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Negotiating the Host Community Agreement for Aggregate Mining Projects

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I. Significance of the Industry

A. Aggregate mining is major industry supplying necessary raw materials for the construction of this country's highways and other infrastructure. As of 1990 the United States produced 2.1 billion tons of aggregate annually, 897 million tons of which were sand and gravel, and the rest crushed stone. National Stone Association, *The Aggregate Handbook*, Washington, D.C., 1991, at 1-4. The term "aggregate" is used in this outline to refer to any combination of sand, gravel or crushed stone.

B. Most crushed stone produced is limestone and dolomite (71% in 1990), with remaining products including granite (14.5%), traprock (8.3%), and sandstone (2.3%). Over half of crushed stone is used as construction aggregate in highway and road construction as road base, and in portland cement concrete and asphalt concrete. *Id.* In 1990, \$8.8 billion of the product of aggregate mining was sold to other industries, for use in construction ranging from highways, airports, dams, jetties and breakwaters to shopping centers, as well as in the chemical, steel and lime industries. *Id.*

C. Economic impact of aggregate mining makes it one of the major industries of the country. Producers of aggregate employed approximately 73,000 throughout the United States, with a payroll of about \$2.5 billion annually in 1990. Of all states, New York ranks ninth in production of aggregate. Regionally, the northeast produces only 16% of the country's aggregate. *Id.*

D. New York State recognized importance of successfully siting new mines with enactment of Mined Land Reclamation Law, ECL Article 23, Title 27 ("MLRL").

“The legislature hereby declares that it is the policy of this state to foster and encourage the development of an economically sound and stable mining industry, and the orderly development of domestic mineral resources and reserves necessary to assure satisfaction of economic needs compatible with sound environmental management practices.” ECL § 23-2703(1). II. Traditional Opposition

A. Despite economic importance of aggregate mining to the country, and general acceptance of need for its products both locally and nationally, proposed aggregate mining projects traditionally run into opposition from neighbors, and less often but frequently from local elected officials.

B. Although sometimes characterized as another locally undesirable land use (“LULU”), aggregate mines when properly operated should not, and do not, present the types of health hazards associated with low-level radioactive waste disposal sites, solid waste landfills, incinerators, and hazardous waste facilities.

C. Community concerns, or anticipated concerns, associated with proposed aggregate mines generally include adverse impacts on nearby well water quantity and quality, blasting vibrations, equipment and blasting noise, increased truck traffic, adverse visual impact, dust emissions beyond the property line, and adverse impact on community character as the result of the preceding impacts.

D. Such concerns, though significant, are distinctly different from the health and safety concerns associated with major combustion facilities, such as incinerators and power plants, and hazardous waste facilities and solid waste landfills. Although the concerns with aggregate mining proposals are not solely aesthetic, they should be amenable to resolution either in DEC permit conditions or a host community agreement, or both.

III. Role of Host Community Agreement

A. Given the low level of risk, host community agreement to facilitate siting of aggregate mine need not raise the moral question of whether it is proper to allow a community, particularly a disadvantaged community, to accept a greater health or safety risk in exchange for compensation. See, e.g., Janet Siegel, *Negotiating for Environmental*

Justice: Turning Polluters into “Good Neighbors” Through Collaborative Bargaining, 10 NYU Env. L. J. 147 (2002); Vicki Been, *Compensated Siting Proposals: Is It Time to Pay Attention?*, 21 Fordham Urban L.J. 787 (1994). Rather, an aggregate mining host community agreement is designed to address mitigation for infrastructure and aesthetic burdens a local community may bear, as well as provide additional assurance that low level health concerns are adequately addressed.

B. Ironically, preemption of local authority by the MLRL 1991 amendments may prompt need for host community agreements. Local community and municipality may feel disenfranchised and hence more demanding of direct relationship with mine operator. This relationship may be expressed in site plan and special permit requirements under local land use laws, a side agreement between the operator and the municipality and/or a community group, or provisions in the DEC permits that recognize the municipality as a participant in notifications, sampling, and other aspects of the operation.

C. MLRL 1991 amendment provides State law shall “supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from . . . enacting or enforcing local zoning ordinances or laws which determine permissible usages in zoning districts.” ECL § 23-2703(2)(b).

D. By this language, MLRL set up distinction between zoning laws which determine which uses are permissible in a town, and other local laws which attempt to regulate mining. The former are permitted, the latter are not.

E. In *Philipstown Industrial Park, Inc. v. Town Board of Town of Philipstown*, 247 AD2d 525, 669 NYS2d 340 (2d Dept. 1998), court struck down local law that would have required a special use permit for mines subject to DEC jurisdiction.

