STATE OF VERMONT
SUPERIOR COURT - ENVIRONMENTAL DIVISION

In Re: North East Materials Group, LLC **DOCKET NO. 143-10-12 Vtec**
JO #5-21

NEIGHBORS FOR HEALTHY COMMUNITIES' MEMORANDUM IN RESPONSE TO VERMONT SUPREME COURT OPINION NO. 2014-190

The Vermont Supreme Court's opinion held that the North East Materials Group (NEMG) rock crushing operations constitute a cognizable change on the Rock of Ages (ROA) tract, and remanded to this Court to address whether this change may cause significant impacts, the second prong of the substantial change inquiry under Act 250. In re Northeast Materials Group, LLC, 2015 VT 79, ¶¶ 31, 36, --Vt.--, --A.3d--. The Supreme Court also remanded for reconsideration of whether rock crushing is grandfathered on the ROA tract and whether past crushing operations were abandoned. Id. ¶ 36.

Pursuant to the undisputed testimony of the Neighbors and NEMG's witnesses, and this Court's prior findings of fact, the NEMG rock crushers not only may cause significant impacts, these rock crushers actually are causing significant impacts, and have done so for four years without an Act 250 permit. Accordingly, this Court should hold that NEMG's rock crushing operations constitute a substantial change and remand to the District Commission for NEMG to seek an Act 250 permit.

Further, the evidence demonstrated that any pre-1970 rock crushing operations that occurred on Site 4 or on Site 2 on the ROA tract have been abandoned. Finally, in light of the limited evidence of pre-1970 rock crushing on the Rock of Ages tract, this Court should hold that the Appellees have failed to meet their burden to prove that any rock crushing is grandfathered.

I. NEMG's ROCK CRUSHING OPERATIONS ARE A SUBSTANTIAL CHANGE BECAUSE THEY MAY CAUSE SIGNIFICANT IMPACTS TO NEIGHBORS.

The second prong of the substantial change analysis is whether the change "*may* result in significant adverse impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10)." Act 250 Rule 2(C)(7) (emphasis added). The undisputed evidence presented at trial from both parties was more than sufficient to demonstrate that NEMG's rock crushing operations have the potential for significant impacts.

All of Neighbors' witnesses testified that NEMG's crushing operations produce significant rock dust, which they are exposed to as it drifts onto their properties. Pamela Austin, a Graniteville resident since 1969, testified that "[t]he dust is just everywhere." Testimony of Pamela Austin, Tr. vol. 2, at 17. She no longer is able to enjoy her front porch because the "grill is just covered with dust." Id. Exhibit 9 is a photograph illustrating the significant dust that had accumulated on her porch screen in the week since it had been installed. Similarly, Suzanne Bennett testified that the dust pollution is "very, very disturbing" because she finds it on her windowsill, porch, car, and lawn. Testimony of Suzanne Bennett, Tr. vol. 2, at 8. This dust pollution began only when NEMG began its crushing operations; Marc Bernier testified that this excessive dust was not present "before this operation moved in two to three years ago." Testimony of Marc Bernier, Tr. vol. 2, at 65.

NEMG's rock crushing operations also generate significant noise. The Environmental Board has acknowledged that "noise can create undue pollution when it intrudes on people, regardless of the decibel level." Re: Sherman Hollow, Inc. et al., Application No. 4C0422-5-EB (Revised), Findings of Fact, Concl. of Law, & Order, at 30 (Vt. Envtl. Bd. Feb. 17, 1989). Neighbors testified that NEMG's rock crushing operations produce loud noise that sounds like "a laundry mat of uneven—unleveled washing machines," Tr. vol. 2, at 23, and a "bunch of bricks"

thrown into a running dryer. Id. at 66. Mr. Bernier testified "you hear that crunch, crunch, crunch . . . that crushing, crushing, crushing." Id.

Finally, NEMG's rock crushing operations carry significant impacts to traffic, primarily from the many large trucks that carry rock aggregate from the crushers. Pamela Austin testified that "[s]ome days there's a hundred" of these trucks along Graniteville Road, the primary road through the village. Id. at 16. Mr. Bernier testified, "I've had to actually go onto the shoulder of the road to avoid being hit by these trucks." Id. at 47. Ms. Bennett testified that, when she encounters the trucks on Graniteville Road, "I'm scared . . . some of [the trucks are] way off on the other line." Id. at 8. Accordingly, these adverse traffic impacts require review under Act 250 to protect the public's interest in safe travel on public roadways. In re Pilgrim P'ship, 153 Vt. 594, 596 (1990), 572 A.2d 909, 910.

Neighbors' evidence concerning the impacts of the rock crushing operations was confirmed by Appellees' witnesses Harry Hart and John Hinckley. Harry Hart testified that the NEMG rock crushing operations produce noise, dust, and truck traffic. Testimony of Harry Hart, Tr. vol. 1, at 138–39. John Hinckley testified that dust is produced from the operations' rolling stock, loaders and buckets, tires, and feeders. Testimony of John Hinckley, Tr. vol. 1, at 126–27.

