

STATE OF VERMONT
ENVIRONMENTAL COURT

RIVERS DEVELOPMENT, LLC	}	
(Rivers' Appeal of Municipal Denial)	}	DOCKET NO. 7-1-05 Vtec
(Rivers' Appeal of Act 250 Denial)	}	DOCKET NO. 68-3-07 Vtec

**NEIGHBORS' REPLY TO
RIVERS' MOTION TO ALTER**

NOW COME Thomas Allen, Robert Dansker, Jack Byrne, Virginia Farley, Doug Hall, Cindy Hall, June Holden Life Estate, Rick Hungerford, Rita LaRocca, Robert McMullin, Beverly McMullin, John Porter, Sandy Porter, Scott Sainsbury, Patricia Sainsbury, Benjamin Sanders, Denise Sanders, Karen Sharpwolf, Ruth van Heuven, Marten van Heuven, Wichard van Heuven, and Constance van Heuven, by and through their attorneys, David L. Grayck, Esq. and Zachary K. Griefen, Esq., and Arthur Hendrickson, Pro Se, and Linda Hendrickson, Pro Se, collectively the "Neighbors," and they hereby file this Reply to Rivers' May 3, 2010 Motion to Alter (the "Motion").

SUMMARY OF REPLY

As set forth below, the Court should deny the Motion because the Court's March 25, 2010 decision (the "Decision") is correct with respect to the issues raised by the Motion. The Motion does not raise any new factual or legal issues, but rather seeks to rehash and re-litigate what has already been presented to the Court. The Court heard 18 days of trial. The Court read and considered the parties' proposed findings and conclusions. The Court made extensive findings of fact based on the evidence. The findings are not erroneous simply

because Rivers' disagrees with the outcome. *In re Route 103 Quarry*, 2008 VT 88, ¶ 4, 184 Vt. 283 (the Environmental Court determines the credibility of witnesses and weighs the persuasive effect of evidence, and the factual findings will be upheld unless, taking them in the light most favorable to the prevailing party, they are clearly erroneous).

Even if the Court's findings are contradicted by substantial evidence they will still be upheld on appeal. *In re Eastview at Middlebury, Inc.*, 2009 VT 98 ¶ 10 citing to *In re Miller Subdivision Final Plan*, 2008 VT 74, ¶ 13, 184 Vt. 188. There simply is no basis for Rivers to demonstrate that there is *no* credible evidence to support the Court's findings in the Decision. *Id.*

With respect to the Court's conclusions of law, they are properly and reasonably supported by the findings. The Motion simply repeats what Rivers has already presented with the hope that the Court will "come to its senses" and suddenly change its mind. While the Neighbors believe that there are additional grounds for the Project's denial, the Decision properly applied the facts to the law and reached a legally sound conclusion. As such there is no error in the conclusions of law with respect to the criteria for which the Project was denied. *Eastview* at ¶ 10 (Supreme Court "will uphold the [environmental] court's legal conclusions with respect to compliance with Act 250 criteria where such conclusions are reasonably supported by the findings").

While the Neighbors believe that the Decision is sound as to the issues raised by the Motion, and that the Motion should be denied, the Neighbors request the Court to modify the Decision as set forth below so that there will be no doubt as to the Court's findings and conclusions should Rivers bring an appeal to the Supreme Court.

REPLY TO MOTION BY PAGE AND PARAGRAPH

Turning to the Motion's general assault on the facts, Rivers asserts that if impacts to the Neighbors are ignored (because they are not "average people") and the noise from the haul road is ignored (for no legally valid reason), then the noise from the quarry would comply with a custom noise standard that is more lenient than the 55 dBA maximum noise level¹ at nearby homes and areas of frequent use and 70 dBA limit at the property line. But the Project as proposed would generate noise levels at nearby residences in excess of 55 dBA, and in excess of 70 dBA at the property line, and noise levels in excess of these maximum levels are offensive and shocking as a matter of law. Moreover, Rivers did not produce any evidence on the noise impacts from trucks accessing the project on the proposed haul road and therefore did not meet its burden of production and fails the aesthetics test. See *McLean Enterprises Corp.*, #2S1147-1-EB, Findings of Fact, Conclusions of Law, and Order at 61 (Vt. Env'tl. Bd., Nov. 24, 2004).

At page 2, paragraph 1,² Rivers asserts that "this trial took a long, long time," as if this were an imposition on Rivers. What Rivers fails to note is that the extended length of the merits hearing was largely due to Rivers insistence, over the objections of the Neighbors and the Town, that the trial be bifurcated so as to allow Rivers to prepare air modeling in order to meet its burden of production. See the Neighbors' Reply to Rivers' Motions Regarding the Consolidated Appeals dated January 2, 2008, at 2 ("The Neighbors oppose [Rivers'] Motion

¹ The Neighbors continue to assert that 50 dBA is the maximum noise level that applies in this proceeding, see Neighbors' Proposed Findings and Conclusions at 56-59. While not conceding that 55 dBA is the appropriate standard in this case, "55 dBA" is used throughout the remainder of this Reply, because the proposed quarry would violate the 55 dBA maximum noise level at nearby residences, and therefore would also necessarily violate the 50 dBA limit.

² Hereinafter citations to Rivers' Motion to Alter will be provided in the following format: "p. __, ¶ __", with paragraphs continued from the last page included in the count.

[to bifurcate] and any attempt by Rivers to delay trial on any aspect of their applications”); Town of Moretown’s Opposition to Rivers’ Motion to Bifurcate at 2 (“[Rivers’] request now to delay the proceeding on [the issue of air impacts] so that it may prepare analysis it elected not to prepare earlier is unreasonable, would require a separate trial, consume more time and resources, delay final resolution of this matter, and prejudice the parties[.]”).

In that same paragraph, Rivers asserts that “important testimony and evidence have been improperly disregarded.” On the contrary, as demonstrated below, the Court’s 223 factual findings are amply supported by the record in this case.

At p.2, ¶ 3, Rivers asserts that the “conclusions reached under Criterion 8 are at odds with many of the conclusions touching on the same subject matter, but set forth under different headings.” The Neighbors address Rivers’ specific contentions *infra*, but note here that the Court’s conclusions under Criterion 8 are amply supported by Neighbor’s Proposed Findings 496–502, 503, 504 (haul road truck impacts) in conjunction with Neighbor’s Proposed Findings 184–188, 192–196, 205–207 and the fact that Rivers utterly failed to produce any evidence on the noise impacts from trucks accessing the project on the proposed haul road.

At p.3, ¶ 1, Rivers accuses this Court of “a number of inconsistencies,” and “several incorrectly applied decisions, including *McLean [Enterprises Corp., #2S1147-1-EB (Vt. Env’tl. Bd., Nov. 24, 2004)]*.” But *McLean* does not help Rivers, because in *McLean* the project proponent “did not produce any evidence on the noise impacts” from aspects of the project including the hillside quarry and building the access road “and therefore, did not meet its burden of production and fails the test.” *Id.* at 60. Here Rivers ignored and failed to

produce evidence on noise impacts from heavy trucks traveling up and down the steep proposed haul road and thus failed to meet its burden of production under Criterion 8.

