STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 256-10-11Oscv

GREEN MOUNTAIN POWER CORPORATION,	)
Plaintiff,	)
	)
v.	)
	)
DONALD AND SHIRLEY NELSON,	)
Defendants.	)

Defendants' Motion for Temporary Restraining Order and Memorandum in Support

Defendants Don and Shirley Nelson move this court to issue a temporary restraining order enjoining Plaintiff Green Mountain Power Company (GMP) and its agents and contractors from trespassing on, blasting and destroying the defendants' property, clear cutting on defendants' property and from casting blast debris and flyrock onto the defendants' property, conduct that constitutes an ongoing trespass and nuisance by GMP that has forced the episodic ouster of the defendants from their land.[1]

GMP and its contractor, Maine Drilling and Blasting (MDB), have begun blasting activities on land that is adjacent to land owned by the defendants. See affidavit of defendant Donald Nelson, marked **Exhibit 2**. Defendants' have not been able to determine the exact site of the blasting that began on October 17, 2011, but have been able to confirm that clear cutting is

[1] GMP was able to obtain a TRO from the court in support of its current activities, but this TRO was obtained through misleading and incomplete disclosures to the court. The true facts of GMPs' blasting and the location of the blasting and its actual and threatened harm to the person and property of the defendants will require that the TRO granted to GMP be dissolved, as the defendants have requested in their October 17, 2011 filing.

already occurring on defendants' property and that either nor or within days blasting will be occurring in very close proximity to the common boundary that GMP shares with defendants. As announced and planned by GMP and as described in the attached affidavit of defendants' surveyor, Paul Hannan, some of the planned blast sites to create a "crane path," so-called, are located on the defendants' land. See affidavit of Vermont licensed surveyor Paul Hannan marked **Exhibit 1**. These ongoing and planned blasting activities are causing, and will continue to cause, irreparable injury to defendants by (1) blasting rock and clear cutting trees on defendants' property thereby permanently destroying the defendants' ridgeline property in a way that can never be restored and (2) projecting debris and rocks from the blasting onto defendants land, thereby damaging defendants' land and endangering the life of defendants and any persons on their property in the vicinity of the blasting. These intentional and ongoing violations of defendants' property rights are intolerable, and emergency court intervention is essential to avoid physical injury to persons and property and to avoid permanent destruction of portions of defendants' land.

FACTS

GMP is engaged in the ultra-hazardous activity of blasting. Consequently, it has a duty to take utmost precautions to avoid damage or harm to the person or property of others. GMP has been aware at least since March 2, 2010 that defendants' have challenged the boundary line being used as the outer boundary of the blast zone by GMP and that the defendants have a documented claim that portions of their land lie within the blast zone. Nevertheless, GMP has taken no steps to address the issue or to secure a legal determination of the correct boundary line. Affidavit of Don Nelson. The location of the boundary line between GMP's leased land and

defendants' property is clearly identified by well-established surveying methodology and demonstrates that GMP is planning to blast rock and clear cut trees and vegetation that is on defendants' property. The defendants have documented by survey that an area of land being used by GMP that runs along the westerly boundary of defendants' property is, in fact, the defendants' land and lies within the lawful boundary of defendants' property. Defendants' surveyor has determined that the proposed path that GMP plans to blast from the side of the mountain to create a path for the movement of a crane to be used by GMP is on defendants' property for a distance of more than 300 feet. Additionally, the proposed location of at least two of the towers for GMP's proposed wind turbine array will be well within 60 meters of defendants' property and, consequently, will be in violation of GMP's Certificate of Public Good.

In the Amended Blasting Plan GMP filed with the PSB and with which it is required to be in compliance, GMP's blaster provides the following assurance: "We are knowledgeable of and will follow all local, state and federal regulations related to transportation and use of explosives." Amended Blasting Plan at 3. Vermont has adopted the National Fire Protection Association (NFPA) Uniform Fire Code (NFPA 1) within the Vermont Fire & Building Safety Code. Pursuant to NFPA 1, the use of explosive material shall comply with NFPA 495 - Explosive Materials Code. See NFPA 1-330 § 65.9.1. The Vermont Division of Fire Safety website confirms that "Regulations on the safety, storage and use of explosive materials are contained in the National Fire Protection Association (NFPA) Standard 495, Explosives Material Code, 2006 edition, adopted under the Vermont Fire & Building Safety Code." Pursuant to NFPA 495, "<u>[f]lyrock[2] shall not be propelled from the blast site onto property not contracted by the blasting</u>

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[2] Flyrock is a term used to describe solid blast debris created by a blast.

operation or onto property for which the owner has not provided a written waiver to the blasting operation." NFPA 495-39 § 11.3.2. (Emphasis added) *See also* NFPA 495 11.3.1 ("flyrock travelling through the air or along the ground shall not be cast from the blast site in an uncontrolled manner that could result in personal injury or property damage.")

The Amended Blasting Plan also includes the following commitment:

1. Mats will be placed so as to protect all people and structures on, or surrounding the blast site and property." Amended Blasting Plan at 4.

