

TOWN OF CHESTER
DEVELOPMENT REVIEW BOARD

In re: Julian Material, LLC (Allstone) Conditional Use Application

MOTION TO EXCLUDE EVIDENCE AND REJECT AMENDED APPLICATION

1. Section 4464 of Title 24 Prohibits Permitting of a Rock Crusher in this Proceeding

Rock crushers are notoriously noisy. For that reason, rock crushers were the subject of one of the most important land use decisions in the Vermont courts on the “substantial change” doctrine. *In re North East Materials Group, LLC*, 2015 VT 79, 199 Vt. 577, 127 A.2d 926, addressed an existing quarry that had already been lawfully using a rock crusher. The question before the Court was whether additional rock crusher use in a new part of the quarry, and therefore additional rock crusher noise from a new location within the quarry, required an amended Act 250 permit. The Environmental Court found that the new rock crusher could not amount to a substantial change because rock crushers were already in use. The Court reversed the Environmental Court because the potential noise impacts of relocating the crusher to a new location could cause a substantial change in noise impacts on the community. See also *In re White*, 172 Vt. 335, 337, 349, 779 A.2d 1264 (2001) (where a quarry operator challenged the Environmental Board’s imposition of a condition prohibiting use of a rock crusher, and the Court reversed and remanded other parts of the Board’s order, the Court authorized the Board to reconsider the prohibition as part of the remand), and *Swaim v. Norwalk Zoning Commission*, 1998 WL 234840 (Ct. Super. Ct. 1998) (holding that a zoning board can lawfully reject a rock crusher without any expert testimony about noise because the non-experts are competent to understand the noise created by rock crushers).

Rock crushers also create rock dust, which can endanger the public’s health as well as affect the appearance of a community. *North East Materials Group, LLC*, 2019 VT 55 ¶ 27-22, 210 Vt. 525, 217 A.3d 541 (dust impacts of rock crusher) (North East Materials Group II”).

Here, the use of a rock crusher anywhere in the South Quarry is not authorized by any existing zoning permit. Here, the application that was filed on May 31, 2023 for an amended zoning permit did not state that permission was being sought for use of a rock crusher. Here, the notice to the public that was required by 24 V.S.A. § 4464 did not inform members of the public that permission was being sought for use of a rock crusher. And here, if a member of the public had visited the town’s files in person or on-line they would not have discovered that permission was being sought to use a rock crusher, because Julian filed a small mountain of reports and plans but never said a word about seeking permission to operate a rock crusher.

Yet, more than six months after Julian Materials filed its application, after the conclusion of three full hearings, and just two business days prior to the scheduled final hearing in this matter—Julian Materials filed documents seeking authorization to operate of a rock crusher in the South Quarry.

Plainly, issuance of a permit authorizing use of a rock crusher on these facts would be unlawful. Section 4464 states (emphasis added):

(a) Notice procedures. All development review applications before an appropriate municipal panel under procedures set forth in this chapter shall require notice as follows.

(1) A warned public hearing shall be required for conditional use review, variances, administrative officer appeals, and final plat review for subdivisions. Any public notice for a warned public hearing shall be given not less than 15 days prior to the date of the public hearing by all the following:

(A) Publication of the date, place, and purpose of the hearing in a newspaper of general circulation in the municipality affected.

(B) Posting of the same information in three or more public places within the municipality in conformance with location requirements of 1 V.S.A. § 312(c)(2), including posting within view from the public right-of-way most nearly adjacent to the property for which an application is made.

(C) Written notification to the applicant and to owners of all properties adjoining the property subject to development, including the owners of properties which would be contiguous to the property subject to development but for the interposition of a highway or other public right-of-way and, in any situation in which a variance is sought regarding setbacks from a State highway, also including written notification to the Secretary of Transportation. **The notification shall include a description of the proposed project and shall be accompanied by information that clearly informs the recipient where additional information may be obtained,** and that participation in the local proceeding is a prerequisite to the right to take any subsequent appeal.

* * *

(5) No defect in the form or substance of any requirements in subdivision (1) or (2) of this subsection shall invalidate the action of the appropriate municipal panel where **reasonable efforts are made to provide adequate posting and notice.** However, the action shall be invalid when the defective posting or notice was **materially misleading in content.** If an action is ruled to be invalid by the Environmental Division or by the applicable municipal panel itself, the action shall be remanded to the applicable municipal panel to provide new posting and notice, hold a new hearing, and take a new action.

The notice to the public in this matter, which is attached to this motion as Appendix A, set forth the "proposed project." The proposed project set forth in the notice did not include a rock crusher. The notice to the public stated that the only change proposed for the South Quarry was construction of a new building to process rock. The notice to the public was correct, because the application stated that the only change proposed for the South Quarry was construction of the building.

A rock quarry that does not use a rock crusher is a different project than a rock quarry that uses a rock crusher. Crushers have potentially severe noise impacts and air pollution impacts. It

would be “materially misleading” to authorize use of a rock crusher where abutters and other members of the public were not informed that a rock crusher was being proposed. In a far less egregious situation the Environmental Division of the Superior Court has held that it was materially misleading for a notice to mention that changes to one part of a condominium was being proposed without mentioning a change proposed for another part of the condominium. Therefore, the zoning permit was reversed. *Ridgetop/Highridge PUD*, Dkt No. 69-5-11 Vtec, Decision on Motion (Vt. Super. Ct. Env’l Div. Feb. 22, 2016)(Walsh, J.) at 7-8.

Mr. Kilgus and Ms. Thorsen ask that the Board reject the proposed change to this project that would allow operation of a rock crusher. A new application must be filed, a new notice to the public must be issued, and a hearing on that application then must be scheduled.

