cases involved improvements or operations at distinct sites or locations on a single tract of land that were analyzed separately for grandfathering. *Howrigan*,

[1] The Vermont legislature has mandated that prior decisions of the Environmental Board shall be given the same weight and consideration as prior decisions of the Environmental Division of the Superior Court. Vt. Stat. Ann. tit. 10 V.S.A. § 8504(m) (2013).

Declaratory Ruling No. 358 at 14-18 (analyzing separately six distinct sites/improvements on single 500-acre tract); *Weston Island,* Declaratory Ruling No. 169, at 1, 4 (analyzing separately three distinct sites/improvements on a 150-acre tract). In both cases, these improvements at distinct sites were analyzed separately for purposes of grandfathering and abandonment based primarily on the distances between these sites and their separation by public highways. *Howrigan*, at 14-18; *Weston Island*, at 3-4.

The Appellees attempted to distinguish these and the many other consistent cases that involve gravel pits, claiming that "Rock of Ages is nothing like a gravel pit." Appellees' Brief at 23. Regardless of the questionable accuracy of that claim, it missed the mark because the import of these cases arises not from their involvement of gravel pits, but from the principle they established: that distinct locations or sites on a single tract should be analyzed separately under the grandfathering provisions of Act 250, particularly where these sites are far apart, separated by public highways, and carry differential impacts on neighboring residents, like the distinct Sites at issue in this case.

The importance of specific improvements and locations to the grandfathering analysis is reinforced further by an additional Act 250 principle - that grandfathering is applicable "only so long as the impacts of the operation upon the environment or upon the community are not greater after June 1, 1970, than before that date." *In re Big Rock Gravel*, LLC, No. 174-8-08 Vtec, slip. op. at 8 (Vt. Super. Env. Div. Oct. 19, 2010), *quoting Re: Orzel*, Declaratroy Ruling No. 174, Findings of Fact, Conclusions of Law, and Order, at 6 (Vt. Envtl. Bd. Oct. 2, 1986)). Plainly, the impacts of rock crushing improvements and operations can vary substantially depending on the location of the rock crushers on the tract, and their proximity to other residents or properties. *In re R.E. Tucker, Inc.*, 149 Vt. 551, 558 (1988); *Re: Weston Island Ventures*, Declaratory Ruling

No. 169, at 3, 5. The Appellees' claim to grandfathering fails because no rock crushing improvements or operations existed at the current NEMG rock crushing Site on June 1, 1970, none have existed there for at least 90 years, and NEMG's rock crushing operations have significant impacts on neighboring residents. Tr. vol. 2, 16-17, 19, 30, 34.

B. Absent Site 1, The Appellees Failed To Prove The Scope, Rates, Or Volumes Of Any Alleged Pre-1970 Crushing.

The Appellees did not contest that they carry the burden of proving the scope, rates, or volume of their alleged pre-1970 rock crushing. *Re: John Goss Sand & Gravel*, Declaratory Ruling No. 280, Findings of Fact, Conclusions of Law, and Order, at 8 (Vt. Envtl. Bd. July 28, 1993). Nor did they challenge that Finding of Fact No. 23 was clearly erroneous because it attributed rock crushing at Site 1 to the ROA tract, when Site 1 is not part of the ROA tract. *See* Act 250 Rule 2(c)(12) (stating that a tract must be owned or controlled by the same person); Appellants' Brief at 19-21.[2]

Instead, the Appellees invested considerable effort in arguing over whether it is possible to infer from Exhibits R and S that some rock crushing actually occurred just prior to 1970 at Site 3. Appellees Brief at 16-18. These Exhibits are in the Printed Case, and the Court is the best judge of this evidence. However, even if one could draw an inference of some actual rock crushing from these documents, the Appellees' argument still fails because (1) there is no evidence of how much rock actually was crushed, and what one party to a contract may "intend," P.C. at 81, is not proof of actual scope, rates, or volumes of rock crushed; and (2) the explicit

[2] The Appellees made the confusing statement that some property formerly called the "Wells-Lamson quarry" now is part of the ROA tract, Appellees' Brief at 15, without contesting the more determinative fact that what Exhibits O and P refer to as the rock crusher constructed by Wells-Lamson (not ROA) was located on Site 1, which is not part of the ROA tract. Tr. vol. 1, 84, 106, 111 (testimony of Appellees' witnesses Donald Murray and Duncan McKay).

terms of Exhibit R contemplated only a temporary rock crusher that would be removed on or before June 1, 1970. See *In re L.W. Haynes, Inc.*, 150 Vt. 572, 573 (1988) (holding that a permanent rock crusher like NEMG's is not grandfathered by prior operation of temporary rock crushers).