Based on this cumulative and undisputed evidence, this Court already has found that NEMG's rock crushing operations produce noise, dust, and truck traffic. In re Northeast Materials Group, LLC, No. 143-10-12 Vtec, slip op. at 7, Finding of Fact 45 (Vt. Super. Ct. Envtl. Div. April 28, 2014) (Walsh, J.) (Decision on the Merits), *noted in* NEMG, 2015 VT ¶ 14, n.6, ¶ 26, n. 12. This Court should require a permit for NEMG's rock crushers because Neighbors overwhelmingly proved that these rock crushers have the potential for significant impacts. Accordingly, the Court should adopt Neighbors' Proposed Findings of Fact numbered

41–56, and Neighbors' Proposed Conclusions of Law numbered 69–76, previously submitted on December 17, 2013.

The evidence demonstrating that the rock crushing operations are a substantial change requires that the Appellees apply for an Act 250 permit. Neighbors respectfully suggest that, because the evidence on this issue is so plain and undisputed, the Court may remand this case to the District Commission on this basis alone.

II. THE APPELLEES' EVIDENCE DEMONSTRATED ABANDONMENT OF ROCK CRUSHING AT SITES 4 AND 2, AND FAILED TO PROVE GRANDFATHERING.

The Appellees' evidence proved that any rock crushing operations that may have existed at Sites 4 and 2 on the ROA tract have been abandoned. Moreover, absent the evidence of rock crushing operations at Site 1, located on a tract that ROA does not own and never has owned, the Appellees' evidence concerning pre-1970s rock crushing on the ROA tract was too "sparse" to prove grandfathering. NEMG, 2015 VT ¶ 34.

A. The Appellees' Evidence Proved That Any Rock Crushing That Occurred On Sites 4 and 2 Was Abandoned.

To qualify for the exemption for pre-existing development, the Appellees "must establish that *the particular land use* has not been abandoned." Re: U.S. Quarried Slate Prods., Inc., Declaratory Rulings 279 & 283, Findings of Fact, Concl. of Law, & Order (Reconsidered), at 22 (Vt. Envtl. Bd. Oct. 1, 1993) (emphasis added). Uses are abandoned where there has been "a substantial period of nonuse." Re: Raleigh B. Palmer, Isle La Motte Gravel Pit, Declaratory Ruling No. 424, Findings of Fact, Concl. of Law, & Order, at 9 (Vt. Envtl. Bd. Nov. 4, 2004). In this case, Appellees' evidence affirmatively proved that ROA abandoned any alleged rock crushing operations at Sites 4 and 2.

Beginning with Site 4, the site of the current NEMG rock crushing operations, the Appellees presented historical texts and photographs related to rock crushing during the 1904–1920 period. The Appellees presented no evidence of any rock crushing operations on Site 4 from the 1920s to the beginning of NEMG's current operations in 2010, a period of approximately 90 years of nonuse of this site for rock crushing operations.

Concerning the alleged rock crushing operations at Site 2, the Appellees presented maps and photographs that indicated a "crusher siding" in 1926, and a "crusher house" in the 1940s and 1950s. Duncan McKay also testified that a "chicken grit" facility was operating on Site 2 in 1957. Tr. vol. 1, at 106–07. However, both Mr. McKay and Donald Murray testified that these "chicken grit" crushing operations ceased at Site 2 around 1960, and Mr. Murray testified that neither the crusher nor the crusher house still existed. Id. at 89–90, 108. The Appellees presented no evidence of any rock crushing operations on Site 2 since 1960—a period of 50 years of nonuse.

Applying the holdings of Quarried Slate Products and Raleigh B Palmer to these undisputed facts leads inevitably to the conclusion that any rock crushing operations that may have existed prior to 1970 on Sites 4 and 2 were abandoned long before NEMG began its rock crushing operations in 2010, because any rock crushing at these sites ceased many decades ago, and periods of 50–90 years clearly qualify as substantial periods of nonuse.

At a minimum, any rock crushing on Site 4, adjacent to the Neighbors and separated from the rest of the ROA tract by Graniteville Road, was abandoned because there was no evidence of any rock crushing occurring at this Site in the past 90 years. See Re: Weston Island Ventures, Declaratory Ruling No. 169, at 2, 5 (Vt. Envtl. Bd. June 3, 1985) (finding that pre-existence of pits on one side of Route 100 "does not extend north of Route 100"); see also Re: Thomas

Howrigan Gravel Extraction, Declaratory Ruling No. 358, Findings of Fact, Concl. of Law, & Order, at 15 (Vt. Envtl. Bd. Aug. 30, 1999) (finding that parcels of land divided by public highways and by distance must be analyzed as "separate and distinct" for Act 250 purposes, including grandfathering).

B. The Appellees Provided Insufficient Evidence Of The Scope, Rates, Or Volumes Of Pre-1970 Rock Crushing On The ROA Tract.

