IN THE SUPREME COURT OF THE STATE OF VERMONT

No. 2016-032

IN RE: NORTH EAST MATERIALS GROUP, LLC
ACT 250 JO #5-21

On Appeal from a Judgment of the
Vermont Superior Court – Environmental Division,
On Remand from the Supreme Court of Vermont
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 Environmental Division on remand, Appellees' brief rehashes old arguments that this Court already has rejected. Appellees also commit significant legal errors and fail to respond to many of Neighbors' principal arguments. Neighbors respectfully request this Court to hold that NEMG's rock crushers require an Act 250 permit.

ARGUMENT

I. EVEN IF NEMG'S ROCK CRUSHING WERE PART OF A PREEXISTING DEVELOPMENT, IT IS A SUBSTANTIAL CHANGE FROM THAT DEVELOPMENT AND THEREFORE REQUIRES AN ACT 250 PERMIT.

To the extent that an argument can be gleaned from Appellees' Brief regarding substantial change, it appears to consist of three main points: 1) that there would have been no reason for remand if this Court had decided that NEMG's crushers are a cognizable change; 2) that because quarrying has occurred at different sites across the ROA tract for the past century, NEMG's crushing operation is not a cognizable change from that development, and; 3) that because crushing can be a mobile activity, NEMG's crushers are being operated in the same manner as previous crushing on the tract, and therefore there is no cognizable change.

As explained below, Appellees are wrong on all points. Additionally, Appellees have not disputed Neighbors' arguments regarding the second prong of the substantial change test—that NEMG's rock crushing creates the potential for significant impacts on Neighbors. Therefore, this Court should hold that NEMG's rock crushers are a substantial change from any preexisting development.

A. <u>This Court remanded for the Environmental Division to determine the second prong of the substantial change test.</u>

The linchpin of Appellees' legal argument concerning cognizable change is the following erroneous assertion:

> There would have been no reason for a remand had this Court had [sic] already ruled that the rock crushers are per se a cognizable change. There would have been nothing for the trial court to do.

Appellees' Br. at 5. Appellees later repeat this error: "Had the Court already made such a ruling respecting cognizable change, any remand decision by a lower court would have been moot." Id. at 7 (emphasis in original). These patently incorrect assertions reflect a misunderstanding of Act 250's substantial change test and of this Court's prior Opinion.

Under Act 250, a cognizable change is but the first prong of the substantial change analysis; the second prong is whether that cognizable change has the potential for significant impact. In re N. E. Materials Grp. LLC Act 250 JO #5-21, 2015 VT 79, ¶ 16, __Vt.__, 127 A.3d 926, 932 (PC at 58) (citing cases). This Court's resolution of the first prong of the substantial change analysis did not necessarily determine the second prong.

Concerning this Court's prior Opinion, even the most casual reading demonstrates this Court's holding that, having decided the first prong—cognizable change—on remand the trial court was to address the second prong concerning the potential impacts from this change:

> The deployment of heavy industrial equipment that qualifies as development in a vicinity where it has not previously been deployed is a cognizable change. We accordingly reverse the Environmental Division's conclusion that the challenged rock-crushing activity is not a cognizable change. Whether the development gives rise to potential significant impact with respect to one or more of the Act 250 criteria remains to be seen.

Id. ¶ 31 (PC at 67) (emphasis added). Like the trial court, Appellees' Brief fails to address this paragraph, thereby highlighting their and the trial court's legal error. This Court's remand instructions to revisit whether NEMG's operations give rise to a substantial change merely reflected this earlier holding. Id. ¶ 36 (PC at 69).

Moreover, as addressed below, even if this Court had not decided that NEMG's crushing is a cognizable change, Appellees' arguments on this issue—like the Environmental Division's—are inconsistent with this Court's Opinion. See also Appellants' Br. at 13-15.

B. This Court has rejected the idea that quarrying on the ROA tract can establish a baseline for considering whether NEMG's crushing is a cognizable change.

Appellees recite findings of the Environmental Division regarding the location of quarrying on the ROA tract, making much of the fact that the quarries run in an approximate north-south line and stating that NEMG's crushers are in the "midst" of the quarries. Appellees' Br. at 16-18. In an argument that even the Environmental Division did not make, Appellees assert that NEMG's crushers are therefore operating "in a vicinity where development [has] previously occurred," and thus the crushers are not a cognizable change from that development. Id. at 14-19, 24.

