IN THE SUPREME COURT OF THE STATE OF VERMONT

No. 2016-170

IN RE: NORTH EAST MATERIALS GROUP, LLC
AMENDED ACT 250 PERMIT

On Appeal from a Judgment of the
Vermont Superior Court – Environmental Division
Docket No. 35-3-13 Vtec

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

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STATEMENT OF THE ISSUES

I. Whether the Superior Court, Environmental Division erred in failing to deny an Act 250 permit for North East Materials Group's asphalt plant project based on undue adverse aesthetic effects, or in failing to impose a condition or conditions that will ensure the asphalt plant will not have an undue adverse effect on aesthetics under Criterion 8 of Act 250, 10 V.S.A. § 6086(a)(8)………..17

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STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

In 2013, North East Materials Group, LLC (NEMG) began operating a hot-mix asphalt plant on the Rock of Ages (ROA) tract in Barre, Vermont. N. E. Materials Grp. Amended A250 Permit, No. 35-3-13 Vtec, slip. op. at 1, 3 (Vt. Super. Ct. Envtl. Div. Apr. 18, 2016) (Decision on the Merits (Altered)), PC 1, 3. The plant is sited between the villages of Lower Graniteville and Upper Graniteville. PC 7.

The District 5 Environmental Commission granted a Land Use Permit for the asphalt plant on January 24, 2013, and an Altered Land Use Permit (Act 250 Permit) on February 26, 2013. PC 1, 3. Neighbors for Healthy Communities (Neighbors) appealed to the Superior Court, Environmental Division. PC 1-2. NEMG and ROA cross-appealed. PC 1. After a three-day merits hearing on May 4, 5, and 6, 2015, the Environmental Division issued a Decision on the Merits (Altered) on April 18, 2016, approving the Act 250 Permit with conditions. PC 1, 31. Neighbors filed this timely appeal because the conditions imposed by the Environmental Division do not ensure compliance with Act 250 criteria 8 (aesthetics) and 5 (traffic).[1]

II. STATEMENT OF THE FACTS

A. The Graniteville Community

Graniteville is a small village comprised of "Upper Graniteville" and "Lower Graniteville." PC 3 (FF 7), 55.[2] Lower Graniteville is northwest of and downhill from Upper Graniteville, and the two are connected by Graniteville Road. Id. Lower Graniteville is home to a general store, playground, senior center, post office, church, school bus stop, and private

[1] In a related appeal, Neighbors are challenging the Environmental Division's decision on remand that NEMG's rock crushing operation—also on the ROA tract—is not subject to Act 250. In re: N. E. Materials Grp., LLC Act 250 JO #5-21, Docket No. 2016-032.

[2] "FF" refers to a Finding of Fact made by the Environmental Division.

residences, with Upper Graniteville being mainly residential. PC 3 (FF 8-9). Graniteville also is home to a Town Forest and biking trails. Tr. (05-04-2015), at 222-23, 235; PC 111. Neighbors described Graniteville as having been an enjoyable place for village living and a source of pride. Tr. (05-05-2015), at 148, 166. In the past, they have enjoyed gardening, hiking, biking, swimming, walking, and having coffee and breakfast outside. Tr. (05-04-15), at 159, 166, 223, 235; Tr. (05-05-2015), at 67.

Graniteville borders an 1160-acre historic stone quarrying tract owned by ROA. PC 2 (FF 3, 4), 55. Presently, granite is quarried from a deep hole roughly in the center of the ROA tract, and is processed at the ROA manufacturing facility on the western edge of the tract. Site Visit (Dec. 4, 2013), N. E. Materials Grp., LLC A250 JO # 5-21, No. 143-10-12 (Vt. Super. Ct. Envtl. Div.). Granite blocks and piles of stones are found throughout the ROA tract. Id.; PC 9 (FF 74).

B. The Asphalt Plant

NEMG began operating its asphalt plant in 2013. PC 3 (FF 15). The plant is on a 3.46-acre site between Lower and Upper Graniteville, south of Graniteville Road. PC 2, 3 (FF 5, 6, 7), 55. The plant is about 100 feet long and 30 feet wide, with a smokestack that extends 35 feet above ground. PC 9 (FF 76, 77). This is the first smokestack ever located on the ROA property. PC 10 (FF 83).

The plant is a batch-type plant, meaning that hot-mix asphalt is manufactured on an as-needed, per-truckload basis. PC 3 (FF 13). As designed, the plant produces a maximum of 250 tons of asphalt per hour. PC 3 (FF 11). Under its Act 250 Permit, it may produce 180 tons per hour, with a rolling average production limit of 4,500 tons per week during any given 45-day

period. PC 3 (FF 11), 105. The Act 250 Permit allows operations from May 1 through mid-November, Monday through Saturday from 6:00am – 4:00pm. PC 3 (FF 12), 108.

As of trial, the asphalt plant had run through two operating seasons. PC 3 (FF 15). In 2013, it operated on 63 days; in 2014, it operated on 77 days. PC 117-20. Neighbors live near the plant, with Pamela and Russell Austin's home being closest, approximately 1,800 feet away. PC 9 (FF 73), 55.

C. The Odor Conditions in the Plant's Air Permit and Act 250 Permit

In June 2012, NEMG's asphalt plant received an Air Pollution Control Permit (Air Permit) from Vermont's Agency of Natural Resources (ANR). This permit contained the following condition:

> Nuisance and Odor: The Permittee shall not discharge, cause, suffer, allow, or permit from any source whatsoever such quantities of air contaminants or other material which will cause injury, detriment, nuisance or annoyance to any considerable number of people or to the public or which endangers the comfort, repose, health or safety of any such persons or the public or which causes or has a natural tendency to cause injury or damage to business or property. The Permittee shall not discharge, cause, suffer, allow, or permit any emissions of objectionable odors beyond the property line of the premises.

PC 96.

Likewise, the Act 250 Permit issued by the District Commission in February 2013 contained the following condition, which repeated the Air Permit condition verbatim:

> With respect to nuisance and odor, the Permittee shall not discharge, cause, suffer, allow or permit from any source whatsoever such quantities of air contaminants or other materials which will cause injury, detriment, nuisance or annoyance to any considerable number of people or to the public or which endangers the comfort, repose, health or safety of any such persons or the public or which causes or has a natural tendency to cause injury or damage to business or property. The Permittee shall not discharge, cause, suffer, allow or permit any emissions of objectionable odors beyond the property line of the premises.