At p.3, ¶ 3, Rivers admits that if its proposed quarry had been permitted and gone into operation, it would have generated up to 54 loaded trucks per day (i.e., 108 one-way trips), 5 days a week, 7:00 am to 5:00 pm, all spring, summer and fall. Plus a dozen blasts, 60 days of drilling rock, and 75-90 days of crushing stone. To this the Neighbors only add: Per year, for thirty three years.

At p.3, ¶ 4, Rivers claims that the Court used truck load capacities of eight and twelve yards in its calculation of the number of truck trips that would be generated by the proposed quarry. As discussed more fully below in this Reply to the arguments made by Rivers on pp. 8–9 of the pending Motion, Rivers is wrong. The Court did not use in its calculations trucks with a smaller volumetric load capacity than those used by Rivers in its calculations, but properly noted that filling the heavy quarry dump trucks used by Rivers to volumetric capacity would cause the trucks to exceed the weight limits set by VTrans.

At p.4, ¶ 3, Rivers turns to the Court's well-supported findings regarding the danger of flyrock from the proposed quarry. The Court's findings are primarily supported by Rivers' own blasting expert, as Rivers acknowledges. See Neighbors' Proposed Findings 80–87, 90, 92–94, 11–118. No-one disagrees that flyrock accidents are rare, but they are common enough that, according to Rivers' blasting expert, it is a necessary precaution for neighbors within 1,500 feet to stay indoors during a blast. Of, course, the neighbors may need to go indoors rather than stay there, leaving behind their hammock, their horse lesson, their food on the grill, or whatever other normal residential activities they may have been engaged in when Rivers decides to conduct a blast.

In regards to horses and horse training, boarding, and lessons, it is in this paragraph that the Neighbors find some agreement with Rivers. Rivers states that the “court did not make any findings about the fact that there are only 7 residences within 1,500 feet” of the proposed quarry” (emphasis added). Numerous Neighbors, including Parties Holden, Porter, Hendrickson, Byrne/Farley, McMullin³ and Sanders, are within this 1,500 danger zone, as shown on the uncontroverted map admitted as Neighbors’ Exhibit N.14. The Holden residence, for example, is a mere 720 feet from the proposed quarry site. See Neighbors’ Proposed Finding 823.

At p.5, ¶ 2, Rivers attacks the Court’s Finding 179, contending that there was no “general agreement” that “quarry activity will cause noise to be heard at the Rivers property line in excess of 70 dBA and at the nearest residences in excess of 55 dBA.” The only reason Rivers can assert a lack of general agreement on this point is because his noise expert’s “CADNA A Noise Modeling Magic” made the haul road noise disappear. But Rivers’ failure to produce any evidence on the haul road noise impacts does not mean that those impacts do not exist, it only means that Rivers failed to meet its burden of production. The Neighbors produced the only credible evidence on these impacts; see Neighbors’ Proposed Findings 184–188, 192–196 and Exhibit N.2.

Moreover, as Rivers admits later in the Motion at p.19, ¶ 3, the noise impacts from the proposed quarry will be in excess of 60 decibels at nearby residences (“Both experts agree that normal conversation takes place in excess of 60 decibels. The quarry noises are not

³ The Court did appear to state in its Conclusions at p.63 that the McMullin Horse Farm, currently operated as Mad River Stables, is “beyond this 1,500 foot exclusion zone.” This is not correct. The McMullin property, residence and stables are within 1,500 feet of the proposed quarry, as is the reach of the Mad River that flows behind their property. Exhibit N.14.

different than that level by the time one reaches Route 100B or the nearby residences.”)

(emphasis added).

Accordingly, to avoid the false controversy created by the Motion, the Neighbors respectfully suggest rewording the Court’s Finding 179, which currently states:

179. The experts disagreed on the proper measurement of noises originating from the quarry. There was some general agreement, offered on different terms, that some quarry activity will cause noise to be heard at the Rivers property line in excess of 70 dBA and at the nearest residences in excess of 55 dBA. These estimates of quarry noise are separate from the measurement of existing background noise, which sometimes also exceeds these levels.

to state instead as follows:

The experts disagreed on the proper measurement of noises originating from the proposed quarry. Much, though not all, of this disagreement was due to Rivers’ decision not to model noise from trucks accessing the quarry via the haul road in its noise model. Rivers’ noise model, unlike the Town’s and Neighbors’ noise model and contrary to the precedent set by the former Environmental Board, does not include any customer trucks, on the haul road or anywhere else. Customer trucks will make significant noise and should be included in the noise study. The evidence shows that when these trucks are included in an assessment of noise impacts, quarry activity will cause noise to be heard at the Rivers property line in excess of 70 dBA and at the nearest residences, including the Holden, McMullin, and Byrne/Farley residences, in excess of 55 dBA. These estimates of quarry noise are separate from the measurement of existing background noise, which sometimes also exceeds these levels.

At p.5, ¶ 4, Rivers states that the “Court found that the visual impacts of the Rivers Quarry were not even adverse. However, the Court found that the Rivers Quarry [sic] were adverse, and unduly so.” The Neighbors are unsure of what the second sentence is intended to mean but guess that it refers to aesthetic impacts. Nevertheless, aesthetic impacts go beyond visual impacts to include noise and other impacts to the senses, and the evidence is that the quarry will have an undue adverse effect on aesthetics due to excessive noise.

At p.5, ¶ 5, Rivers states that the Court found that the “nearest Quarry operations would be 460 feet from the Route 100B Corridor.” The Neighbors address the Court’s treatment of the Route 100B Corridor and scenic byway designation later in this Reply, but note here that the proposed haul road, an integral part of quarry operations, would be located within the Corridor, and that there is no valid legal reason to exclude activity on the haul road from the definition of quarry operations.

At p.6, ¶¶ 2–3, Rivers discussion of “mandatory” language in the Moretown Town Plan omits any mention of the provision of the Town Plan’s specific and mandatory guidance regarding the extraction of mineral resources in Chapter 4, “Natural & Cultural Resources,” which states as follows:

The Development Review Board shall, through the conditional use review process, ensure that the extraction of gravel and other mineral resources does not permanently scar the landscape, adversely impact ground or surface waters, or unreasonably impact adjacent neighbors.

Town Plan at 35.

Rivers further fails to note that not every earth extraction operation must be provided for; earth extraction operations in the Ag-Res District are conditional uses, not uses permitted by right. As conditional uses, earth extraction operations must meet criteria requiring that the operation not adversely affect the character of the area (MZR § 5.2(C)(2)) or adversely affect the bylaws (MZR § 5.2(C)(4)), including MZR § 4.10(B)(1), which states in its entirety as follows:

- (1) No noise shall be permitted which is excessive at the property line or is incompatible with the reasonable use of the surrounding area. Excessive noise shall be considered a sound pressure level that exceeds 70 decibels at the property line on a regular or reoccurring basis.

As already noted, and as the Court properly concluded on p. 54 of its Decision, noises emanating from the quarry would regularly exceed the 70 dBA maximum at the Rivers property line in violation of MZR § 4.10(B)(1).