This argument embodies Appellees' fundamental error throughout this case of equating rock crushing with granite quarrying, an error that this Court firmly rejected by holding that cognizable change turns on proof of actual crushing in sufficient volumes near the current NEMG site:

> Whether the crushing operations at issue here constitute a substantial change from the pre-1970 ROA dimension-stone quarry development turns on the actual existence, relative location, and relative amount of pre-1970 crushing, and the consequent impact of the new crushing on the Act 250 criteria. It does not turn on a general abstract conception of the relationship between dimension-stone quarrying and rock crushing.

In re N. E. Materials Grp., 2015 VT 79, ¶ 31 n.17 (PC at 67) (emphasis added). This Court also declined to rely upon "generalizations about the relationship between rock-crushing activities and dimension-stone quarrying" and noted that "[w]hether crushing is best characterized as 'integral to' or 'ancillary to' dimension-stone quarrying is beside the point." Id.; see also ¶ 30

(PC at 66) (referring to pre-1970 "crushing operations" in relation to substantial change test) and ¶ 14 (PC at 56) (referring to Environmental Division finding that no cognizable change "in rock-crushing activity" had occurred). Further, the Clifford's Loam factors explicitly recognize that the "'addition of a stone crusher'" to quarrying activities can constitute a cognizable change. Id. ¶ 29 (PC at 64-65) (citing In re Clifford's Loam & Gravel, Inc., Declaratory Ruling No. 90, slip op. at 3 (Vt. Envtl. Bd. Nov. 6, 1978)).

This Court's analysis of the gravel pit cases further illustrates that what matters is not whether quarrying has occurred on or near the NEMG site, but whether significant crushing has occurred, and this Court determined that NEMG's crushing fit the fact pattern for cognizable change:

> The circumstance here—the introduction of significant crushing operations on a site not known to have had similar operations for over fifty years—is more closely analogous to the introduction of new operations on a different site within a gravel extraction tract than to the gradual expansion of existing operations.

In re N. E. Materials Grp., 2015 VT 79, ¶ 30 n.14 (PC at 66) (emphases added).[1]

Additionally, the parties have never contested that quarrying has occurred on the ROA tract. See In re N. E. Materials Grp. LLC A250 JO #5-21, No. 143-10-12 Vtec, slip op. at 11 (Vt. Super. Ct. Envtl. Div. Apr. 28, 2014) (Walsh, J.) (Decision on the Merits) (PC at 42) ("It is undisputed that dimension stone quarrying took place at all of ROA's quarry sites prior to

[1] The first paragraph of footnote 14 of this Court's Opinion does not stand for the proposition that crushing anywhere on the ROA tract suffices to establish a baseline for cognizable change. Rather, this Court explained that a district commission could consider pre-1970 crushing at various sites within a tract, even if those sites were on separate quarries. However, the distance between sites and similarity of operations would be relevant to determining whether crushing is more akin to a gradual expansion of existing operations or the introduction of significant new operations on a site within a tract, which in turn is relevant to the cognizable change test. See In re N. E. Materials Grp., 2015 VT 79, ¶ 30 n.14 (PC at 66). In this case, this Court already has decided that NEMG's operations are more akin to "the introduction of new operations on a different site within a . . . tract." Id.

1970."). And, in its prior Opinion, this Court was familiar with the general existence and locations of the four quarries now referenced by Appellees. See In re N. E. Materials Grp., 2015 VT 79, ¶ 3 (PC at 52) (referring to "several quarries . . . owned and operated by distinct entities" that are "adjacent to each other in a configuration running roughly from north to south"); In re N. E. Materials Grp., No. 143-10-12 Vtec, slip op. at 3, 5 (Apr. 28, 2014) (PC at 34, 36, FF 3-6, 20-25) (referring to multiple quarry companies and noting north-south configuration).

In sum, Appellees' arguments are not new, and this Court already has rejected them.

C. The idea that the "mobility" of crushing can establish a baseline for considering whether NEMG's crushing is a cognizable change contradicts this Court's Opinion.

Both Appellees and the Environmental Division seemingly took this Court's statement that "some level of granularity" is required in the substantial change analysis, In re N. E. Materials Grp., 2015 VT 79, ¶ 30 (PC at 66), as license to invent their own test for assessing cognizable change—namely, that because crushing can be a mobile activity on quarrying tracts, relocating a crusher on the ROA tract does not give rise to a cognizable change. See In re N. E. Materials Grp. LLC A250 JO #5-21, No. 143-10-12 Vtec, slip op. at 13, 18 (Vt. Super. Ct. Envtl. Div. Dec. 23, 2015) (Walsh, J.) (Decision on the Merits, hereinafter "Decision") (PC at 13-18); Appellees' Br. at 11-12, 16.