PC 106.

Thus, at the time of the trial, this asphalt plant had operated for two seasons pursuant to conditions in both of its governing permits that specifically prohibited objectionable odors beyond the property line of the premises.

D. The Impacts of the Asphalt Plant

1. Odors and Fumes on Neighbors' Properties.

The asphalt plant has several points where air emissions can occur: through the smokestack, which emits steam, fumes, and exhaust gases that appear bluish and hazy; through filtered vents on temporary storage tanks; and through fugitive emissions from loading and unloading asphalt trucks. PC 3, 10 (FF 16, 84). Pollutants include carbon monoxide, volatile organic compounds (VOCs), particulate matter, sulphur dioxide, nitrogen oxides, and the hazardous air pollutants benzene, formaldehyde, cadmium, nickel, and arsenic. PC 4, 5 (FF 18, 19, 25), 87, 90.

Liquid asphalt is stored in a tank with a small vent equipped with a carbon activated filter whose purpose is to eliminate offsite odors. PC 12 (FF 107, 108). Nevertheless, over the plant's two years of operation, fumes from the plant repeatedly have caused asphalt odors on Neighbors' properties and inside their homes. PC 6 (FF 43). As a result of the fumes, Neighbors have experienced multiple health effects including watery eyes, throat stinging, headaches, dizziness, and nausea. Id.; Tr. (05-04-2015), at 159, 160, 171, 209-10, 212, 223; Tr. (05-05-2015), at 60, 105, 132, 163. Almost all of these Neighbors have curtailed their outside activities and have had to shut their windows when the plant is operating. PC 6 (FF 43); Tr. (05-04-2015), at 159, 212-13, 223, 235, 261-62, 263-64; Tr. (05-05-2015), at 60, 67, 76-77, 107, 112.

For example, Pamela Austin—who lives nearest the asphalt plant with her husband Russell and their daughter and grandchildren—testified she has smelled asphalt at least once a

week during the plant's operating season, and more often in August and September. Tr. (05-05-2015), at 102, 104-05; PC 63-73. When the fumes and smells are present, she cannot use her yard or porch, and the smell has come into her home through the air conditioner as well. Tr. (05-05-2015), at 105, 107, 112, 119. Ms. Austin testified the fumes give her headaches, and nausea and vomiting if she cannot escape the smell. Id. at 105.

Melyssa Danilowicz of Upper Graniteville also testified that the fumes and odors have forced her to stay inside and have prevented her from doing outdoor activities she previously enjoyed. Tr. (05-04-2015), at 159; PC 56-62. She has smelled the asphalt at her home, on the front porch, and in her yard. Tr. (05-04-2015), at 160. She described these fumes as "very dank" and "heavy," a "chemical, fuel, petroleum" smell that stings, causing her nausea, headaches, watery eyes, and sore throat. Id. at 159, 160. Similarly, Suzanne Bennett, who has lived in Upper Graniteville for 55 years, testified she cannot enjoy the outdoors like she used to because of the fumes and smells from the asphalt plant, and she needs to go inside and close her windows to avoid them. Id. at 208, 212-13. Ms. Bennett described the asphalt smell at her home as very, very strong and oily, causing her nausea, awful headaches, and burning watery eyes. Id. at 209-10, 212.

Marc and Lori Bernier, who also live in Upper Graniteville, likewise testified they have stopped doing outdoor activities they used to enjoy because of the asphalt plant. Tr. (05-04-2015), at 223, 235, 261-62, 263-64; Tr. (05-05-2015), at 67, 76-77; PC 74-83. The Berniers have smelled asphalt at their home many times and also while in the Town Forest, while driving around Graniteville, and at friends' houses in town. Tr. (05-04-2015), at 221-22; Tr. (05-05-2015), at 59, 61. To Mr. Bernier, the smell is strong, annoying, offensive, and pungent, and "you want to get away from it and you have no place to go." Tr. (05-04-2015), at 220-21, 225-26.

The odors give him headaches like a sinus pressure behind the eyes. Id. at 223. For Ms. Bernier, the intensity of the asphalt fumes and smells is very, very strong; it lingers on hot days, and she can taste it in her mouth. Tr. (05-05-2015), at 60, 63. It causes her watery and burning eyes, burning throat, nausea, and breathing difficulties and dizziness if she is exposed for longer times. Id. at 60. To try to avoid the smell, she goes inside and closes the windows. Id. Because of the asphalt plant, she feels "very trapped, very cooped up," and is unable to escape to the outdoors, which used to be a source of tranquility. Id. at 76.

Padraic Smith, whose home is in Lower Graniteville, testified he has smelled the asphalt from his porch and lawn, and while out walking. Tr. (05-05-2015), at 154, 162-63. Mr. Smith described the asphalt smell as a very strong petrochemical smell, caustic. Id. at 163. Even given his poor sense of smell, the fumes are "very sharp" to him, and they affect his lungs depending on the strength of the smell. Id. at 161, 163. According to Mr. Smith, because of the asphalt plant, "everything seems to be worse" and it is more difficult to enjoy village living. Id. at 166. Additionally, Denise Viens-Kirkpatrick testified she has smelled asphalt at multiple homes in Graniteville. Id. at 131. She described the smell as offensive, horrible, and overpowering, giving her nausea and migraines. Id. at 132.

Periodically, Neighbors have contacted enforcement officials at ANR regarding off-site odors. PC 6 (FF 41); Tr. (05-04-2015), at 168-69. For example, in October 2014, ANR employee Dave Shepard came to Ms. Danilowicz's home after she called to report the smell. Tr. (05-04-2015), at 168. As they stood in the backyard, Mr. Shepard said he could smell the asphalt. Id. at 169. On an earlier occasion, in September 2014, Mr. Shepard advised Ms. Austin to stay inside with the doors and windows closed if she did not want to smell the asphalt. PC 69. When Ms. Bernier spoke with another ANR employee (Mr. Wakefield) in September 2014, he

told her it "might be a good idea" to stay in the house on the days the fumes bothered her. Tr. (05-05-2015), at 65, 101. ANR has not initiated any enforcement actions. PC 6 (FF 42).

Some Neighbors have considered trying to sell their homes because of the asphalt plant. Tr. (05-04-2015), at 213, 261-64.