“While a locality retains general authority to regulate land use, and has the authority to determine that mining will not be a use within its confines, it may not regulate the specifics of the extractive mining or reclamation process The local law under review attempts to do just that. By conditioning the grant of a special use permit on specific aspects of a mine’s operation and reclamation the Town Board has usurped the authority which, under the Environmental Conservation Law, has been delegated solely to the DEC.” *Id.*, 247 AD2d at 527-28. F. Similarly, in *Town of Throop v. Leema Gravel Beds*,

Inc., 249 AD2d 970, 672 NYS2d 212 (4th Dept. 1998), the Court found that sections of the town zoning law which dealt with the actual operation and process of mining were superseded by the State law.

G. Recognizing that towns have an interest in the permit conditions for a mine under DEC jurisdiction, the State has provided an avenue for town comment and involvement. Under § 23-2711(3), the local government is given notice of a complete application by certified mail and the chief administrative officer of the town may then make a determination and notify the DEC as to the items that might affect the municipality. The determination to be made by the municipality, with public input if it wishes, may address the following issues:

appropriate setbacks from property boundaries and thoroughfares; type, length and height of barriers to restrict access; control of dust; and hours of operation. Any determination must be supported by justification for the conclusions reached. If DEC finds that the town's determinations are reasonable and necessary, DEC must incorporate them into the permit. If DEC does not agree, it must provide a written statement to the municipality as to why any part of the determination was not incorporated. See, DEC, Technical Guidance Memo MLR 92-2

H. The role of the host community agreement in this legal context is to provide the municipality and the neighbors with an additional vehicle to give them assurance that their concerns will be addressed in the siting and operation of the mine.

IV. Scope of Host Community Agreement

A. Well Water. Neighbors often assume, incorrectly, that the blasting in a mine will open fissures in rock that will drain water from the aquifer serving their wells and leave their wells dry, or contaminate the aquifer. Contamination issues are generally dealt with by a Spill Prevention Countermeasure Control ("SPCC") Plan in the mining permit and should not require a separate agreement. However, concerns about well water quantity and quality are dealt with by a well arbitration agreement under the authority of Matter of Empire Bricks, Inc., Interim Commissioner's Decision, (August 1, 1990) 1990 WL 179755:

"Chief ALJ Drew concluded that reasonable doubts existed concerning whether or not

the proposed mining operation would adversely impact the quantity of water in neighboring wells. Upon appeal of this ruling, I have reviewed the relevant submittals and while I find that such an impact is not reasonably expected to occur, the offer of Empire Bricks, Inc. (the "Applicant") to provide potable water would adequately mitigate such an impact in the unlikely event it occurs. Therefore, if the Applicant is prepared to accept a condition which will require it to provide potable water to adjacent landowners whenever the quantity of water in the wells of such landowners is insufficient unless and until the Applicant can demonstrate to the satisfaction of the Department that its mining operation is not a contributing cause to such problem, there is no issue for adjudication. Specifically, such a condition would apply to those landowners who have property which abuts the perimeter of the Applicant's property and/or are located on either side of Churchland Lane from the junction of Churchland Lane and Churchland Road extending in an easterly direction to the point where Churchland Lane makes a ninety degree turn northward." See also, Matter of Peckham Materials Corp., Commissioner's Decision (January 28, 1994) 1994 WL 115092; Matter of Gernatt Asphalt Products, Inc., Interim Commissioner's Decision (April 29, 1994) 1994 WL 327454; Matter of Jointa Galusha LLC, Interim Commissioner's Decision (May 7, 2002) 2002 WL 974335. But see, Matter of William E. Dailey, Inc., Interim Commissioner's Decision (June 20, 1995) 1995 WL 394546.

The terms of the well arbitration agreement may be negotiated with the municipality and/or the neighbors, but to satisfy Empire Bricks it must be inserted as a condition in the mining permit.

B. Blasting. The potential impact of blasting is often the most misunderstood impact by neighbors. The two common concerns are cracks in buildings caused by excessive ground motion, and noise from excessive air concussion, known as overpressure. The mine operator and the neighbors have a common interest. A well designed blast will concentrate its energy on loosening rock in the mine. Energy from blast which goes into ground or air vibration is expensive wasted energy for the mine operator, something to be minimized in efficient use of explosives.

Mine operators are accustomed to working within the standards recommended by the United States Bureau of Mines for the rate of ground movement, known as particle velocity, associated with possible building damage. See, The Aggregate Handbook, at 5-16 to 5-25. Given the amount of research supporting the Bureau of Mines recommend-

ed standards, there would be no basis for a host community agreement adopting novel standards. The areas for negotiation, whether in a permit or a host community agreement, include advance notification of blasting, limitation on hours of blasting, record-keeping for blasts, and repair agreements with baseline surveys for adjacent buildings.