The Appellees' burden includes proof of the scope of the alleged pre-1970 rock crushing operations on the ROA tract, including extraction or production rates. See Re: John Gross Sand & Gravel, Declaratory Ruling No. 280, Findings of Fact, Concl. of Law, & Order, at 8 (Vt. Envtl. Bd. July 28, 1993) (stating that burden of proof for pre-existing development not met where gravel pit extraction rates not produced). The Appellees failed to meet this burden because they submitted insufficient evidence of the scope or rates of any of the alleged pre-1970 rock crushing on the ROA tract.

The Appellees presented no witnesses who testified concerning the scope, rates, or volumes of any alleged rock crushing that occurred on the ROA tract prior to 1970. Donald Murray did not begin working at ROA until the late 1970s, and accordingly did not testify concerning pre-1970 scope, rates, or volumes. Duncan McKay began working at Wells-Lamson in 1957, and saw the "chicken grit" facility at Site 2, but did not testify concerning this facility's scope, rates, or volumes.

Absent the irrelevant evidence from Site 1, located on a separate tract, and with Sites 4 and 2 having been abandoned, the only evidence that could be construed as relating to pre-1970 rock crushing, including the scope, rates, or volume of crushing, is from Exhibits R and S, which relate to a temporary period of rock removal from Site 3, and which indicate a potential for temporary rock crushing on that site. However, as Mr. Murray conceded, these Exhibits provide

no evidence that any rock crushing actually occurred. Testimony of Donald Murray, Tr. vol. 1, at 91–92.

Even if these Exhibits are construed as providing evidence of rock crushing, they concern Site 3, far from the present NEMG crushing site, and relate only to a few months of temporary rock crushing, as opposed to NEMG's permanent rock crushing operation. The Appellees presented absolutely no evidence concerning the scope, rates, or volumes of rock crushing that may have occurred near the present NEMG crushing site prior to 1970. See NEMG, 2015 VT ¶¶ 28, 30 (past crushing operations must be analyzed on a site-by-site basis). Therefore, the Appellees failed to meet their burden of proving a grandfathering exemption for NEMG's rock crushing operations. This Court should adopt Neighbors' proposed findings of fact numbered 18-35, and 40, their proposed conclusions of law numbered 57-62, and 64, and their proposed Judgment.

III. THIS COURT SHOULD REMAND THIS CASE FIRST, THEN PROCEED TO THE ASPHALT PLANT APPEAL.

In May 2013, Neighbors moved to add the following question to the Statement of Questions in the asphalt plant appeal:

> "Whether the impacts from the crushers should be included in the review of NEMG's Act 250 application for a proposed asphalt plant."

On July 2, 2013, this Court granted this motion, holding that:

> If this Court were to find that (1) the crushing impacts should be considered, and (2) the consideration of the impacts would effectively result in substantial and material changes in the original application, we would be forced to remand the case to the District Commission.

Order dated July 2, 2013, at 3.

Neighbors also moved to coordinate these appeals by requesting that the Court initially proceed with the appeal relating to permitting for the rock crushers because, if the rock crushing

operation needed an Act 250 permit, remand of the asphalt plant case to the District Commission would be required. On July 2, 2013, this Court granted the motion to coordinate.

Pursuant to the Vermont Supreme Court's opinion, this Court should conclude that the impacts of NEMG's rock crushing operations must be considered under Act 250 and remand this case to the District Commission so that Graniteville citizens can be heard concerning rock crushing that has impacted them for four years without a permit. In turn, this will result in substantial and material changes to NEMG's project and its impacts, which then will include the rock crushers as well as the asphalt plant, and the cumulative impacts of both operations. These changes should result in a remand of both cases to the District Commission. *See* Act 250 Rule 34(c) (requiring a new application when there is a substantial and material change to a project); In re Application of Lathrop Limited Partnership, 2015 VT 49, ¶ 107, -- Vt. --, -- A.3d -- (changes to a project that carry the potential for impacts that were not reviewed by the District Commission require remand to the Commission).

Accordingly, the Court should decide this case first, remand this case to the District Commission, and then address appropriate resolution of the asphalt plant appeal. If needed, Neighbors anticipate filing a motion to remand the asphalt plant appeal once this Court has ruled in response to the Supreme Court's opinion in this case.

CONCLUSION

The Supreme Court held that this Court should consider "the actual existence, relative location, and relative amount of pre-1970 crushing, and consequent impact of the new crushing on the Act 250 criteria." NEMG, 2015 VT ¶ 31, n. 17. Applying this holding to the evidence adduced at trial, NEMG's rock crushing operations plainly constitute a substantial change that requires an Act 250 permit. This Court should remand this case to the District Commission for

re-initiation of the Act 250 permitting process and then address remand of the asphalt plant case as well.

Respectfully submitted this September 4, 2015.

BY: 

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing *Neighbors for Healthy Communities' Memorandum In Response To Vermont Supreme Court Opinion No. 2014-190*, on this 4th day of September, 2015, via USPS First Class mail, postage prepaid, to the following:

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Neighbors for Healthy Communities

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