Based on this evidence, the trial court found that the fumes and odors from the asphalt plant may be "shocking or offensive to the average person" and that they create undue adverse aesthetic effects. PC 16 n.5, 28-29. Specifically, Neighbors "experience pungent, eye-watering, and throat-stinging odors from the Project that permeate their properties in the summer time, and cause [them] to forgo outdoor recreation." PC 28-29.

In response to these findings and its conclusion of undue adverse effects under criterion 8, after NEMG had been operating for two years pursuant to two permits that prohibited asphalt fumes and odors from crossing the property line, the Environmental Division neither denied the permit nor imposed further conditions. PC 31. Instead, the lower court re-incorporated the condition that already existed not only in NEMG's Air Permit, but also in its Act 250 Permit, using the exact same words:

> The Permittee shall not discharge, cause, suffer, allow or permit from any source whatsoever such quantities of air contaminants or other materials which will cause injury, detriment, nuisance or annoyance to any considerable number of people or to the public or which endangers the comfort, repose, health or safety of any such persons or the public or which causes or has a natural tendency to cause injury or damage to business or property. The Permittee shall not discharge, cause, suffer, allow or permit any emissions of objectionable odors beyond the property line of the premises.

PC 29.

2. <u>Truck Traffic through a Sharp Curve in Lower Graniteville Village.</u>

Asphalt from the plant is transported by large dump trucks and longer, gondola-type trucks similar to tractor-trailers. PC 7 (FF 46). There is no limit on the number of truck trips per

day. PC 105-10. Based on the plant's maximum hourly output of 180 tons per hour, the plant could produce eight truckloads of asphalt per hour, yielding 16 one-way truck trips per hour to-and-from the site, or 18 trips if a fuel delivery occurred the same hour. PC 10 (FF 90). According to NEMG's production records, the maximum number of one-way truck trips per day was 58 in 2013 and 60 in 2014. PC 10 (FF 91), 117-20. In all, the asphalt trucks represent a 5-11% increase in traffic volume along Graniteville Road during peak operation. PC 10 (FF 92).

Though the asphalt plant's Act 250 Permit contemplated two access points for the site—one from the southern portion onto Pirie Road, and one from the northern portion onto Graniteville Road—100% of the asphalt plant truck traffic uses the access point on Graniteville Road because the Pirie Road access point has not yet been opened.[3] PC 7, 8 (FF 47, 53), 107, 114; Tr. (05-04-2015), at 136. This means all of the asphalt plant trucks travel on Graniteville Road, a designated truck route, through Lower Graniteville to reach various Vermont routes. PC 7, 8 (FF 48, 53); Tr. (05-04-2015), at 119.

In Lower Graniteville, a .3-mile segment of Graniteville Road is designated by the Vermont Agency of Transportation as a High Crash Location (HCL). PC 8 (FF 54). This HCL begins near the Graniteville General Store and continues west to the entrance of the Quarry Hill Senior Apartments. Id. An HCL designation means the .3-mile stretch of road has experienced five or more accidents over a five-year period. PC 8 (FF 55).

The most notable feature of the HCL on Graniteville Road is a sharp curve at the intersection of Graniteville Road with Baptist Street, which comes in from the west. PC 55, 112; Tr. (05-04-2015), at 105, 121; Tr. (05-05-2015), at 188-89. NEMG's traffic expert characterized the curve as approximately a 90-degree turn. Tr. (05-04-2015), at 121. In the HCL section,

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[3] Trucks using the Pirie Road exit would travel through Williamstown to Routes 14 and 64. PC 7 (FF 50), 55, 107.

Graniteville Road has two paved lanes with narrow shoulders, a roadside telephone pole limiting vehicle use of the shoulder, and no sidewalks. PC 8 (FF 59, 60). Of the five crashes in the HCL in the 2008-2012 period, two occurred in the sharp curve, one occurred at the crosswalk, and two occurred in the parking lot of the General Store. PC 9 (FF 67, 68).

The HCL goes through the hub of commercial and community activity in Lower Graniteville, including the general store, the post office, and a park and playground. PC 111; Tr. (05-04-2015), at 22-23; Tr. (05-05-2015), at 158-61, 190-92. These features lead to a high level of pedestrian and motor vehicle activity in the HCL. Tr. (05-05-2015), at 191-92. The HCL also includes a crosswalk across Graniteville Road, a school bus stop, and the entrance to a bike path. Id. at 158-61, 192-93. It is a focus of activity for children and the elderly, two especially vulnerable groups in terms of highway safety. Id. at 193; PC 112-13.

For all of these reasons, Neighbors' expert testified that the HCL is a location where inattention can get a driver into trouble. Tr. (05-05-2015), at 199-200. Both Neighbors' and NEMG's experts testified that adding traffic to an HCL increases the likelihood of a crash in that location in essentially a linear relationship, e.g., adding 5% more traffic increases the likelihood of crashes by 5%. Tr. (05-04-2015), at 125-26; Tr. (05-05-2015), at 200-01, 205-06; PC 115-16.

Neighbors also produced video evidence that tractor-trailer-sized asphalt trucks traveling through the HCL fail to stay in the proper lane, crossing over the plainly visible centerline 4-5 feet into the oncoming lane to negotiate the sharp curve. PC 8 (FF 61), 125 (Video Exs. 25 & 26). NEMG's expert acknowledged, when viewing one of the videos, that the truck could not round the curve without encroaching into the other lane, and that having a truck four feet into the oncoming lane "lean[ed] towards the unsafe side of the spectrum." Tr. (05-04-2015), at 132-35.

Additionally, Mr. Bernier testified about an incident in which he had to drive off the road in order to avoid an oncoming truck that had veered into his lane. Tr. (05-04-2015), at 251. Another time, he was traveling east on Graniteville Road and had to stop at the sharp curve because a westbound asphalt truck was coming toward him in his lane. Id. at 252-53. His vehicle and the truck avoided a head-on collision only by stopping, essentially facing each other, inches apart. Id. Eventually, Mr. Bernier was able to back up as the cars behind him reversed little-by-little; then, by going through a ditch, he went around the truck. Id. at 253.

Based on this evidence, the Environmental Division concluded it was necessary to address the "existing safety concern" in the sharp curve area and the "danger" large trucks crossing the centerline may pose. PC 18-19. Therefore, the Environmental Division imposed two traffic conditions. Id. First, trucks traveling to and from the asphalt plant must stay in the proper lane of travel at all times, including in the sharp curve on Graniteville Road. Id. at 19. The Environmental Division recognized that state law already requires vehicles to stay in the proper lane of travel. Id. Second, NEMG must pay to have the centerline of the sharp curve in the HCL painted each spring, to aid in enforcement of the first condition. Id.