2. Section 1204 of Title 24 Prohibits Permitting of a Rock Crusher in this Proceeding

This on-the-record proceedings is governed by the Municipal Administrative Procedure Act. Section 1204 of the Act states:

(a) Initial public notice of any hearing under this chapter shall be provided in accordance with applicable statutes. All parties and interested persons shall be given an opportunity for hearing after reasonable notice.

(b) At any hearing held under this chapter, opportunity shall be given to all parties to respond and present evidence and argument on all issues involved.

Submission of plans for a rock crusher two business days before the final hearing in this matter is grossly unfair, and departs from §§ 1204(a) and (b). The parties had no notice until Thursday December 7 at 3:15 pm (when Julian emailed it’s latest filing) that Julian is seeking a permit for use of a rock crusher. That filing does not provide reasonable notice for a hearing on Monday evening, December 11. Mr. Kilgus and Ms. Thorsen, and other parties, need time to prepare to cross-examine Mr. Matosky and to prepare rebuttal evidence.

For similar reasons, Julian’s noise expert, Mr. Duncan, should not be allowed to present testimony on the noise impacts of rock crushing. The Board had earlier ordered that any noise report be submitted sufficiently in advance of hearing so that all parties could prepare. There is no noise report that addresses use of a rock crusher. It is impossible for the parties to prepare for any testimony on the noise impacts of rock crushing. No verbal testimony about the noise impacts of a rock crusher should be allowed.

3. Section 1206 of Title 24 Prohibits Admission into the Record of Evidence Pertaining to a Rock Crusher.

Section 1206 of the Municipal Administrative Procedure Act prohibits admission of irrelevant testimony. Because the notice to the public did not include a rock crusher, evidence about a rock crusher is irrelevant to this proceeding and should not be admitted. Neither Mr. Matosky nor any other witness should be allowed to testify about a rock crusher.

4. Sections 4464 and 1204 of Title 24 Prohibit Permitting of Any of the Quarries Where Blasted Rock Will Be Transported to an Offsite Facility That Has Not Been Identified.

The impacts of trucking blasted rock from a quarry are potentially major. The trucking impacts include issues of highway congestion, safety of stopping sight distances and intersection sight distances, pedestrian safety, noise and dust. See, e.g., *In re Katzenbach Act 250 Permit*, 2022 VT 42, 287 A.3d 36 (pedestrian safety impacts of trucks that transport quarried rock), *In re North East Materials Group II* ¶ 7-26 (noise impacts of trucks that transport quarried rock).

Section 4464, quoted above, states that the notification to the public of the filing of an application “shall include a description of the proposed project.” Because of the potentially severe impacts of trucking blasted rock, a “description of the proposed project” must include a description of where the rock will be transported for processing before it is sold, including the likely travel routes.

The notice that was issued to the public in this matter informed the public that the truck routes would be from the North and South Quarries to the Chandler Road site and, later, from the North Quarry and the Chandler Road Quarry to the South Quarry site.

That notice is now materially misleading. The December 7 filing announces that Julian Materials has dramatically changed its plans. Instead of transporting blasted rock to the unlawful Chandler Road processing facility at first, and later transporting blasted rock to the South Quarry processing facility that Julian proposed to construct, Julian now says all blasted rock will be transported to an “offsite facility” that it has chosen not to identify—except to say that it is in another municipality. Persons who may not have qualified for interested person status for the May 31 application might have compelling claims for interested person status under the December 7 application—but it is impossible to know this because the routes are not identified. Section 4464 means nothing if a rock quarry permit applicant can file an application for a permit without identifying the truck route by which blasted rock will be transported to be processed before it is sold. It is impossible for members of the public to know whether every day there will be forty loaded trucks passing by their home, their school, their place of business, the roads where they walk for recreation, or the roads their children ride their bicycles along to school. The amended application must be rejected under § 4464.

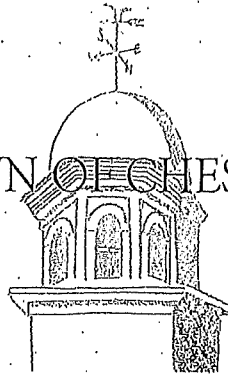
The amended application must also be rejected under § 1204. Submission of the new trucking plans two business days before the final hearing in this matter, again, is grossly unfair, and departs from §§ 1204(a) and (b). That filing does not provide reasonable notice for a hearing on Monday evening, December 11. Mr. Kilgus and Ms. Thorsen, and other parties, need time to prepare to cross-examine Mr. Matosky and to prepare rebuttal evidence.

Dated at Bristol, Vermont, this 10th day of December, 2023.

SCOTT KILGUS and LESLIE THORSEN
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TOWN OF CHESTER
NOTICE OF HEARING FOR CONDITIONAL USE PERMIT

Julian Materials, LLC has applied for a Conditional Use Permit for properties located at 3643 VT RT 103 North and 137 Chandler Road in the Town of Chester. The proposed use is to make modifications to three stone quarries including the relocation/consolidation of processing operations, implementation of stormwater improvements at the Chandler Road quarry, the construction of a new building for processing at the South Quarry, and a new contractor yard at the North Quarry.

The Town of Chester Development Review Board will hold a hearing on this application at 6:00 PM on Monday, September 11, 2023, at the Chester Town Hall at 556 Elm Street in Chester. The application, exhibits, and additional information may be viewed on the Town of Chester website home page at www.chestervt.gov.

Participation in this hearing in person, via Zoom videoconference, or in writing is a prerequisite to the right to take any subsequent appeal.

A link to participate in this hearing via Zoom videoconference may be found on the Town of Chester website home page at www.chestervt.gov.

Dated at Chester, Vermont this 4th day of August 2023.

Preston Bristow
Zoning Administrator
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