However, this Court gave ample guidance regarding the level of granularity that would be required in order to establish that NEMG's rock crushers are not a cognizable change. Specifically:

- crushing "decades ago and miles away" from NEMG's site is not sufficient;
- a "pre-1970 history of intermittent crushing at two or three different locations on an 1170-acre tract" is not sufficient;
- any "relationship" between quarrying and crushing is not sufficient, and;

- the Environmental Division's findings regarding crushing of unspecified amounts or duration before 1920 near the NEMG site, of unspecified amount or duration from the 1920s to 1960s by Wells-Lamson, and of approximately 30,000-40,000 cubic yards for eight months at the Smith Quarry in 1969-1970, are not sufficient.

In re N. E. Materials Grp., 2015 VT 79, ¶¶ 7, 24, 28, 31 n.17, 34 (PC at 54, 62, 64, 67, 69).

Rather, to establish a baseline that potentially could support the conclusion that NEMG's crushers are not a cognizable change, there would need to be additional findings regarding the actual existence, location, and amount of crushing in the vicinity of the current NEMG site. Id. ¶ 31 n.17 (PC at 67); see also id. ¶ 5 n.1 (PC at 53) (noting that Environmental Division had not made findings as to "volume" or "duration" of crushing near NEMG's current location and that "[t]here was no evidence of any crushing activity on or near [the NEMG] site after the 1920s"). A general finding that it is common to move crushers around a tract does nothing to establish this required baseline.

Therefore, upon remand, there was no reason for the Environmental Division to assert that this Court left "little guidance" on the issue of cognizable change. Decision, PC at 13. Likewise, there was no need for the Environmental Division to reanalyze the cases that had been analyzed by this Court, to characterize this Court's decision as a "departure" from these cases, or to criticize this Court's reasoning as "not fully compatible with traditional preexisting-development/substantial-change analysis." Id., PC at 13-14. Rather than accept this Court's analysis and holding, the Environmental Division invented a "relocation" test for cognizable change that is absent from this Court's Opinion and that led to the same conclusion—no cognizable change based on sparse evidence of pre-1970 crushing—that this Court had reversed. Id., PC at 16-18.

Appellees suggest the Environmental Division was "unsure of the approach to take." Appellees' Br. at 9. Appellees do not explain why the Environmental Division should have

experienced any such uncertainty, or why "this Court differed somewhat from prior Environmental Board decisions," id., since this Court wrote that it was the Environmental Division's opinion—not its own—that was inconsistent with those Board decisions. See In re North East Materials Group, LLC, 2015 VT 79, ¶¶ 29-31 (PC at 64-67) (reviewing gravel pit and other Environmental Board decisions and finding Environmental Division's analysis inconsistent with those decisions).

Appellees conclude their discussion of the law of substantial change with the assertion that, if the "relocation" test for cognizable change utilized by the Environmental Division on remand is mistaken, then the cases of In re Clifford's Loam & Gravel, Inc., Declaratory Ruling No. 90 (Vt. Envtl. Bd. Nov. 6, 1978) and In re F.W. Whitcomb Constr. Co., Declaratory Ruling No. 408 (Vt. Envtl. Bd. Aug. 28, 2002) must be abandoned. Appellees' Brief at 12. To the contrary, the Environmental Division's "relocation" test misapplied these two cases.

As to Clifford's Loam, this Court discussed that case at length and concluded that its four-factor test indicated that NEMG's rock crushers are a cognizable change. In re North East Materials Group, LLC, 2015 VT 79, ¶ 30 n.14 (PC at 66).[2] As to F.W. Whitcomb, NEMG's rock crushers are not being "operated in essentially the same manner" as rock crushers before June 1, 1970, because there were no rock crushers at or near the NEMG site on that date, or for five decades prior, if ever, and there are no findings about the duration and amount of that crushing, if it existed. See F.W.Whitcomb, at 4. Thus, Appellees and the Environmental

[2] Appellees continue to ignore this Court's Opinion in their later discussion of Clifford's Loam and F.W. Whitcomb, in which they suggest that NEMG's rock crushers are like the gradual expansion of gravel pits. Appellees' Br. at 15-16. This directly contradicts this Court's conclusion, based on those cases, that NEMG's rock crushers are more analogous to the introduction of new operations on a different site within a tract. In re North East Materials Group, LLC, 2015 VT 79, ¶ 30 n.13, 14 (PC at 65-66).