The ROA tract contains several internal roads that connect work areas throughout the ROA property. PC 2 (FF 4). There is an entrance to one of these internal roads directly across from the entrance to the asphalt plant site, on the other side of Graniteville Road. PC 55. Neighbors' expert testified that the truck traffic from the asphalt plant could avoid the HCL in Lower Graniteville altogether if the asphalt plant trucks used these internal roads. Tr. (05-05-2015), at 217-20. The trucks could re-enter Graniteville Road near ROA's processing plant, which is on the northwest portion of the ROA tract, and continue from there on the established

truck route the asphalt trucks currently are using. Tr. (05-04-2015), at 119; Tr. (05-05-2015), at 217-20, 266.

STANDARD OF REVIEW

This Court reviews issues of law and statutory interpretation de novo. In re Treetop Dev. Co. Act 250 Dev., 2016 VT 20, ¶ 9, ___ Vt. ___, ___ A.3d ___. "De novo review allows this Court to proceed with a nondeferential, on-the-record review." Id.

The Environmental Division's legal conclusions regarding compliance with Act 250 criteria will be upheld if the findings "reasonably support those conclusions." In re Chaves, 2014 VT 5, ¶ 22, 195 Vt. 467, 93 A.3d 69; In re Rinkers, Inc., 2011 VT 78, ¶ 8, 190 Vt. 567, 27 A.3d 334 ("We likewise uphold the court's legal conclusions with respect to compliance with Act 250 criteria when they are reasonably supported by the findings.").

ARGUMENT

The Environmental Division correctly determined that NEMG's asphalt plant project does not satisfy criteria 8 and 5. To remedy these defects, the Environmental Division imposed conditions already required by law—including one condition that already exists in NEMG's Act 250 Permit—and already shown to be inadequate. Under these circumstances, it was impossible for the lower court to conclude that the asphalt plant would comply with Act 250 criteria. The Environmental Division's conclusions are not reasonably supported by the findings and they contradict Act 250's central mandate—that all criteria must be met before a permit may be issued.

I. AN ACT 250 PERMIT MAY BE ISSUED ONLY IF IT ENSURES THAT ALL TEN ACT 250 CRITERIA WILL BE MET.

At the heart of Act 250, Vermont's landmark land use legislation, is the requirement that every development must meet the Act's ten criteria. 10 V.S.A. § 6086; Application of Great E.

Bldg. Co., 132 Vt. 610, 614, 326 A.2d 152, 154 (1974) ("The concern for sound and viable planned development which best serves the public interest is expressed in the ten [criteria] contained in 10 V.S.A. § 6086."). The purpose of the Act and of the criteria is to "protect Vermont's lands and environment," In re Treetop, 2016 VT 20, ¶ 11 (citations and internal quotation marks omitted), and "promote the general welfare through orderly growth and development," In re Wildlife Wonderland, Inc., 133 Vt. 507, 520, 346 A.2d 645, 653 (1975) (quoting Findings and Declaration of Intent, 1969 No. 250 (Adj. Sess.), § 1 (Apr. 4, 1970)); see also Southview Assocs., v. Bongartz, 980 F.2d 84, 87-89 (2d Cir. 1992) (describing history and purposes of Act 250).

A permit may be issued only when each of these criteria is met. 10 V.S.A. § 6086(a) ("Before granting a permit, the District Commission *shall find* . . . ." (emphasis added)); also, e.g., In re Treetop, 2016 VT 20, ¶ 11 (Act 250 approval "requires . . . affirmative findings under all ten statutory criteria before issuing a permit."); In re Woodford Packers, Inc., 2003 VT 60, ¶ 22, 175 Vt. 579, 830 A.2d 100 ("Act 250 mandates that . . . the 'subdivision or development' meets *all* ten criteria under 10 V.S.A. § 6086." (emphasis in original)) (citing Act 250).

Though the party opposing a project has the burden to show unacceptable impacts under criteria 8 and 5, as Neighbors have done in this case, the applicant always has the burden to produce sufficient information for affirmative findings to be made under all of the criteria. 10 V.S.A. § 6088(b); In re Denio, 158 Vt. 230, 237, 608 A.2d 1166, 1170 (1992) ("Nothing in the language of the statute prevents the Board from finding against the applicant on an issue even though the applicant does not have the burden of proof on that issue. In fact, the statute requires the Board to make a finding on each factor, including aesthetics, irrespective of the placement of

the burden of proof."); Re: Okemo Mountain, Inc., No. 2S0351-12A-EB, Findings of Fact, Concl. of Law, & Order, at 18 (Vt. Envtl. Bd. July 23, 1992) ("Moreover, the Board has consistently held that regardless of who has the burden of proof on a particular issue, the applicant always has the burden of producing evidence sufficient to enable the Board to make the requisite positive findings on all of the criteria.").[4]

A. When a Proposed Project Does Not Meet the Act's Criteria, the Permit Must Be Denied or Sufficient Conditions Imposed.

When the District Commission (or Environmental Division) is unable to conclude a project will meet the criteria, the permit must be denied or conditions imposed. 10 V.S.A. § 6086(a), (c); see, e.g., In re Wildlife Wonderland, 133 Vt. at 520-21, 346 A.2d at 653 (affirming denial of permit for proposed game farm); In re McShinsky, 153 Vt. 586, 594, 572 A.2d 916, 921 (1990) (affirming denial of permit for proposed campground); Re: Clarence & Norma Hurteau, No. 6F0368-EB, Mem. of Decision, at 3 (Vt. Envtl. Bd. Mar. 25, 1988) ("The language in § 6086(c), which authorizes the imposition of appropriate permit conditions with respect to the ten criteria of Act 250, is the very heart of Act 250. Without the ability to impose conditions, the Board would have only the discretion either to deny a permit or to grant a permit for whatever a developer proposes.").

Consistent with Act 250's mandate, any conditions imposed must ensure a proposed project will meet the Act's criteria. In re Treetop, 2016 VT 20, ¶ 12 ("In order to ensure continued compliance with the statutory criteria, the Commission is entitled to grant conditional approval by imposing reasonable conditions on a project."); Re: Twin State Sand & Gravel Co.,

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[4] The Court "gives deference to the Environmental Board's interpretation of legislation within its area of expertise." In re N. E. Materials Grp., LLC, 2015 VT 79, ¶ 9, ___ Vt. ___, 127 A.3d 926, 934 (citing cases); see also In re Woodford Packers, 2003 VT 60, ¶ 4 (affording deference to "'the Board's specialized knowledge in the environmental field'") (citation omitted).