At pp. 6–7 of Rivers’ Motion to Alter, Rivers expresses dismay that the Court’s took notice of the status of Route 100B as a Vermont Byway and Scenic Highway in the vicinity of the proposed quarry. The Neighbors note that while the Vermont Byway designation was approved in 2006, this stretch of road has been a Scenic Road since 1989, see the Moretown, Vermont Transportation Map 5-8 attached to the Moretown Town Plan and cited in the Town Plan at 32. The scenic roads law provides that designation does not preclude landowner rights “so long as the development is in accordance with existing law or ordinance.”

Notwithstanding Rivers’ dismay, the Court’s Findings 149 and 150 are perfectly acceptable. A close reading of those Findings shows that the Court did not rely upon the Vermont Byway and Scenic Highway designation to support its conclusions regarding the scenic character of the area. However, to avoid confusion, the Neighbors propose that the Court eliminate Finding 149 in the Decision and reword Finding 150 to state as follows:

150. Route 100B in the vicinity of the proposed quarry is one of the most scenic and aesthetically charming roads in Vermont. Testimony revealed that this area of Route 100B has been considered an especially scenic road for decades.

Similarly, while the Court’s conclusions regarding the scenic character of the area surrounding the proposed quarry were in no way based upon the Vermont Byway and Scenic Highway designation, the Neighbors respectfully suggest that the Conclusions under Criterion 8 be reworded as follows:

-- At p.53 of the Decision, last complete paragraph, first sentence, change “along the scenic corridor that is Route 100B” to “along this scenic stretch of Route 100B.”

-- At p.53 of the Decision, last incomplete paragraph, delete the first sentence⁴ and reword the second sentence to state: “The scenic river valley along Route 100B in the vicinity of the proposed quarry has historically hosted residential and agricultural activities and continues to do so to this day.”

-- At p.55 of the Decision, second complete paragraph, last sentence, change “and the scenic corridor of Route 100B” to “and the scenic nature of Route 100B.”

-- At p.56 of the Decision, first complete paragraph, delete the third through fifth sentences⁵ and reword the sixth sentence to state “The quarry would be shocking and offensive to area residents and to persons visiting the area, due to noises emanating from the proposed drilling, blasting, crushing, loading, and hauling of rock.”

At p.8, Rivers misstates or misunderstands the Court’s findings regarding the volume of crushed stone carried by trucks exiting the quarry, as that volume relates to the number of truck trips generated by the quarry. See, e.g., p.8, ¶ 5, stating that the Court “specifically found that an average day of truck traffic (39 to 54 loads) should be based, in part, on 8 and 12 yard trucks.” This is incorrect. As the Court’s findings 177–120 clearly explain, the findings are not based upon Rivers using 8 to 12 yard sized trucks, but upon heavy-duty dump trucks being limited to carrying 8–12 yards of crushed stone (less than their volumetric capacity) because stone is heavy and the trucks must comply with state highway weight limits set by VTrans.

⁴ “Route 100B is a rural major collector highway, but its route has been designated a scenic corridor.”

⁵ “First, we note...” through “within the scenic corridor.”

Rivers misconstrues the Court's Findings 103, 117–119 as specifying smaller trucks than Rivers expects, rather than specifying the expected heavy duty dump trucks with estimated load capacities up to 16 cubic yards, but restricted to 12 yards because of the weight of the stone. Rivers then uses its mistaken smaller 8–12 yard volume capacity trucks to draw a false equivalency between heavy quarry haul trucks and the smaller potato chip delivery-type trucks in FHWA Category 5. The consequence of Rivers' mistake is that the impact of the additional heavy quarry trucks is minimized in two ways: (1) the heavy quarry trucks are mischaracterized as physically smaller trucks, and (2) the amount of existing similar truck traffic on Route 100B is erroneously inflated, making the impact of the new trucks added by the presence of the Rivers quarry seem smaller by comparison.

At p.9, ¶ 3, Rivers asserts that “noise impacts from ‘medium’ and ‘heavy’ trucks are not too dissimilar.” In support of this assertion, Rivers notes that “[t]here is a sound level range difference of less than 10 decibels” between a medium truck and a heavy truck. The Neighbors note that, as Rivers and the Court are surely aware, a difference of 10 decibels is an approximate doubling of perceived sound levels, see Rivers' Noise Report, Exhibit R.9, at 2, Table 1. While Rivers may choose to assert that a truck nearly twice as loud as another truck is “not too dissimilar” in its noise impacts, the assertion is not credible.

At p.9, ¶ 4, Rivers argues that the Court should have included Category 5 trucks in its calculation of increases in truck traffic. But this argument is grounded in the errors described above regarding Rivers' treating heavy quarry dump trucks limited to less than their volumetric capacity as smaller trucks at their maximum volumetric capacity. The Court's Findings and Conclusions regarding the increases in heavy truck traffic that would be generated by the quarry are well-supported by the evidence and by simple math.

At p.10, ¶ 1, Rivers misstates the Court's Finding 120 as setting the "number of an average day [at] 39 loads." That is not what Finding 120 says, rather, Finding 120 states that "the truck traffic generated by the Rivers quarry would average between thirty-nine (39) and fifty-four (54) daily round-trip truck trips." Rivers chooses the low end of this average for its subsequent calculations. If one substitutes the higher end, the result is 64.8 one-way Rivers-generated trips through the Village.

At p.18, ¶ 4, Rivers asks "[w]on't the quarry noise similarly become less intrusive background noise as times [sic] passes?" While Rivers' question is perhaps rhetorical, the answer is simple. The noise impacts from Rivers' proposed quarry, including its haul road, would exceed 55 dBA at the Holden, McMullin, and Byrne/Farley residences every working day of the operating season for thirty-three years. See Neighbors' Proposed Findings 205-207. Quarry noise impacts will also exceed 70 dBA at nearby property lines; see Neighbors' Proposed Findings 65-66. In addition, when Attorney Grayck asked Mr. Guldberg at trial on February 14, 2008 whether the quarry as proposed "will or won't result in a level in excess of 70 dBA at the property line," Mr. Guldberg replied "Yes, I said it may occur."

Notwithstanding the preceding, at p.18, ¶ 5 and continuing on to p.19, Rivers asserts that it "in no way agrees that quarry operations will ever exceed 70 dBA at the property line." Rivers goes on to say at the top of p.19 that "Mr. Guldberg does not predict that quarry operations will exceed 70 dBA at the property line. Nor does Mr. Guldberg agree that quarry operations will exceed 55 dBA at the nearby residences." Of course, Mr. Guldberg's predictions completely ignored noise from quarry trucks traveling up and down the haul road. But Rivers' failure to introduce any evidence regarding haul road noise does not negate the

fact that quarry operations would violate the longstanding Act 250 precedent of 70 dBA maximum noise levels at the property line and 50/55 dBA at nearby residences.

Rivers may not agree with what is plainly true, but the fact is that Rivers' noise expert Peter Guldberg testified that two trucks passing each other would produce 83 decibels at 50 feet. In that circumstance, he said, sound levels at a nearby residence would exceed 55 decibels unless that residence was a quarter mile away. A quarter mile is 1,320 feet. There are at least six residences within 1,320 feet of the proposed haul road, including the Holden, Porter, Hendrickson, Byrne/Farley, McMullin, and Sanders residences. Exhibit N.14.