C. Noise. Noise negotiations have been focused by issuance of the DEC guidance entitled, "Assessing and Mitigating Noise Impacts," DEP-00-3, October 6, 2000, revised February 2, 2001 ("Noise Guidance"). Any negotiation of host community agreement will probably refer to the Noise Guidance, although its express purpose is only to provide guidance to staff and applicants.

The draft permit for St. Lawrence Cement, Greenport, issued August 24, 2001, for example, references the Noise Guidance in a permit condition and establishes receptor locations, baseline ambient levels, and a limit over ambient of 10 dBA during daytime operations and 5 dBA during nighttime operations. The draft permit also requires submission of a mitigation plan consistent with the Noise Guidance prior to commencement of construction, but the Commissioner has been asked to rule that the mitigation must be specified before the permit can be approved.

Areas for negotiation, whether for the permit or the agreement, include hours of operation, mitigation measures for equipment including muffling and enclosures, site design to achieve mitigation, noise complaint and disposition procedure, establishment of a noise monitoring program at the property line and at sensitive receptor locations in the community, and possibly limits on noise increase over ambient at such locations. Also to be clarified in negotiations are the measurements to be used, that is, whether dBA is to be stated as the Equivalent Sound Level, or Leq, averaged over what duration. Other sound measurements are problematic and difficult to compare with references. See examples in Noise Guidance at 7-8.

D. Dust. Although combustion emissions will be addressed in the DEC air permit for generators on site, the principal concern of the operator and the neighbors is the emission of dust particles beyond the property line. DEC routinely adds dust suppression measures to mining permits, including spraying unpaved roads, paving principal access routes, keeping paved roads swept, and no tracking onto highways.

Unlike combustion emissions, most of the particulate matter emitted from a mine

operation are large, heavy particles that will settle within a mine property. The Aggregate Handbook, 5-9 to 5-14. Pit and quarry particle emissions range from 0.1 micron to more than 300 microns in sizes. Given their size and tendency to fall to the ground close to the source of emission, mining dust is considered more of a nuisance than a health issue. Id.

Areas for negotiation include equipment to control dust emissions from plant operations (drilling, blasting, crushing, conveying, screening and stockpiling) either through dry collecting systems or water suppression. Fugitive emissions control could involve housekeeping measures, additional wetting, paving, maintenance of vegetation and wind breaks.

E. Trucks. An undeniable impact of any mine operation will be truck traffic, with every shipment requiring one empty truck in before the full truck can go out. With respect to noise, trucks traversing must conform with the applicable State statute setting noise level limits, New York State Vehicle and Traffic Law § 386.

In addition to § 386, the DEC's regulations ensure that vehicles meet the sound limits under § 386. 6 NYCRR §§ 450.1 - 454.5. The regulations set forth allowable noise levels, the type of measurements that may be used, and the method(s) to use when measuring the sound levels.

In Falke's Quarry, Commissioner's Decision (March 12, 1991) 1991 WL 94058, measurements were taken on a public roadway near a mine to determine the effects of trucks pulling from and coming to a stop sign. Those measurements were done even though trucks presently used the roads where the applicant proposed to operate the mine. The ALJ noted that although the loudness of trucks would not increase, they would occur more often. He concluded that although a few houses would experience truck noise more often, no mitigation was possible and a "no action" option was too severe. Id. at 24.

Regarding emissions, the Commissioner has ruled that emissions from diesel engines are regulated pursuant to applicable engine exhaust emission rules, and therefore no adjudicable issue is raised. Sour Mountain Realty, Interim Commissioner's Decision, (July 18, 1996) 1996 WL 566247.

Trucks are therefore a traffic issue that must be dealt with by traditional traffic impact studies. Areas for negotiation may include routes, coordination with school buses, posting signs, providing signals, and possibly assisting in the repair of traveled roads.

V. Validity of Host Community Agreement

A. SEQRA. Since a host community agreement will often include an offer of compensation by the applicant in exchange for some degree of assurance by the municipality that it will not object to issuance of the permit, and will consider the project grandfathered should any future local land use law be enacted banning mining, SEQRA compliance is required. The timing issue has been raised in litigation both for the St. Lawrence Cement project in Greenport and the Jointa Galusha project in Hartford: can the town enter into such an agreement with the applicant before the DEC as lead agency has issued its FEIS. The Greenport proceeding was settled, but the Hartford proceeding is pending.

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