No. 3W0711-5-EB (Altered), Findings of Fact, Concl. of Law, & Order, at 20 (Vt. Envtl. Bd. Apr. 29, 2005) ("The Board and Commissions may impose reasonable permit conditions within the limits of its police power to ensure that projects comply with the statutory criteria."); Re: McDonald's Corp., No. 100012-2B-EB, Findings of Fact, Concl. of Law, & Order, at 15 (Vt. Envtl. Bd. Mar. 22, 2001) ("'The purpose of permit conditions is to alleviate adverse effects that would otherwise be caused by a project. Those adverse effects would require a conclusion that a project does not comply with the criterion at issue unless the condition is followed.'") (citation omitted).

Conversely, if conditions cannot or do not ensure a project will comply with the statutory criteria, the permit must either be denied or other, adequate conditions imposed. See, e.g., Re: Pike Indus., Inc., No. 5R1415-EB, Findings of Fact, Concl. of Law, & Order, at 30 (Vt. Envtl. Bd. June 7, 2005) ("Certainly, there are some cases in which the Board may be able to conclude, based on projections, that a project will not be able to meet . . . established standards; in those cases, the Board has not hesitated to deny the application."); Re: Vt. Elec. Power Co., No. 7C0565-EB, Findings of Fact, Concl. of Law, & Order, at 5 (Vt. Envtl. Bd. Dec. 12, 1984) ("our options are limited to imposing reasonable conditions . . . or denial of an application where undue adverse aesthetic impacts cannot be corrected by imposition of conditions").

In the traffic context, because a permit cannot be denied solely under criterion 5, conditions are particularly important for ensuring compliance with the Act and ensuring public safety. See 10 V.S.A. § 6087(a), (b). As this Court has stated: "Before a land use permit may be issued, the district environmental commission . . . is compelled by statute to find that the proposed development '[w]ill not cause unreasonable congestion or unsafe conditions with respect to use of the highways.'" In re Alpen Assocs., 147 Vt. 647, 647, 514 A.2d 322, 322

(1986) (quoting 10 V.S.A. § 6086(a)(5)) (holding Environmental Board has jurisdiction to impose traffic conditions).

B. Conditions that Repeat Existing Requirements with which the Permittee Has Not Complied or Cannot Comply Are Insufficient to Meet the Act's Criteria.

This Court has not addressed the precise question of when a condition is insufficient to ensure compliance with Act 250. However, rules from Environmental Board precedent show that it is insufficient to: (1) duplicate a previously imposed condition on an already noncompliant permittee, and (2) impose conditions with which the evidence indicates the permittee cannot comply. See Pike Indus., No. 5R1415-EB, at 30, 46; Re: McLean Enters. Corp., No. 2S1147-1-EB, Findings of Fact, Concl. of Law, & Order, at 62, 68 (Vt. Envtl. Bd. Nov. 24, 2004); Re: Lawrence White, No. 1R0391-8-EB, Findings of Fact, Concl. of Law, & Order, at 32, 34 (Vt. Envtl. Bd. Apr. 16, 1998). Neighbors have not found a single case where the lower court or Environmental Board imposed a condition that already was required by law, and already had been violated or the evidence showed the applicant could not comply, as a means of satisfying Act 250.

For example, in McLean Enterprises, a quarry permit was denied under several criteria, including under criterion 8 because the evidence indicated the project could not comply. No. 2S1147-1-EB, at 88. The permittee's modeling had shown project noise levels would exceed the Board's noise standards. The Board noted that the "inability of the Project to comply with the noise standards" arose from the project's design and location, and it was "not the Board's role to attempt to redesign the Project to reduce impacts." Id. at 68. For this and other reasons, the project failed criterion 8. Id. Underlying this determination was the Board's cogent rationale:

> A permit may be granted if appropriate permit conditions can alleviate the undue adverse effect of a project as presented. . . . However, it is contrary to common sense and could result in irreparable environmental harm to grant a permit

> authorizing a project with permit conditions which alleviate the undue adverse impacts, if the evidence indicates the Permittee cannot comply with the conditions.

Id. at 62.

In another case, the Board imposed new conditions where previous conditions either had not been complied with, or were insufficient to meet the criteria. Lawrence White, No. 1R0391-8-EB, at 32, 34. The Board noted the permittee "ha[d] not been able to operate in accordance" with previous noise standards and, for dust, the permittee's proposed measures were "either proposed by the Permittee or required in previous permits" and had not been followed. Id. Accordingly, the Board imposed new noise conditions including restricted hours and the prohibition on a crusher, and new dust conditions including paving of traveled ways. Id.[5]

The Environmental Division also has recognized that merely restating or re-imposing existing conditions, or granting a permit when conditions cannot adequately address impacts, does not "ensure" compliance with the criteria. In denying a permit for a quarry and rock crushing operation based on an inability to impose conditions that would alleviate impacts, the court stated: "While approval with conditions has been an accepted regulatory practice for many years, there are occasions where a proposed project's nonconformance is so significant that conditional approval is not the proper response." In re: Rivers Dev. Conditional Use Appeal, No. 68-3-07 Vtec, slip op. at 6 (Vt. Super. Ct. Envtl. Div. Aug. 17, 2010) (concluding that nonconformities under criteria 8, 9(E), and 10 were "so egregious as to make approval with conditions unworkable"). In another case, the Environmental Division denied a permit

[5] This case involved permit revocation and the issuance of a corrective permit. On appeal, the Supreme Court upheld the permit revocation but remanded the corrective permit because the developer's evidence was improperly excluded. 172 Vt. 335, 349, 779 A.2d 1264, 1274-75 (2001). The Court did not question the underlying legal premise of the Environmental Board decision: where the evidence shows conditions cannot be or have not been complied with, those conditions are insufficient to ensure the project meets the ten criteria.

amendment for an aggregate extraction project because the project could not meet the noise condition in its prior permit. In re O'Neil Sand & Gravel Act 250 Amendment Application, No. 48-2-07 Vtec, slip op. at 13 (Vt. Envtl. Ct. Feb. 23, 2010).