C. The Appellees' Evidence Demonstrated Abandonment Of Any Rock Crushing Improvements Or Operations That Had Occurred At Site 4 On The ROA Tract.

As with the rest of their brief, the Appellees misapplied *Re: U.S. Quarried Slate Prods., Inc.*, Declaratory Ruling Nos. 279 and 283, Findings of Fact, Conclusions of Law, and Order (Vt. Envtl. Bd May 9, 1995). Under this case, the key question is whether the "particular land use" has been abandoned. *Re: U.S. Quarried Slate Prods., Inc.*, at 22. The reasonable expectations of neighboring property owners also are an important factor in this analysis. *Id*. at 23; *Re: Raleigh B. Palmer, Isle La Motte Gravel Pit*, Declaratory Ruling No. 424, at 9-10 (Vt. Envtl. Bd. Nov. 4, 2004).

Because no rock crushing improvements or operations have existed at Site 4 for at least 90 years, that particular land use at that Site has been abandoned, just as the slate quarries at issue in *Re: U.S. Quarried Slate Prods., Inc*., had been abandoned because these quarries had not been worked for decades and were filled with water, much like the abandoned quarries on the ROA tract. Equally important, all of Neighbors' witnesses have lived in their homes for many decades without experiencing the noise, dust, and truck traffic of rock crushing improvements and operations located next door or nearby. Tr. vol. 2, 14-15. These uncontested facts demonstrate that any use of Site 4 for rock crushing improvements and operations back in the 1910s-1920s has long been abandoned.

D. Grandfathering Cannot Be Based On A "Relationship" Between The ROA Quarry Business And Rock Crushing Operations.

Last, the Appellees did not cite any law that would permit grandfathering based on a "relationship" between ROA quarry operations and rock crushing operations, as asserted by the Environmental Court. P.C. at 10. Nor did the Appellees defend the Environmental Court's findings based on industry custom, P.C. at 12, which were clearly erroneous because there was no evidence of industry custom.

Curiously, the Appellees invested nearly two pages in attempting to explain a single answer of Donald Murray, Appellees' Brief at 7-8. Again, the Court is the best judge of this evidence, but the larger and more significant point is that rock crushing is an ancillary and minor part of ROA's quarry. Appellant's Brief at 24. This point was supported by substantial evidence from multiple questions and responses. *Id*.

II. NEMG's ROCK CRUSHING IMPROVEMENTS AND OPERATIONS ARE A SUBSTANTIAL CHANGE FROM ANY PRE-1970 ROCK CRUSHING IMPROVEMENTS ON THE ROA TRACT.

A. NEMG's Rock Crushing Improvements And Operations Are A Cognizable Change.

The Appellees' brief never addressed whether the NEMG rock crushing improvements and operations at Site 4 are a "cognizable change" from pre-1970 rock crushing improvements on the ROA tract. Instead, the Appellees followed the Environmental Court in arguing that rock crushing is grandfathered anywhere on ROA's massive 1100-acre tract. Appellees' Brief at 12-18.

The uniform precedent cited the Appellant's opening brief directly refuted this argument. The most analogous of these cases is *Re: Weston Island Ventures*, which held that, among other changes, the operation of a rock crusher in a new location on a 150-acre tract was a cognizable

change, even though a rock crusher had been used at other locations on the same tract prior to 1970. *Re: Weston Island Ventures*, Declaratory Ruling No. 169, at 3, 5.

Similarly, this Court has affirmed the Environmental Board's recognition that the noise impacts of a rock crusher vary with its location, *In re R.E. Tucker, Inc.*, 149 Vt. at 558, and has affirmed that the installation of a permanent rock crusher, among other improvements, is a substantial change even though temporary rock crushers had operated on the tract. *In re L.W. Haynes, Inc*., 150 Vt. at 573.

A "cognizable change" is any physical change that does more than repair or maintain existing improvements. *Re: Stonybrook Condo. Owners Ass'n*, Declaratory Ruling No. 385, Finding of Fact, Conclusion of Law, and Order, at 8 (Vt. Envtl. Bd. May 18, 2001). This low threshold has captured such minor alterations such as the addition of antennas inside a church steeple and the replacement of a wooden guardrail with a steel guardrail. *In re Vt. RSA Ltd. P'ship*, 2007 VT 23, ¶ 11; *Re: Vermont Agency of Transp. (Route 73)*, Declaratory Ruling No. 298, Findings of Fact, Conclusions of Law, and Order, at 2-3 (Vt. Envtl. Bd. May 9, 1995). It also has applied where the developer has continued the same type of improvements or operations but at a different site on the same tract. *Sec'y, Vt. Agency of Natural Res. v. Earth Constr., Inc.*, No. E92-031 Vtec, slip op. at 9 (Vt. Envtl. Ct. July 6, 1993) (Wright, J.) (finding a cognizable change in the dumping of waste soil in a new site on the same tract); *Re: Lake Champagne Campground*, Declaratory Ruling No. 377, Findings of Fact, Conclusions of Law, and Order, at 16 (Vt. Envtl. Bd. Mar. 22, 2001) (finding a cognizable change in the storage of campers in a new site on the same tract); *Re: Agency of Admin.*, Declaratory Ruling No. 151, Findings of Fact, Conclusions of Law, and Order, at 5 (Vt. Envtl. Bd. May 9, 1984) (finding a cognizable change in the replacement of leach fields in a new site on the same tract).