Division misinterpret these cases, just as the latter misinterpreted this Court's Opinion to reissue the very conclusion that this Court had reversed.

D. NEMG's rock crushers create the potential for significant impacts on Neighbors.

The Environmental Division's twelve new findings of fact on remand conclusively establish actual and potential impacts on Neighbors from NEMG's rock crushers. Decision, PC at 7-8 (FF 54-65). Appellees did not contest these new findings or otherwise address them in their brief, other than to argue that Neighbors should not have briefed the issue. Appellees' Br. at 2. However, Neighbors briefed the second prong of the substantial change test—the potential for significant impact—because this prong of the test has been met. Therefore, once this Court corrects the Environmental Division's legal errors concerning cognizable change, this Court also should enter Judgment for Neighbors based on these additional findings of fact. There is no need for yet another remand to the Environmental Division because that court's findings now establish both prongs of the substantial change test.[3]

II. NEMG'S ROCK CRUSHING IS NOT GRANDFATHERED AS A PREEXISTING DEVELOPMENT AND IT THEREFORE REQUIRES AN ACT 250 PERMIT.

NEMG's rock crushing operation is not part of a preexisting development because NEMG has not proven, and the Environmental Division has not found, that pre-1970 crushing occurred at various sites and times for many decades on the ROA tract at levels commensurate with current levels. See In re N. E. Materials Grp., 2015 VT 79, ¶¶ 24, 34 (PC at 62, 69) (articulating requirements for meeting preexisting standard). This was true in this Court's prior decision and it is still true. In addition, even if the Environmental Division's conclusions

[3] Appellees did not need to devote a section of their brief to the issue of abandonment, an issue that Neighbors did not appeal. A finding of abandonment is not necessary to establish Act 250 jurisdiction because 1) NEMG's rock crushers are not part of a preexisting development and, even if they were, 2) NEMG's rock crushers are a substantial change from that development.

second-time around met the legal standard for preexisting development, they are invalid because they are based on impermissible inferences. See generally Appellants' Br. at 19-24.

Appellees do not acknowledge or respond to these arguments, or to this Court's direction regarding the necessary findings to support a conclusion that NEMG's crushers are part of a preexisting development. Instead, Appellees make a few points toward the end of their brief that appear to be the extent of their preexisting development argument. See Appellees' Br. at 21-26. The main points from that argument are addressed below.

A. This Court did not decide that crushing is part of the preexisting development on the ROA tract.

Appellees' chief position on the preexisting issue appears to be that, because this Court approved the Environmental Division's tract-wide approach to determining preexisting development, this Court approved the Environmental Division's holding that crushing is part of the preexisting development on the ROA tract. Appellees state:

> Because this Court sustained the Environmental Division's approach regarding "pre-existing development," the more precise question in this appeal is whether the facts presented to the Environmental Division on the issue of "substantial change" or "cognizable physical change" present sufficient evidence to sustain NEMG/ROA's burden of production.

Id. at 1 n.1. Later, Appellees point to the "'Pre-Existing Development'" analysis in the Environmental Division's opinion and state that "[t]he trial court's discussion here is clearly dicta," presumably because "[t]his Court has expressly approved and affirmed the tract wide approach to 'pre-existing development.'" Id. at 22 (emphasis in original).

Appellees are seriously mistaken to assert that a tract-wide approach equals a tract-wide conclusion of a preexisting development that included rock crushing, or that this Court "decided" the latter issue. See id. This Court held that, though the tract-wide approach for assessing

preexisting development was permissible, the Environmental Division's findings did not actually establish that crushing was part of the ROA preexisting development. This Court stated:

> [W]e do not take issue with the Environmental Division's broad approach to defining the preexisting development. To the extent that the evidence shows that dimension-stone quarrying was conducted throughout the ROA tract for many decades, and that crushing operations were part of those operations at various sites within the tract at various times through that period, the Environmental Division could conclude that the disputed crushing operations are grandfathered unless Neighbors can show that they constitute a substantial change. FN Whether the evidence actually supports such a finding is a distinct question which we consider in Part III, infra.

