Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-311

JUNE TERM, 2007

In re Appeal of Licausi, et al.	}	APPEALED FROM:
	}	
	}	
	}	Environmental Court
	}	
	}	
	}	DOCKET NO. 203-11-98 Vtec
		Trial Judge: Merideth Wright

In the above-entitled cause, the Clerk will enter:

Applicant Crushed Rock, Inc., which seeks a conditional-use permit to operate an asphalt plant, and neighbors opposing the permit appeal an Environmental Court decision on remand from this Court granting the permit but amending conditions restricting the plant's hours of operation. We affirm.

In October 1998, the Town of Clarendon zoning board of adjustment granted applicant a conditional-use permit for the operation of an asphalt plant at the site of an existing and permitted stone and gravel quarry. Neighbors appealed the ruling to the Environmental Court, which also granted the permit subject to several conditions aimed at mitigating the plant's impact on the rural area. Following neighbors' appeal to this Court, we reversed and remanded the matter "to require the court to address the issue of the cumulative impact of the added noise and any other additional adverse environmental consequences of the proposed plant." In re John A. Russell Corp., 2003 VT 93, ¶ 33, 176 Vt. 520 (mem.). On remand, the Environmental Court found no material adverse impact from the plant on the character of the area apart from the noise of the plant. The court concluded that allowing the plant to operate during hours in which a stone crusher was not permitted to operate would materially increase the type and level of noise and thus adversely affect the character of the area, but that any adverse impact from the noise of the plant could be averted by restricting the plant's hours of operation to the operating hours of the even louder stone crusher. Consequently, the court amended the existing conditions to restrict the plant's hours of operation to those in which the stone crusher was allowed to operate. Both applicant and the neighbors appeal from that decision.

For its part, applicant challenges the Environmental Court's reasoning that because the ambient noise level of the road adjoining the subject property is twenty-to-twenty-five decibels less than the noise level of the asphalt plant, operation of the plant when the stone crusher is not operating will significantly increase the level and type of noise in the area and thus adversely affect

the character of the area. According to applicant, the court's reasoning is flawed because it did not take into account the proximity of the neighbors' homes to the source of the noise generated by the road and the plant. We find no merit to this argument. In our remand decision, we expressly noted that the Environmental Court "did not evaluate the neighbors' complaint that the frequency of loud noise would increase and affect the use and enjoyment of nearby residences." Id. (emphasis added). As noted above, the Environmental Court concluded that operation of the asphalt plant during hours when the stone crusher was not permitted to operate would increase the "type and level" of noise in the area. In this case, the ambient noise level represented the level of noise generated by traffic on a rural road, which is not constant and thus differs significantly in frequency, type, and level from the noise of an operating plant. Accordingly, the court reasonably restricted the hours of plant operation to the hours of operation of the even louder stone crusher, which would not raise the noise level in the area.

For their part, neighbors argue that the Environmental Court erred (1) by concluding that restricting plant hours of operation to those in which the stone crusher is permitted to operate would mitigate any adverse impacts with respect to noise, and (2) by concluding that the cumulative impact of the plant would not adversely impact the character of the area with respect to other criteria, such as visual aesthetics, odor, and light. We find these arguments unavailing. The evidence demonstrated that operating the asphalt plant at the same time as the stone crusher would not increase the noise level from that generated by the stone crusher alone. Neighbors point out, however, that the current conditions, which permit the stone crusher and asphalt plant to operate any six out of seven specified hours during the day, could result in the stone crusher and asphalt plant operating at different hours, thus increasing the noise level for an hour a day. We assume that the Environmental Court was aware of this possibility when it imposed the conditions and concluded that, even if such a possibility occurred, the relatively de minimis increase in noise level would not have a material adverse impact on the character of the area. As far as the neighbors' speculation about the impact of the operation of the plant on visual aesthetics, odor, and light, the evidence introduced at the hearing on remand, including expert testimony, amply supported the court's determination that operation of the plant under the existing conditions would have no adverse impact on the character of the area with respect to those criteria. See id. ¶ 30 ("Our review of the Environmental Court's determination of whether there is material adverse effect is generally deferential: we will uphold the court's determination unless clearly erroneous.").

Affirmed.

BY THE COURT:

_____

John A. Dooley, Associate Justice

_____

Denise R. Johnson, Associate Justice

_____

Marilyn S. Skoglund, Associate Justice