To eliminate any confusion over this issue, the Neighbors propose a new finding to be inserted between Finding 179 and Finding 180 in the Decision as follows:

[New] 180. The noise impacts from Rivers' proposed quarry, including its haul road, would exceed 70 dBA at the Rivers property line and 55 dBA at the Holden, McMullin, and Byrne/Farley residences every working day of the operating season for thirty-three years. Rivers did not dispute the conclusion of the Town's and Neighbors' noise expert, Mr. Kaliski, that that haul road truck noise will produce noise exceeding 55 dBA at these three residences on a regular basis. In fact, Rivers' noise expert Peter Guldberg testified that two trucks passing each other would produce 83 decibels at 50 feet. In that circumstance, he said, sound levels at a nearby residence would exceed 55 decibels unless that residence was a quarter mile away. A quarter mile is 1,320 feet. There are at least six residences within 1,320 feet of the proposed haul road, including the Holden, Porter, Hendrickson, Byrne/Farley, McMullin, and Sanders residences.

At p.19, ¶ 2, Rivers correctly states that only the Neighbors' and the Town's noise expert, Ken Kaliski, modeled haul road noise and that when haul road noise was included in the noise model, noise impacts in excess of 70 dBA at the property line and 55 dBA at nearby residences were predicted. Rivers states this as though it were a dirty trick to include noise impacts from the quarry's haul road in the noise model, despite the importance of haul road noise in other quarry decisions, see, e.g., *Re: Town of Barre, #5W1167-EB, Findings of Fact,*

Conclusions of Law, and Order at 12–13 (Vt. Envtl. Bd., June 2, 1994) (finding that the “project would have substantial impacts on the [neighboring] properties. The impacts include ... audible intrusions due to ... the increased noise from cars and trucks ascending and descending the steep grade.”); *Re: McLean Enterprises. Corp.*, #2S1147-1-EB, Findings of Fact, Conclusions of Law, and Order at 24 (Vt. Envtl. Bd., Nov, 24, 2004) (“the access road is a steep winding road which will require the trucks to go up and down in low gears and also use engine brakes”).

In the next sentence, Rivers asserts that “the exceedances primarily occur when the trucks are lower on haul road and nearer to Route 100B.” This is wrong. Figures 5–7 of Kaliski’s report, Exhibit N.2/T.2, show the results of the modeling assuming three different locations of a quarry truck on the proposed haul road: near Route 100B, halfway up, and near the quarry. All three locations produced sound levels in excess of 55 dBA at a nearby residence (which residence depending on the location of the trucks). See Neighbors’ Proposed Finding 185.

At p.19, ¶ 3, Rivers states: “Both experts agree that normal conversation takes place in excess of 60 decibels. The quarry noises are not different than that level by the time one reaches Route 100B or the nearby residences.” First of all, this supports the Court’s finding that there is “general agreement” that quarry noises will exceed 55 dBA at nearby residences. Secondly, Rivers appears to be trying to minimize the quarry noise impacts by comparing them to having a stranger’s unwanted conversation in your ear, from 7:00 am to 5:00 pm every working day of the spring, summer and fall, for thirty-three years. That’s hardly a comforting analogy for the Neighbors.

At p.20 Rivers provides a long block quote from *Re: McLean Enterprises Corp.*, #2S1147-1-EB, Findings of Fact, Conclusions of Law, and Order (Vt. Env'tl. Bd., Nov. 24, 2004), which states in relevant part that the applicant "did not produce any evidence on the noise impacts" from aspects of the project including the hillside quarry and building the access road "and therefore, did not meet its burden of production and fails the test." *Id.* at 61. Rivers then states that appropriate conditions can, under *McLean*, "alleviate even undue adverse impacts." But the Board in *McLean* mentioned the possibility of mitigation through permit conditions in the context of its larger point:

On the other hand, the Board will deny a permit if permit conditions cannot be drafted to alleviate the undue adverse impact. 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. This holds especially true for a quarry operation where construction would result in environmental impacts which could not be easily reversed.

Id. at 62 (emphasis added). This point—that it is dangerous and contrary to common sense to "alleviate" a project's undue adverse impacts by imposing conditions that the applicant cannot comply with—is especially relevant here. Rivers asks the Court to ignore the evidence presented at trial and simply rule that the quarry shall not violate the 55 dBA noise standard, even though the quarry project cannot comply with this condition.

Rivers' position that it should simply be granted a permit with conditions and work out the details of how to comply later has been a consistent theme throughout these proceedings and is repeated in the pending motion, see p.21, ¶ 3 ("All that Rivers is seeking is a reasonable permit condition that allows it to operate."); p.25, ¶ 2 ("The permit should simply be conditioned so as to prohibit flyrock from leaving the project site.").

At p.20, ¶ 2, Rivers asserts that a “buffer of 200 feet . . . is far less than the one proposed by Rivers.” However, Rivers is once again ignoring its haul road in making this assertion. As shown on Rivers’ “Project Overview Plan, Sheet 1 of 7,” which was submitted to the District Commission below on October 18, 2005 as Exhibit 33 to Appellant’s original Act 250 application, the distance from the proposed haul road to the Holden property line is 1.125 inches. As shown on the above-mentioned Project Overview Plan, Sheet 1, one inch equals 200 feet. The distance to the Holden’s property line is therefore 225 feet. See also Neighbors’ Proposed Findings 65–66. While it is true that 200 is less than 225, Rivers’ statement that a “buffer of 200 feet . . . is far less than the one proposed by Rivers” (emphasis added) is a grievous and misleading exaggeration.

At p.21, ¶ 4, Rivers does not even mention area residents in its list of “average person[s]” who would be impacted by the quarry noise. Rivers’ exclusion of all the neighbors of the proposed project from its analysis of noise impacts is disingenuous and self-serving, as is excluding haul road noise from its noise analysis. The fact is that the Project, if permitted, would generate noise levels at nearby residences in excess of 55 dBA, and noise levels in excess of the applicable maximum level are offensive and shocking as a matter of law.

Rivers’ argument that the Neighbors are not average people was raised in its March 27, 2009 Proposed Findings and Conclusions at p. 74 (“The question, however, is not merely whether the noise from the Project is out of character with the surrounding area or whether the Project will increase noise levels, but whether it is so out of character as to be aesthetically shocking or offensive to the average person”) (emphasis in original). The Neighbors rebutted Rivers’ assertion that project abutters should not be considered average people under Criterion 8 in their April 27, 2009 Reply to Rivers’ Proposed Findings and Conclusions at pp.

9–10. The Court rejected Rivers’ argument. The Court correctly ruled that Rivers’ position that project neighbors are not “average people” is contrary to Act 250 precedent. See, e.g., *Leonard R. Lemieux, Rose T. Lemieux d/b/a Chelsea Ledge Pit*, #3R0717-EB, Findings of Fact, Conclusions of Law, and Order at 10 (Vt. Envtl Bd., March 1, 1995):

the Board concludes that the Project would offend the sensibilities of the average person because it would be out of character with the surrounding scenic qualities of the area. The surrounding scenic qualities of the area are rural residential and conservation. The Kuban residence adjoins the proposed Project. The Project would be out of context with the surrounding rural residential and conservation area due to the noise it would generate and the visibility of the Project's open cut face extraction area from the Kuban residence and Route 110.

(Emphasis added).