II. THE ENVIRONMENTAL DIVISION'S CONCLUSION THAT NEMG'S ASPHALT PLANT WILL COMPLY WITH CRITERION 8 IS NOT REASONABLY SUPPORTED BY THE FINDINGS.

The Environmental Division found that the asphalt plant creates undue adverse aesthetic effects through fumes and odors that regularly have permeated Neighbors' properties and disrupted their lives. PC 16 n.5, 28-29. Rather than deny the Permit, or impose additional conditions, the lower court merely re-imposed the odor condition that already existed in both NEMG's Act 250 Permit and its Air Permit. In doing so, the Environmental Division ignored its own findings illustrating NEMG repeatedly had violated this condition and, apparently, cannot comply with this condition. Therefore, the Environmental Division's conclusion that the asphalt plant will comply with criterion 8 was not reasonably supported, was "contrary to common sense," and, if allowed to stand, would render meaningless Act 250's mandate that permits must ensure compliance with the criteria. 10 V.S.A. § 6086(a); see McLean Enters., No. 2S1147-1-EB, at 62.

A. The Environmental Division Correctly Determined that the Asphalt Plant Has Created Undue Adverse Aesthetic Effects on Neighbors that Must Be Remedied under Criterion 8.

Criterion 8 requires that a project "will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas." 10 V.S.A. § 6086(a)(8). Aesthetics encompasses "'all the senses, including sound, smell, and overall perception. . . . The aesthetics of a Vermont village environment include all of the qualities that make it attractive and desirable to live in and visit.'" PC 20 (citation omitted); see

also In re Application of Lathrop Ltd. P'ship I, 2015 VT 49, ¶ 9, ___ Vt. ___, 121 A.3d 630 (describing criterion 8 as "aesthetics, noise, visual impacts, odors").

The Environmental Division applied the accepted two-part Quechee test to determine that the asphalt plant has created undue adverse aesthetic effects on Neighbors over the plant's two years of operation. PC 20-30. First, the Division determined odors from the plant do not "fit" the surroundings and are therefore "adverse:"

> [T]he Project has caused perceptible asphalt odors on the Appellants' properties and inside their homes if they leave the windows open or air conditioners running. While the industrial ROA quarry is a prominent feature in the area, this quarry operation has not included petrochemical manufacture, and chemical odors from the Project itself do not fit the area's context even considering the history of quarrying.

PC 28. Second, the Division determined these adverse impacts are "undue" because the asphalt plant creates odors that may be "shocking or offensive" to the average person:

> Appellants who are not hyper-sensitive [to odors] credibly testified that they experience pungent, eye-watering, and throat-stinging odors from the Project that permeate their properties in the summer time, and cause Appellants to forgo outdoor recreation. We find that these smells may be "shocking or offensive to the average person," and therefore that they may be "undue."

PC 28-29; see also id. at 16 n.5 ("[w]e do find that off-site odors are undue under criterion 8").[6]

These determinations were supported by testimony from multiple Neighbors who described the fumes and odors produced by the asphalt plant as offensive, horrible, overpowering, oily, chemical, and caustic. Supra, at 4-7. These fumes and odors have caused a

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[6] An adverse impact is undue if any one of three factors is met: (1) the project violates a clear, written community standard on local aesthetics; (2) the project offends the sensibilities of the average person; or (3) the applicant failed to take reasonably available mitigating steps. In re McShinsky, 153 Vt. at 592-93, 572 A.2d at 920. The Environmental Division concluded that there was not a clear, written community standard to preserve the aesthetic smells of the area and that the plant had utilized generally available mitigating steps (e.g., limited operation times, storage in a sealed tank). PC 28. Therefore, the asphalt plant project was not "undue" under these factors, but it was under the second factor (offending sensibilities). Id.

range of health problems including headaches, nausea, breathing difficulty, sore throats, and watery eyes; and have led to many changes in Neighbors' lives including cessation of outdoor activities, and closing windows and air conditioning vents in the summer. Id.

B. The Environmental Division Did Not Remedy these Undue Adverse Effects Because It Merely Reincorporated an Insufficient, Already Existing Condition that NEMG Repeatedly Has Violated.

After finding that the asphalt plant fumes and odors created undue adverse effects under criterion 8, the Environmental Division "incorporated" condition 22 from NEMG's Air Permit into its Act 250 Permit:

> The Permittee shall not discharge, cause, suffer, allow, or permit from any source whatsoever such quantities of air contaminants or other material which will cause injury, detriment, nuisance or annoyance to any considerable number of people . . . . The Permittee shall not discharge, cause, suffer, allow, or permit any emissions of objectionable odors beyond the property line of the premises.

PC 31. The Environmental Division did not mention or address the fact that this condition already had been "incorporated" verbatim into the Act 250 Permit, as condition 5, under which NEMG had been operating for two years. See PC 106.

The Environmental Division continued:

> NEMG testified that it can and does comply with this condition. We conclude that this condition, if complied with, will adequately address Appellants' concern over the odors from the hot-mix Project under Criterion 8, because it forbids the impacts Appellants complain of.

PC 29.[7]

[7] The trial court did not provide a citation for its statement concerning NEMG's testimony that NEMG can and does comply with this condition. In fact, no officer or employee of NEMG testified. NEMG's sole witness concerning air issues was its air pollution consultant, a technical witness who visited the site twice, for a total of three hours, during scheduled stack emissions testing at the plant. Tr. (05-06-2015), at 80-82. He admitted he could not testify as to whether odors escape the plant during other times. Id. at 82. Even if there were some testimony that could be construed as asserting that NEMG had complied with the odor condition, the trial

While it is true enough that compliance with the condition would address the undue adverse effects, the Environmental Division's own findings demonstrate that the condition has not been complied with. Given these findings, merely re-prohibiting these impacts adds nothing to ensure compliance with criterion 8 and it is "contrary to common sense." McLean Enters., No. 2S1147-1-EB, at 62.

C. Because the Condition Is Insufficient to Bring the Asphalt Plant into Compliance with Criterion 8 of Act 250, the Permit Must Be Denied or New and Further Conditions Imposed.