The Appellees' construction and operation of rock crushing improvements where none existed as of 1970 undoubtedly is a cognizable change that meets this low threshold.

B. NEMG's Rock Crushing Improvements And Operations May Cause Significant Impacts.

The Appellees' argument that Neighbors failed to prove the impacts of pre-1970s rock crushing operations on the ROA tract, Appellees' Brief at 20, is insensible as a matter of law and as a matter of fact. As a matter of law, the burden is on the Appellees, not Neighbors, to prove the existence, nature, and scope of their pre-1970 operations. *See Re: John Gross Sand & Gravel,* Declaratory Ruling No. 280, at 8 (stating that burden of proof for pre-existing development not met where gravel pit extraction rates not produced.). As a matter of fact, the Appellees admit that no rock crushing improvements or operations existed at Site 4 as of 1970, P.C. at 46, 59, 67; Tr. vol. I, 47-50; therefore, the pre-1970 impacts from rock crushing at this Site were nonexistent.

The correct statement of the law, drawn from the statute, the rules, and from multiple cases, is that Neighbors must prove that the Appellees' rock crushing operations "*may* result in a significant adverse impact" with respect to any of the Act 250 criteria. Vt. Stat. Ann. tit. 10 § 6081(b) (emphasis added); Act 250 Rule 2(c)(7); *In Re Hale Mountain Fish & Game Club, Inc.*, 2007 VT 102, ¶ 4.

In this case, Neighbors readily met that burden through extensive testimony concerning the noise, granite dust, and truck traffic they have experienced from NEMG's rock crushing improvements and operations. For example, Pamela Austin testified that the noise sounds like a "laundry mat full of uneven -- unleveled washing machines." Tr. vol. 2, 23. Suzanne Bennett testified that "[t]he dust is very, very disturbing to me. I have it in -- on my windowsill, my

porch, my stair, my car, my lawn, furniture, tables outside. You have to wash everything before you get to use it." *Id.* at 8. Further, these witnesses noted that these impacts began only after NEMG commenced its rock crushing. Tr. vol. 2, 16, 20, 22, 65.

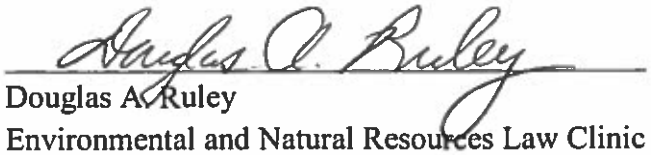
These impacts experienced by the neighbors precisely track the same impacts of noise, dust, and traffic that demonstrated that the installation of a permanent rock crusher was a substantial change in *In re L.W. Haynes, Inc.*, Declaratory Ruling 192 at 6-7. Accordingly, as in *L.W. Haynes*, Neighbors' evidence more than sufficed to demonstrate that NEMG's rock crushing improvements and operations may cause significant impacts and constitute a substantial change that requires an Act 250 permit.

CONCLUSION

Viewed through either the lens of grandfathering, or the lens of substantial change, neither Vermont law nor the facts of this case support the Environmental Court's broad exemption from Act 250 permitting for rock crushing improvements and operations anywhere on the vast ROA tract. This Court should reverse the Environmental Court and require that the Appellees obtain an Act 250 permit for their rock crushing operations.

Respectfully submitted this 8th day of October, 2014.

Neighbors for Healthy Communities
By:



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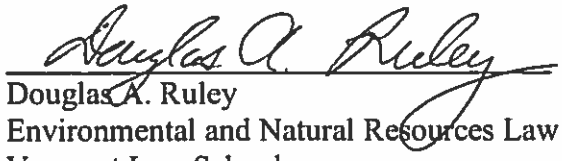
VERMONT RULE OF APPELLATE PROCEDURE V.R.A.P. 32(a)(7)(A)(i)
CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the word count limitation set forth in V.R.A.P. 32(a)(7)(A)(i). The Microsoft Office Word 2010 word processing system was used to create this Brief and according to the software word count tool it contains 3419 words.

Dated: October 8, 2014.

BY: 

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