In the last sentence of this ¶ 4 on p.21, Rivers asserts that the quarry noise “is not shocking and offensive . . . in light of the brief distance over which the noise will be heard at all.” This assertion, again, ignores the noise impacts on the Neighbors, who are not speeding by in a car but would remain exposed to the quarry’s noise impacts, which would in some cases double the noise they currently experience, day after day for decades. Rivers continually disregards the impacts on the Neighbors throughout the pending motion, asking again at p.23, ¶ 2 “how . . . can the quarry offend the sensibilities of an average person visiting the area under Criterion 8?” (emphasis added). See Neighbors’ Proposed Findings 155, 207–209. The Decision quite succinctly answers this question, to Rivers’ displeasure.

At p.22, ¶ 1, Rivers asserts that “the quarry noise will become background.” In other words, Rivers is asserting that the Neighbors should just get used to noise impacts that exceed the maximum noise levels established by a long line of Act 250 cases. But that arrogant assertion finds no support in the facts of this case or applicable precedent. See, e.g., Neighbors’ Proposed Finding 712–717, showing that Bob McMullin enjoys napping on his

porch in the summertime and working on his horse farm. Rivers cannot reasonably ask Mr. McMullin to “get used to” the quarry noise impacts, which will be more than double the existing noise level at his residence, Neighbors’ Proposed Findings 207, 209; Testimony of Kaliski on 12/17/2008, Exhibit N.2/T.2 at 23–24. Nor can Rivers ask the customers of Mad River Stables on the McMullin property to get used to the loud, jarring industrial “impulse” noises from the quarry rather than taking their business elsewhere. See Neighbors’ Proposed Findings 717–718.

At p.22, ¶ 2, Rivers states that the “standard that the Court imposes in it[s] ‘shocking and offensive’ analysis . . . would appear to prevent any quarry in an area populated with residences if a quarry does not already exist.” That is a gross mischaracterization of the Decision. The Court’s familiar standard for shocking and offensive noise of 55 dBA at nearby residences and areas of frequent use and 70 dBA at the property line does not prevent “any quarry,” but only quarries that cannot comply with these long-established standards. If a quarry operation is located so close to adjoining landowners that its noise exceeds the applicable maximum noise levels, then it must be denied.

At p.22, ¶ 3, Rivers asserts that the “Court appears to have concluded that addition of trucks will be shocking and offensive.” If the quarry had been permitted, based on Rivers’ own estimates of truck activity, heavy trucks would be accessing the quarry well over one-half of the time all day long most days the quarry is in operation (average day), and nearly continuously (54 minutes per hour) all day on a peak day. During peak hours of each (average) day (i.e., daily, when the quarry is in operation), heavy trucks will be accessing the site continuously, and during peak hours of peak days, there will be nearly two heavy trucks on site at all times. In its Decision the Court determined that higher trip making associated

with legal weight limits obtains, thus these impacts would be correspondingly, and significantly, higher. (Testimony of Oman 2/22/08 and Exhibit N.1/T.1 Pages 6-8 and Table 2a, not disputed by the Rivers). See also Neighbors' Proposed Findings 496-502, 504, 505.

At p.22, ¶ 4, Rivers restates the argument it made on p.8 of the pending Motion, which erroneously conflates a heavy truck required to carry a smaller volumetric load because the load is composed of heavy crushed rock with a smaller truck filled to volumetric capacity. See Neighbors' Proposed Finding 503, Exhibit N.1/T.1 at 2-3. Moreover, the Court did not rely primarily on a "doubling" of traffic to determine that there is an undue adverse impact" as asserted by Rivers, although the Court did properly find, as one of the factors supporting its conclusion that the quarry would have an undue adverse impact under Criterion 8, that the Rivers quarry could double the number of heavy trucks traveling on Route 100B in the vicinity of the quarry. This finding is amply supported by the Town's and Neighbors' Traffic Study, admitted as Exhibit N.1/T.1, at pp.8-10, credibly concluding that "among heavy vehicles (FHWA veh types 6 - 13) quarry heavy truck traffic may be expected be nearly 200% of existing conditions."), *id.* at 10.

Other factors that the Court considered in concluding that the quarry would have an undue adverse impact under Criterion 8 were the noises and activity that the quarry would bring to the area, which currently has no similar commercial or industrial activities, the intrusive nature of the noises that would emanate from the proposed quarry, and the fact that "noises emanating from the quarry at regular intervals will exceed the established maximum at both the property line and at the nearby residences." Decision at 54.

At p.22, ¶ 4, Rivers asserts that the Court's calculation "fails to account for any intercept of existing truck traffic." But there are few, if any, opportunities for intercepted

trips. See Neighbors' Proposed Finding 495, Exhibit N.1/T.1 at Table 1 and pp.5-6, and Testimony of Oman on 2/22/08. Moreover, the guidance provided by the Institute for Transportation Engineers, which establishes standard trip generation methodology, makes no provision for the concept of a new trip with a new origin replacing or "intercepting" an existing trip along the same route. See Neighbors' Proposed Conclusions at 131. Once again, Rivers is rehashing facts properly rejected by the Court.

At p. 23, ¶ 4, Rivers states that "[n]one of the earth extraction cases, including *McLean*, prohibit a quarry simply because quarry noise is not present prior to the quarry or because quarry noise is different from existing noises." This is true but of no help to Rivers; prior quarry cases prohibited quarries because the noise impacts, as here, violated well-established maximum noise limits.

At p.24, ¶ 2, Rivers asserts that the "only impact in any way related to this project that might exceed 70 dBA at the property line is the entry and exit of trucks." That assertion is false. The proposed quarry would generate noises at regular intervals exceeding 70 dBA at the property line and 55 dBA at the nearby residences. Rivers' expert Mr. Guldberg testified that blasting noise may exceed 70 dBA at the Rivers' property line. Moreover, trucks on the proposed haul road near the access to Route 100B would be a frequent daily occurrence; there is no justification for disregarding the noise impacts of these trucks. See also Neighbors' Proposed Finding 155.

At p.24, ¶ 2, Rivers asserts that the quarry's operations would be "more than 700 feet from Route 100B and more than 500 feet from the nearest neighbor." But this assertion improperly ignores the quarry's proposed staging area and proposed haul road and the trucks that will travel on it. The proposed haul road and the quarry staging area are located 225 feet

from the Holden property line, Neighbors' Proposed Finding 594, and the haul road, at its entrance, is located less than 200 feet from the McMullin property line, Neighbors' Proposed Finding 68. See this Court's Corrected Decision on Neighbors' Motion for Summary Judgment in four consolidated dockets dated Jan. 18, 2008, at 4 ("The distance from the haul road to the McMullin property line is approximately 150 feet.").

At p.25, ¶ 1, Rivers misstates the facts regarding the distance from quarry blasts to adjoining neighbors at the J.P Carrara Quarry and Bickford Quarry. While Rivers states as fact that there were "residences at 1,000 feet" from the Carrara quarry, the truth is that the nearest residence, the Buffum home, was at least 1,200 away from the blast site. See *Route 103 Quarry (Appeal of J.P. Carrara & Sons, Inc.)*, Docket No. 205-10-05 Vtec, at 13, Finding 19 (Vt. Env'tl. Ct., Nov. 22, 2006) (Durkin, J.) ("Nancy & Carroll Buffum, Sr., own and occupy property to the east of the Quarry, along the East Road. Their property is about 1,200 feet from the Quarry. Since the Buffum residence is the closest to the Quarry, it has served as the site for the seismograph monitoring device..."). In the case of the Bickford quarry, the closest neighbor was not within 500 feet of the quarry blasting operations, but rather was within 500 of the quarry's access road, *Charles and Barbara Pickford, #5W1186-EB*, Findings of Fact, Conclusions of Law, and Order at 7, Finding 13 (Vt. Env'tl. Bd., May 22, 1995).