This is a textbook example of inappropriately authorizing a project with a condition despite findings and evidence showing that the condition is ineffective in ensuring compliance with Act 250. The evidence and the trial court's findings demonstrate not only that the asphalt plant has not complied with criterion 8, but that it cannot meet criterion 8 at its present location, with its proximity to the neighbors. Pursuant to its own findings of undue adverse effects under criterion 8 over two years of operation, the Environmental Division should have denied the permit. See In re Brattleboro Chalet Motor Lodge, Inc., No. 4C0581-EB, Findings of Fact, Concl. of Law, & Order, at 11-12 (Vt. Envtl. Bd. Oct. 17, 1984) (denying permit and inviting applicant to redesign project because, "as proposed," it did not meet criterion 8); McLean Enters., No. 2S1147-1-EB, at 68, 88 (denying permit and stating "is it not the Board's role to attempt to redesign the Project to reduce the noise impacts to the neighbors") (citing cases); In re: Rivers Dev. Act 250 Appeal, No. 68-3-07 Vtec, slip op. at 1, 57, 71 (Vt. Super. Ct. Envtl. Div. Mar. 25, 2010) & slip op. at 6 (Vt. Super. Ct. Envtl. Div. Aug. 17, 2010) (denying permit

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court's findings of Neighbors' repeated exposure to asphalt odors demonstrate that any such testimony was inaccurate.

where conditions could not be imposed to alleviate impacts of quarry and rock crushing operation).

At a minimum, new and further conditions are required to ensure compliance with criterion 8. See, e.g., Lawrence White, at 32, 34 (Vt. Envtl. Bd. Apr. 16, 1998) (imposing additional conditions where permittee had not complied with existing noise and dust conditions); Treetop Dev. Co. Act 250 Application, No. 77-6-14 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Mar. 25, 2015) ("It would be irrational to . . . grant[] an Act 250 permit despite insufficient findings of compliance with Act 250 . . . .").

Because they do not ensure compliance with criterion 8, the Environmental Division's decision and NEMG's Act 250 Permit do not comply with Act 250. See, e.g., 10 V.S.A. § 6086(a) (projects must meet criteria); In re Treetop, 2016 VT 20, ¶ 12 (conditions must ensure compliance). This Court should reverse the trial court's conclusions and deny the permit based on the trial court's findings, or remand for consideration of whether additional conditions, if any, can ensure compliance.

III. THE ENVIRONMENTAL DIVISION'S CONCLUSION THAT NEMG'S ASPHALT PLANT WILL COMPLY WITH CRITERION 5 IS NOT REASONABLY SUPPORTED BY THE FINDINGS.

The Environmental Division found that the sharp curve in the Lower Graniteville High Crash Location is a safety concern that may pose a danger. PC 18-19. Rather than requiring new or further conditions to remedy this danger, the lower court "imposed" a condition already required by Vermont law, with a lesser condition designed to aid in its enforcement. Not only have asphalt trucks repeatedly violated this condition, but the evidence shows these trucks cannot comply with the condition. Therefore, the Environmental Division's conclusion that the asphalt

plant meets criterion 5 was not reasonably supported and further traffic conditions must be imposed.

A. The Environmental Division Correctly Determined that the Sharp Curve in Lower Graniteville Is a Safety Concern that Must Be Remedied under Criterion 5.

Criterion 5 requires that a project "[w]ill not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed." 10 V.S.A. § 6086(a)(5); In re Alpen, 147 Vt. at 647, 514 A.2d at 322 (explaining statutory mandate that criterion 5 be met before permit is issued). Although a lower court may not deny a permit based on criterion 5, it must impose conditions that alleviate the impacts. 10 V.S.A. § 6087(b); In re Wal-mart Stores, Inc., 167 Vt. 75, 86, 702 A.2d 397, 404 (1997) ("Criterion 5 states that no development shall 'cause unreasonable congestion or unsafe conditions with respect to the use of highways . . . .'") (quoting 10 V.S.A. § 6086(a)(5)); In re Agency of Transp., 157 Vt. 203, 207, 596 A.2d 358, 359-60 (1991) ("Under criterion 5, the Board or Commission must find that the subdivision or development '[w]ill not cause unreasonable congestion or unsafe conditions . . . .'") (quoting 10 V.S.A. § 6086(a)(5)).

The Environmental Division's findings that the sharp curve area on Graniteville Road is an "existing safety concern," and that large trucks crossing the centerline may pose a "danger," were well supported. PC 18-19. The evidence showed asphalt trucks crossing over the yellow centerline in the HCL by 4-5 feet. Supra, at 9. Throughout this sharp curve, there are narrow shoulders, a roadside telephone pole limiting vehicle use of the shoulder, and no sidewalks. Supra, at 8-9. Additionally, Neighbors testified to specific incidents of trucks being unable to negotiate the curve without crowding other vehicles off the road. Supra, at 10. Further, this HCL goes through the hub of commercial and community activity, including the general store,

post office, a park and playground, school bus stop, and crosswalk, where children and the elderly are especially vulnerable. Supra, at 9. Last, both experts testified that adding traffic to an HCL increases the likelihood of a crash in essentially a linear relationship, e.g., adding 5% more traffic increases the likelihood of crashes by 5%. Supra, at 9.

As this Court has held: "Exacerbating [an] existing traffic hazard by allowing additional travel on [the] road would be detrimental to the public interest." In re Pilgrim P'ship, 153 Vt. 594, 596-97, 572 A.2d 909, 910-11 (1990) (upholding Environmental Board's conclusion that development did not meet criterion 5).[8] Thus, the Environmental Division was correct to impose conditions, but the conditions are inadequate.

B. The Environmental Division Did Not Remedy this Safety Concern Because It Merely Imposed One Condition that Already Is Required by Law and with which NEMG Has Not Complied, and Another that Is Not Supported by the Evidence.

1. The Primary Condition the Environmental Division "Added" Is Already Required by State Law and NEMG Has Not Complied With It.

The Environmental Division noted that state law already requires vehicles to stay in the proper lane, and that "failing to follow [the] law presents a safety concern in this matter, especially at the sharp curve along Graniteville Road." PC 19. Despite this recognition, the Environmental Division "added" the following condition to NEMG's permit: "When using

[8] The Environmental Division relied on Pilgrim Partnership in reasoning that adding vehicles to the HCL would not "exacerbate" the existing safety concern because the underlying problem in Pilgrim was congestion, unlike here. PC 18. This was incorrect. In Pilgrim, there were both congestion and underlying safety concerns, including, as here, a narrow roadway and a sharp curve, with this case having the addition of an HCL designation. See 153 Vt. at 595-96, 572 A.2d at 910. Further, the Pilgrim Court was clear that the real issue there was adding more traffic to an existing traffic hazard. Id. at 596. Thus, the Environmental Division committed legal error in concluding that adding traffic to the existing safety concern posed by the sharp curve in the HCL did not exacerbate the problem, irrespective of whether trucks crossed the centerline. In any case, in this instance, the Environmental Division did conclude that there is a safety concern and trucks crossing the centerline may pose a danger, thus determining the asphalt plant project could not meet criterion 5 without conditions. PC 18-19.

public roads, trucks associated with the Project will remain in their travel lane at all times, including when traveling on the sharp curve in Graniteville Road at the intersection of Graniteville Road and Baptist Street." PC 31.