In re N. E. Materials Grp., 2015 VT 79, ¶ 24 (PC at 62) (emphasis added). Then, in Part III of its Opinion, this Court reviewed the Environmental Division's findings regarding crushing and held:

> The sparseness of these subsidiary findings, especially when we set aside the findings relating to the off-site crushing, does not match the breadth of the Environmental Division's conclusion that intermittent crushing, presumably in an amount commensurate with the crushing at issue in this case, characterized ROA's operations for over a century. . . . Thus, we reverse the Environmental Division's findings concerning the scope of rock-crushing activities in the preexisting development and the absence of abandonment. We remand for consideration in light of the record evidence of pre-1970 rock-crushing operations on the ROA tract. On remand, in light of this opinion and the record evidence, the Environmental Division should revisit its findings concerning whether NEMG's rock-crushing operations fit within the general scope of ROA's pre-1970 development . . . .

Id. ¶¶ 34-36 (PC at 69) (emphases added). Appellees ignore these holdings.

B. "Common sense" cannot support the Environmental Division's speculations regarding crushing on the ROA tract.

Rather than address this Court's Opinion, Appellees discuss the Environmental Division's "valuable dicta" and extol the use of "common sense," as if "common sense" could excuse the trial court's use of unsupported inferences and impermissible double inferences, as well as its unsupported conclusion that landowners often did not keep records prior to 1970 because they did not know they would need to under Act 250. Compare Appellants' Br. at 20-24

with Appellees' Br. at 22-25. Further, the "common sense" citations provided by Appellees are inapposite. Those cases, including a dissent, related to canons of statutory construction, the question of what a "reasonable person" would do in a given set of circumstances, and the notion that juries are capable of following general jury instructions—not to leaps of faith (or inferences) in the evidentiary fact-finding context. See Appellees' Br. at 23 (citing cases).

Appellees also recite some of the Environmental Division's findings regarding crushing and state that "[t]he trial court reasonably concluded that at least some crushing is done without a written contract as the 1988 Cooley contract says so." Id. at 25 (emphasis in original). They continue: "The trial court did not speculate what other crushing there had been. It simply determined that the writings did not necessarily demonstrate all of the crushing that occurred. This is an application of common sense." Id. (emphasis added). Whether this would actually make sense is irrelevant because this is not what the Environmental Division did. The Environmental Division did in fact speculate, and it determined much more than that contracts do not necessarily capture all crushing. It concluded, based on this "no written contracts" idea and the idea of an economic relationship between quarrying and crushing, that "crushing was occurring continuously (though intermittently) on the ROA tract since the early 20th century." Decision, PC at 12. Appellees' treatment of the issue suggests that they too would find this conclusion defies common sense.

And, as explained in Neighbors' principal brief, it certainly defies the legal standards for relying upon inferences in making factual findings. Most importantly, even this speculation does not meet the legal standard for establishing preexisting development—pre-1970 crushing at

various sites and times for many decades on the ROA tract at levels commensurate with current levels.[4]

CONCLUSION

The NEMG rock crushers have impacted Neighbors for more than five years without an Act 250 permit, yet the crushers are not grandfathered as a preexisting development and, even if they are, they are a substantial change from that development. Neighbors respectfully request this Court to enter Judgment that the rock crushers are subject to Act 250 and must obtain an Act 250 permit in order to operate.

Respectfully submitted this 30th day of March, 2016.

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[4] Regarding the State's brief, to the extent its position is that economic evidence is neither sufficient nor necessary in Jurisdictional Opinion cases, we tend to agree. However, it is important to be clear about the Environmental Division's use of "economic evidence" in this case. It is not as if there were a mountain, or even a molehill, of "economic" evidence. Rather, though not entirely clear, the Environmental Division's statement that there is an "economic relationship" between crushing and quarrying appears to be based on the statement of Donald Murray that crushing helps the bottom line. Decision, PC at 11-12. This "economic relationship" was used to support the Environmental Division's preexisting development conclusion, not its cognizable change conclusion. Id. The Environmental Division's cognizable change analysis was based on the "mobile" nature of crushing. Id., PC at 16-18. And, even if there is an economic relationship between quarrying and crushing, that relationship does not satisfy the standard for establishing preexisting development, as explained above and in Neighbors' principal brief.

VERMONT RULE OF APPELLATE PROCEDURE 32(a)
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). The Microsoft Office Word 2010 word processing system was used to create this Brief and according to the software word count tool it contains 4,014 words, excluding the Table of Contents, Table of Authorities, signature blocks, and this Certificate of Compliance.

Dated March 30, 2016.

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