At p.25, ¶ 2, Rivers argues that it should get a permit which "should simply be conditioned so as to prohibit flyrock from leaving the property." This argument directly contradicts the former Board's exhortation in *McLean* at 62 ("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”), and the Neighbors simply note here, in addition, that this requested permit condition is impossible to comply with according to Rivers’ own blasting expert. See Neighbors’ Proposed Findings 80–87, 90, 92–94, 111–118.

At p.25, ¶ 4, Rivers again misstates the distance from the Carrara project to its nearest neighbor. Moreover, the “modifications to [Carrara’s] quarry” consisted largely of digging deeper, so that by the time of the Court’s decision in that case the blasting was occurring within a pit seventy feet below ground level. As noted in Exhibit Rath Cross 1, Flyrock Control - By Chance or Design, “If the ground rises from the launch site, the throw will be less. If the ground drops below the launch site the throw will be greater, as illustrated in Figure 2.” *Id.* at 4 and see Figure 2. See also Testimony of Art Hendrickson on 12/15/2008.

To avoid any further confusion regarding this issue, the Neighbors propose a new finding to be inserted between Finding 169 and Finding 170 in the Decision, stating as follows:

[New] 170. Rivers’ proposed quarry, perched high above the Neighbors’ homes, presents a much greater danger of fly rock than a deep pit like the J.P. Carrara quarry. The Rivers’ proposed quarry would be hundreds of feet on the top of a hill above the Neighbors’ homes. Fly rock thrown from the top of a hill will travel farther and impact harder than on level ground or from below grade.

At p.27, ¶ 3, Rivers states that “Mr. Rath testified that he does not believe that flyrock is likely to leave the project site.” That is true as far as it goes, but Mr. Rath also testified that:

- A. He was concerned for the safety of people living near the proposed quarry site during any blasts, and recommended that anyone within 1,500 feet of a blast remain inside or under cover during the blast. (Cross Exam of Rath 12/15/2008).
- B. Many blasting accidents involving injury resulting from flyrock occur from excessive flyrock beyond the protected blast zone. (Cross Exam of Rath 12/15/2008).

- C. Where blasting operations are conducted in proximity to populated areas, flyrock may be a hazard to people, structures, and equipment not on the blasting site. (Cross Exam of Rath 12/15/2008)
- D. He would not recommend blasting the faces as depicted in the site plans (Cross Exam of Rath 12/15/2008)
- E. The use of hole liners (which do not appear in any of Rivers' reports, discovery responses or application materials), laser profiling, and bore hole tracking will not eliminate the risk of flyrock. (Cross Exam of Rath 12/15/2008).

At p.27, ¶ 4, Rivers admits that each blast (up to a dozen per year, for thirty-three years) would be preceded by two loud air horn warnings. Each of these warnings would disturb the neighbors' use and enjoyment of their property, and would warn all neighbors within 1,500 feet to abandon their outdoor activities and seek shelter in their homes or risk life and limb.

At p.28, ¶ 2, Rivers cites the Court's Finding 170, in which the Court found that "Rivers' expert credibly maintained that a properly planned and executed blast will not result in flyrock beyond the boundaries of the Rivers Property." The Neighbors respectfully disagree with this characterization of Mr. Rath's testimony. Mr. Rath in fact testified that flyrock is unlikely to leave Rivers' property, but that:

- A. Even where great care is taken to map and incorporate geology into blast design and implementation, cases may occur where adverse geologic conditions exist in the bank that are unknown. (Cross Exam of Rath 12/15/2008)
- B. If a void, mudseam, crack or mis-drilled hole goes unnoticed when a blast is detonated, flyrock could result. (Cross Exam of Rath 12/15/2008)

- C. Bore tracking and laser profiling can identify anomalies in a hole but cannot identify those anomalies between the holes and the face. (Cross Exam of Rath 12/15/2008)
- D. An anomaly between holes or between the holes and the face could produce unexpected results, including flyrock. (Cross Exam of Rath 12/15/2008)
- E. Even a small crack in the rock connecting to a bore hole can produce flyrock. (Cross Exam of Rath 12/15/2008)

Thus even a “properly planned and executed blast” can result in flyrock leaving Rivers’ property. That is why Mr. Rath recommends that the Neighbors within 1,500 feet seek shelter indoors during every blast event.

At p. 28, ¶ 3, Rivers expresses dismay at “being penalized for attempting to respond to some of the Opponents’ concerns by agreeing to orient blasts away from Route 100B where possible.” The “attempt” Rivers is referring to was nothing more than a poorly thought out, last-minute alteration of the blasting plan which Rivers and Mr. Rath had dreamed up over the weekend before Mr. Rath’s testimony in Court. The Court properly dismissed this “alternative” in Finding 173. The Phase 1 blasting progression that Mr. Rath described is not reflected on any site plan or report, nor was it disclosed to anyone prior to Mr. Rath’s testimony. (Cross Exam of Rath 12/15/2008). Given Mr. Rath’s testimony on cross examination that he and Mr. Rivers or Mr. Rivers’ attorneys had come up with this idea “a few days ago,” Rivers’ assertion in footnote 1 of the pending Motion that it “committed to taking this approach a number of years ago” is a flat out lie.

At p. 28, ¶ 5, Rivers asserts that the Court erred in considering recent flyrock accidents in Vermont and in West Lebanon, New Hampshire, stating that the “set up of the Percy quarry

does not even minimally resemble the proposed Rivers quarry.” The Percy quarry is in fact safer than the proposed Rivers quarry; see Neighbors’ Proposed Findings 125–127.

At p.29, ¶ 1, Rivers asserts that remedy for flyrock incidents is to impose additional safety precautions. Of course, the quarries that Rivers refers to are existing quarries. Furthermore, the blaster at the Percy quarry was cited for failing “to warn or evacuate persons in the Pine Crest Mobile home park and house holds [sic] adjacent to the park” following the April 28, 2008 flyrock accident there, see Exhibit N.20, § 2, #4 (emphasis added). See also Neighbors’ Proposed Findings 83, 135.

At p.29, ¶ 2, Rivers suggests that the Court require, via a condition subsequent contained in a permit condition, a “more thorough submission as to use of hole liners.” But hole liners do not remove the risk of flyrock, as Mr. Rath admitted on cross examination, stating that anomalies between holes or between the holes and the face could produce unexpected results, including flyrock. (Cross Exam of Rath 12/15/2008). Later in this paragraph, Rivers mischaracterizes Mr. Hendrickson’s strong and valid concerns. Mr. Hendrickson’s concern is not that “a plan was not followed” in the recent Percy Pit and West Lebanon flyrock accidents; his concern is that something went wrong and flyrock was the result. See Neighbors’ Proposed Findings 76, 77, 79, 80–82. Moreover, flyrock accidents can occur even when a blasting plan is followed precisely, see Neighbors’ Proposed Findings 81–83, 92–94, 111, 117, 145.