As with the odor condition previously addressed, this traffic condition adds nothing, and therefore does not ensure that criterion 5 will be met. There is no question that the trucks using NEMG's plant have not complied with existing state law, or the trial court's traffic condition, by staying within the proper lane. As the video evidence and the Environmental Division's findings show, asphalt trucks have crossed the centerline by 4-5 feet into the oncoming lane. Supra, at 9. Further, the record indicates NEMG cannot comply with either state law or the condition. NEMG's expert acknowledged that trucks could not round the turn without encroaching into the other lane. Supra, at 9. And, as NEMG has pointed out, it does not own, operate, or control any of the asphalt haul trucks. NEMG Mot. to Alter J., N. E. Materials Grp. Amended Act 250 Permit, No. 35-3-13 Vtec (Vt. Super. Ct. Envtl. Div. Mar. 21, 2016), PC 46-47.

2. The Secondary Condition the Environmental Division Added Is Not Supported by the Evidence and Will Not Alleviate Impacts.

The Environmental Division added a second traffic condition to "aid enforcement" of the first, requiring NEMG to "pay to have the centerline of the HCL section of Graniteville Road painted each spring, to make it clear to drivers and observers where the centerline of the road is." PC 19, 31.

As explained above, conditions must be designed to "alleviate adverse impacts" and bring a project into compliance with the criteria. See, e.g., In re Treetop, 2016 VT 20, ¶ 12. The second condition does not meet this test because (1) its purpose is merely to aid in enforcement of the first condition which, as already illustrated, is insufficient; and (2) there is no evidence to suggest that painting the line will help trucks stay in the proper lane, or that trucks crossed the

centerline because they could not see the line. To the contrary, in Neighbors' video evidence of trucks encroaching into the opposite lane, the yellow centerline was plainly visible. Supra, at 9. Compare with Twin State Sand & Gravel, No. 3W0711-5-EB (Altered), at 20-24 (conducting detailed analysis of record to impose traffic conditions).

C. Because the Environmental Division's Conditions Are Insufficient to Ensure Compliance with Criterion 5, New and Further Conditions Are Required.

Because the primary traffic condition the Environmental Division imposed already was required by law, already has been violated, and cannot be complied with, that condition is insufficient. See, e.g., In re Treetop, 2016 VT 20, ¶ 12 (conditions must ensure compliance); Lawrence White, No. 1R0391-8-EB, at 32, 34 (imposing additional conditions where permittee had not complied with existing conditions). As previously put by NEMG: "Since a truck driver who violates a motor vehicle statute risks implicating his/her CDL license and/or employment, it is difficult to imagine that this same driver would now avoid this conduct simply because it might violate Appellees' Act 250 Permit." NEMG Motion to Alter, PC 48. The secondary condition is insufficient for the reasons explained above.

This is especially true because the Environmental Division had the authority to impose conditions that actually would satisfy criterion 5. See, e.g., Pike Indus., at 37 (Vt. Envtl. Bd. June 7, 2005) (upgrade intersection to add exclusive left turn lane); Re: Okemo Mountain Inc., Nos. 2S0351, Findings of Fact, Concl. of Law, & Order, at 86 (Vt. Envtl. Bd. Feb. 22, 2002) (install street light, signs, and traffic officer; count and monitor traffic; require employees to use certain route to avoid adding additional traffic to one area); Re: Barre Granite Quarries, LLC, No. 7C1079 (Revised)-EB, Findings of Fact, Concl. of Law, & Order, at 76-77 (Vt. Envtl. Bd. Dec. 8, 2000) (limit travel route, truck size, speed, time of year, and snow plowing; avoid school bus roads; monitoring and maintenance); Re: John & Joyce Belter, No. 4C0643-6R-EB, Findings

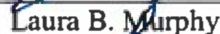
of Fact, Concl. of Law, & Order, at 18 (Vt. Envtl. Bd. May 28, 1991) (reconstruct and expand inside radii of S-curve, install stop signs, add sidewalks, trim vegetation). Rather than merely repeating state law, Neighbors' expert offered a simple alternative that would provide a true remedy: trucks traveling to-and-from the plant would use internal roads on the ROA tract to avoid traveling through the sharp curve and HCL in Lower Graniteville entirely, thereby also avoiding the playground, general store, senior center, post office, church, school bus stop, and residences. Supra, at 10-11.

For all of these reasons, the Environmental Division's conclusion that the asphalt plant will comply with criterion 5 is not reasonably supported by the findings and, if the Act 250 Permit is not otherwise denied under criterion 8, adequate traffic conditions must be imposed before the permit may be issued.

CONCLUSION

For the reasons stated above, Neighbors respectfully request the Court to reverse the Environmental Division's conclusions that the conditions will ensure compliance with criteria 8 and 5. NEMG's permit should be denied for failure to comply with criterion 8. In the alternative, Neighbors request remand for consideration of new and further conditions to ensure compliance with these criteria and Act 250.

Respectfully submitted this 5th day of August, 2016.



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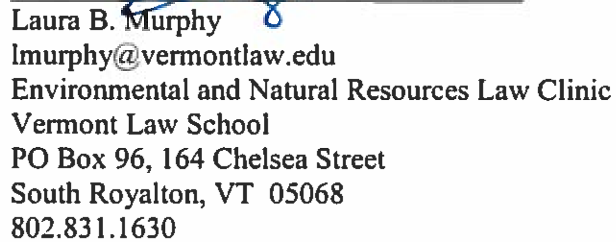
VERMONT RULE OF APPELLATE PROCEDURE 32(a)
CERTIFICATE OF COMPLIANCE

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 8698 words, excluding the Statement of the Issues, Table of Contents, Table of Authorities, signature blocks, and this Certificate of Compliance.

Dated August 5, 2016.

BY: 

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