At p.29, ¶ 3, Rivers states that because flyrock accidents are rare, “[t]his meets the preponderance of the evidence standard.” In other words, Rivers is asserting that it is more likely than not that its proposed project will not caused head-sized chunks of rock to come crashing through the Neighbors roofs, so there is no problem. On the contrary, Rivers should

not be issued a permit for a project that “probably won’t” maim or kill the Neighbors in their homes. Nor should the Neighbors have to cower inside during every blast, as recommended by Rivers for their safety, and fear what may happen to them or, alternatively, flee their homes to seek safety elsewhere.

At p. 30, ¶ 1, Rivers asserts that it is “well over 500 feet from the road.” Again, Rivers is willfully blind to its haul road which begins at the road and runs to the proposed quarry floor.

At p.30, ¶ 4, Rivers recites a litany of alternate sources of crushed stone, including sources in Williston, Williamstown, Barre, Hinesburg, Granville, Plainfield and Northfield. That’s a lot of sources for crushed stone, showing that if the Town of Moretown or area residents need crushed stone, they are in no way dependent on Rivers’ proposed quarry to supply it. In any event, the Court already heard and rejected this evidence.

At p.31, Rivers asserts that the Court “referred to a number of individual sections of the Moretown Town Plan in reaching it[s] conclusion of nonconformance but has not identified which of these sections it concludes the project does not conform with.” But the Court did identify particular sections that Rivers’ proposed project fails to conform to, see the Decision at 69, Finding 222, citing the Town Plan at 35 as requiring that quarries not “unreasonably impact adjacent neighbors,” and at 71, concluding that the Rivers quarry conflicts with the use and enjoyment of neighboring properties.

In summary, Rivers’ contentions as to the Court’s Findings of Fact should be rejected. The Court’s Findings are amply supported by credible evidence. Rule 59(e) should not be used to “relitigate old matters,” *Appeal of Van Nostrand*, Docket Nos. 209-11-04 Vtec & 101-5-05 Vtec, at 4 (Vt. Env’tl. Ct., Dec. 11, 2006) (Durkin, J.) (quoting and citing 11 Wright,

Miller & Kane, Federal Practice and Procedure Civil 2d: § 2810.1 (2d ed. 1995). Disagreement between the moving parties, or disagreement with the Court's Decision, is not grounds for reconsideration. *In re Boutin PRD Amendment*, Docket No. 93-4-06 Vtec, at 2 (Vt. Envtl. Ct. May 18, 2007) (Wright, J.). Rivers' post-judgment Motion as to the Court's Findings is nothing more than an attempt to relitigate matters because Rivers disagrees with the Court's Decision. And as explained below, Rivers' disagreements with the Court's Conclusions of Law are similarly unfounded and should be rejected by the Court.

Reply to River's Legal Arguments

Rivers makes certain attacks on the Decision's legal conclusions. In general Rivers complains that the Court fundamentally misapplied basic Act 250 and zoning principles. The Neighbors believe that the Decision is sound with respect to the matters raised by the Motion and offer the following reply to specific issues in an aid to the Court.

I. THE DECISION PROPERLY APPLIES THE CONCEPT OF "FIT" IN ITS APPLICATION OF THE *QUECHEE* ANALYSIS

Rivers' objects to the Court's Criterion 8 *Quechee* analysis on the ground that the Court has misapplied the concept of "fit." The Neighbors disagree.

The concept of "fit" informs both the "adverse" and "undue" components of the *Quechee* analysis. Certainly, as the Decision recognizes, the formulaic application of *Quechee* assigns the question of "fit" to just the "adverse," or first part, of *Quechee*. But the actual language of Criterion 8—and that of *Quechee*—is not so limited. Rather, as the Decision recognizes, the former Environmental Board imbued the entirety of the Criterion 8 aesthetics analysis with the concept of "fit."

In judging the impact of a proposed project on the values described in Criterion 8, the cornerstone is the question: Will the proposed project be in harmony with its surroundings—will it “fit” the context within which it will be located?

Quechee then lays out five factors which “must be weighed collectively in deciding whether the proposed project is in harmony with—i.e., “fits”—its surroundings.” In evaluating the “fit” factors, the Environmental Board fully understood that what “fits” in one location may not “fit” another because aesthetic compatibility is a function of two variables: one, the proposed project’s attributes; and two, the nature of the proposed project’s surroundings. Thus, the Environmental Board concluded its discussion of the “fit” factors:

If after a collective analysis of these factors, we conclude that the proposed project would have an adverse impact on the aesthetics or scenic or natural beauty of the area, the next step is to determine whether the adverse impact is “undue.”

Only the formulaic application of *Quechee* binds and limits the concept of “fit” to Criterion 8’s penultimate question of whether a project’s effect on aesthetics is adverse. Rather, as the Board explained, the *ultimate* question of whether a project’s adverse effect on aesthetics is undue is the issue of “fit” at its most basic and granular level:

We conclude that an adverse impact is undue, and therefore violates Criterion 8, if we reach a positive conclusion with regard to any one of the following:

1) Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area?

* * *

2) Does the project offend the sensibilities of the average person?

* * *

- 3) Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings?

These three questions in Part II of the *Quechee* analysis bring the inquiry of “fit” to its most fundamental level. A project certainly does not “fit” if it (1) violates a clear, written community standard intended to preserve the aesthetics of the area; (2) offends the sensibilities of the average person; or (3) is so poorly designed that the applicant has failed to take generally available mitigating steps to harmonize the project with its surroundings. Simply put, Part II of *Quechee* examines how badly a proposed project does not “fit.”

As the Decision makes clear at pages 56–57, the proposed quarry fails each of the three Part II *Quechee* tests. The Decision’s Criterion 8 analysis is exactly what is required under *Quechee*. There is no error with respect to this part of the Decision.

II. THE COURT DID NOT IMPROPERLY CONSIDER THE SCENIC BYWAY DESIGNATION

Rivers makes an extended attack upon the Court’s consideration of the status of Route 100B as a Vermont Byway and Scenic Highway in the vicinity of the proposed quarry. While the Neighbors have already addressed this issue with respect to the findings of fact, the Neighbors believe there are two legal arguments which further respond to Rivers’ contention on this issue.

First, the Motion fails to contest that the Court erroneously admitted evidence of Route 100B’s designation as a scenic highway. Instead, the Court properly admitted this evidence under V.R.E. 402. By failing to make an objection under V.R.E. 402, Rivers has waived all objections to the Court’s consideration of this evidence.

Second, even if Rivers properly preserved an objection under V.R.E. 402, the Court has properly denied this objection. It is an undisputed fact that Route 100B is designated as a scenic highway. The designation is one fact among many presented to the Court that evidences both the aesthetic attributes of this portion of Route 100B and how those aesthetic attributes are regarded by the public. Consideration of this fact in no way violates the Vermont Scenic Roads statute and the Vermont Byways Manual.⁶

The Neighbors believe that the Court did not commit any error with respect to the consideration of Route 100B's designation as a scenic highway. The Decision does not state that the proposed quarry is denied because it violates the Vermont Scenic Roads Statute and the Vermont Byways Manual. Rather, the Decision states that the "quarry will contradict the very characteristics that brought the scenic designation upon this area; it will offend an average person visiting the area, expecting to enjoy its scenic quality, but not anticipating the noises emanating from the drilling, blasting, crushing, and load of rock at an adjacent quarry." This conclusion by the Court is correct under Criterion 8.

Moreover, even if the Supreme Court was to conclude that it was erroneous to consider this evidence, the Court's conclusion of law under Criterion 8 is amply supported by additional findings of fact such that this error would be harmless and not constitute grounds for reversal.

In any event, the Neighbors believe that the Court could eliminate any dispute by simply modifying its findings and conclusions as set forth above at pages 9-10.

⁶ The Neighbors also note that the Program Manual does not have the force and effect of law and, therefore, it is impossible for the Court to have violated the Manual in its consideration of this evidence.

III. RIVERS' DEMAND FOR A QUARRY CARTE BLANCHE HAS NO BASIS IN LAW

A general theme of the Motion is that the proposed quarry must be allowed because earth extraction is a conditional use, and because the Court has already ruled that the Moretown town plan provides for the responsible extraction of earth materials. Rivers' position is that because earth extraction *may* be allowed his project *must* be allowed, but that the Court may impose permit conditions. Rivers' position is erroneous as a matter of law.

First, the Court well knows that a conditional use is a use that may be allowed with conditions, or denied if it fails to comply with the applicable conditional use criteria. There is no legal requirement that all conditional uses must be allowed, albeit with conditions.

Second, the Court well knows that the same principle applies under the Act 250 criteria. That is, an affirmative finding under any given criterion *may* be made, in part, by the imposition of a condition. As the former Environmental Board explained in the *Bickford* decision (which Rivers cites to at page 25 of his Motion), the purpose of permit conditions is to "alleviate adverse effects that would otherwise be caused by the [p]roject, and that those adverse effects would require a conclusion that the [p]roject does not comply with the criteria at issue unless the conditions are followed." *Re: Charles and Barbara Bickford, #5W1186-EB, Findings of Fact, Conclusions of Law, and Order at 24 (May 25, 1995).*

Where Rivers is wrong is asserting that he is *entitled* to an affirmative finding of law through the imposition of a permit condition, regardless of the evidence. Such a position has no basis in zoning or Act 250 law. As the former Environmental Board further explained in *McLean* a permit condition which cannot be complied with cannot, as a matter of law, be the basis for an affirmative legal conclusion. *McLean* at 62.

Ultimately, a permit condition must be reasonable. *In re Denio*, 158 Vt. 230, 240 (1992). A permit condition which, based on the evidence, cannot be complied with fails as a matter of law to comply with *Denio*, *Bickford*, and *McLean*.

Since the Court has properly found that the proposed quarry will exceed the applicable 70 and 50/55 dBA standards, no permit condition can be imposed which meets *Denio*, *Bickford*, and *McLean*. Likewise, there is no permit condition which could be imposed with respect to blasting and the Neighbors within 1,500 feet since such a condition would have to order them to stay in their homes during a blast, or flee their homes. Such a condition cannot meet *Denio*, *Bickford*, and *McLean* because the burden of compliance is solely on Rivers, not the Neighbors, and it is the Neighbors who would have to modify their conduct to enable Rivers to operate the proposed quarry. Such a condition would be unprecedented and illegal.

Therefore, ordering conditions which are contrary to the evidence, or which order the Neighbors to do something to protect their own safety, cannot legally be the basis for an affirmative legal conclusion. The Court properly rejected the proposed quarry as there are no conditions which can alleviate its noncompliance with the applicable criteria.

IV. THE DECISION DOES NOT IMPOSE A NO-FLY ROCK GURANTEE

Rivers' claims the "Court would require Rivers to 'guarantee' that no flyrock incident will ever occur." Motion at 25. This is absolutely false. The Decision does not require any such guarantee. Rather, the Decision denies the proposed quarry because Rivers cannot meet the applicable criteria, including that the Neighbors would have to alter their conduct to take reasonable safety precautions against the threat of flyrock.

The fundamental problem is that Rivers has proposed a quarry project which cannot safely contain its actual and potential impacts. There is, at least, the potential for a flyrock

incident. The Court properly considered the potential for such an incident. The evidence was that such an incident can occur, and has occurred at other locations, notably at the Pike quarry in Lebanon, New Hampshire. The Court properly admitted this evidence and Rivers has waived any objection to its consideration by the Court.

Further, Rivers' own blasting expert testified that, in consideration of the potential for a flyrock incident, Neighbors within 1,500 feet of the proposed quarry need to remain in their houses during a blast for their own safety. This fact means there is no reasonable permit condition which could protect the Neighbors. Rivers' citation to *Re: J.P. Carrara & Sons, Inc.*, #1R0589-3-EB (Third Revision), Findings of Fact, Conclusions of Law, and Order (April 21, 1995) is irrelevant because there is no modification, nor permit condition, which can change the fact that, for the Neighbors own safety, they have to remain indoors (or flee their homes) when Rivers' conducts a blast. Based on the admission of Rivers' own blasting expert, the proposed quarry must be denied because it cannot safely operate within the limits of the jurisdictional tract of involved land, and the risk burden cannot legally be shifted to the Neighbors.

V. THE COURT PROPERLY CONSIDERED NOISE FROM THE HAUL ROAD AS AN IMPACT EMANATING FROM THE QUARRY'S TRACT OF INVOLVED LAND

Rivers objects to the Court's consideration of truck noise from the haul road. Rivers' contends that truck noise from the haul road does not fall within the definition of "quarry operations." Rivers' exclusion of truck noise from the haul road from "quarry operations" is erroneous based on the definition of "involved land" under NRB 2(C)(5)(a).

In relevant part, the definition of "involved land" states: "The entire tract or tracts of land, within a radius of five miles, upon which the construction of improvements for

commercial or industrial purposes will occur, and any other tract, within a radius of five miles, to be used as part of the project . . .” The haul road is located on the proposed quarry’s tract of involved land. As such any construction and use of the haul road is an element of the project over which jurisdiction exists. The Court properly considered truck noise as an impact which will emanate from the proposed quarry’s use of the jurisdictional tract of involved land. *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶ 9 (2007) (the underlying purpose of Act 250 is to regulate the impacts of development, not the purpose served, nor the parties benefited by the construction). Accordingly, the Court should reject as contrary to law Rivers’ request to exclude from the definition of quarry operations the truck noise from the haul road.

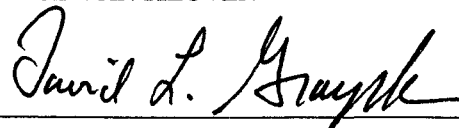
VI. SUMMARY

In summary, the Court should deny the Motion, and modify the Decision as set forth herein.

DATED this 4th day of June 2010.

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VIRGINIA FARLEY, DOUG HALL, CINDY HALL, JUNE
HOLDEN LIFE ESTATE, RICK HUNGERFORD, RITA
LAROCCA, ROBERT MCMULLIN, BEVERLY MCMULLIN,
JOHN PORTER, SANDY PORTER, SCOTT SAINSBURY,
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