The Plan Attaches Material Safety Data Sheets for the materials to be used during blasting, several of which require the user of that material to "COMPLY WITH THE SAFETY LIBRARY PUBLICATION NO.4 "WARNINGS AND INSTRUCTIONS" AS ADOPTED BY INSTITUTE OF MAKERS OF EXPLOSIVES". *See e.g.* Amended Blasting Plan, MSDS No. B-3 for AUS ITN ITE WR SERIES at 2; MSDS No. C-3 for SHOCK*STAR (TM) SHOCK TUBING at 2; MSDS MDB-1 for MDB BLEND 1966 at 2. Safety Library Publication No. 4 of the Institute of Makers of Explosives includes the requirement that the blaster should "ALWAYS use a blasting mat or other protective means when blasting close to residences or other occupied buildings or other locations where injury to persons or damage to property could occur as a result of flyrock."

GMP possesses a Certificate of Public Good (CPG) from the Vermont Public Service Board (PSB) which, *inter alia*, requires that:

1. All blasting will be performed in accordance with any and all applicable laws and regulations" including the requirements of Office of Surface Mining Reclamation and Enforcement (OSM) Blasting Performance

Standards contained in 30 C.F.R. §§ 816.61-816.68 and 817.61-817.68. (These standards prohibit any blasting that will cause "fly rock" to be cast "beyond the permit boundary" (30 C.F.R. §§ 816.67 (c)(3) and 817.67(c)(3)). CPG at Paragraph 36)

2. That blasting mats be used to control "limit the occurrence of flyrock". *Id.*

3. That the base of all towers for turbines must be at least 60 meters from the nearest property line. CPG at Paragraph 23

GMP's current and planned blasting activities do not comply with the cited provisions of its Amended Blasting Plan, the relevant regulations and industry standards or its CPG and its current blasting activities, to the extent they involve the possible casting of debris and flyrock on to property owned by defendants, where individuals are lawfully camping.

Beyond the direct trespass and irreparable harm to defendants and their property by virtue of GMP's blasting away portions of defendants' land, the blasting that is occurring on GMP's side of the line is also directly interfering with the defendants' use and enjoyment of their property and creating a trespass and a nuisance by casting, or creating a substantial risk of casting, debris and flyrock, onto defendants' land where lawful invitees are camped.

GMP has acknowledged in its filing in support of its own TRO request that it has not and will not take the precautionary steps of using sufficient blast mats and other blasting techniques available to it -- as required by its Amended Blasting Plan and its CPG - - to prevent fly rock from being projected onto property that GMP does not own or lease and in the vicinity of where people are present. GMP has acknowledged that it has the technology, know-how and means to control the blast debris to keep it from being projected onto defendants' property, but that it

chose not to take those precautions and is refusing to do so now.

GMP received its CPG on May 31, 2011. It had ample time to design its blasting plan to use the required blasting mats to prevent flyrock from being cast onto the defendants' land. Having chosen not taken those steps, it cannot now claim a hardship when the defendants refuse to vacate a portion of their property to accommodate their blasting. As noted above, persons engaged in blasting are required to avoid causing harm to the person or property of others. That includes the duty to prevent blast debris from going onto another's property. GMP's failure to take proper and prudent precautions to keep blast debris from threatening and being thrown onto the defendants' land cannot be used to shift to the defendants the responsibility to prevent harm to the defendants' person and property.

GMP does not appear before this Court with "clean hands". GMP has a long history of distorting the facts and misrepresenting facts in its zeal to obtain a CPG for its wind project. GMP has a documented record of ignoring its permit obligations and ignoring the rights of its neighbors and being less than forthcoming with the PSB and the Court:

- In its June 14, 2011 Motion for Reconsideration of the Board's Order in Docket 7628, GMP argued that reconsideration of certain permit conditions was appropriate since no other party had requested those conditions and they were therefore unforeseen - this was entirely incorrect and misleading.
    - On June 24, 2011, GMP provided a letter to the Board admitting that its statement in its Motion for Reconsideration was "erroneous."
- In its August 9, 2011 Opposition to Craftsbury and Albany's Motion for Stay Pending Appeal, GMP argued that the timing to obtain certain easements set forth in an

MOU reflected the priority of those easements and did not suggest that GMP had knowledge of the potential for delay from altering the timing to secure those easements.

  - On August 11, 2011, GMP provided a letter to the Board stating that pursuant to a request from ANR, GMP was altering its argument, and that the timing to obtain the easements was actually by GMP's request, which was based on its concerns regarding delay of the project, completely contradicting their prior argument.
  - The Board later acknowledged that the August 11 admission by GMP raised "significant concerns" that GMP had provided misleading arguments to the Board. See Sep. 6, 2011 Order Re Motions for Stay at 6.

- On July 21, 2011, GMP submitted a letter to the Board indicating that a GMP contractor had cut "approximately 10" trees on the Project site prior to being permitted by GMP and the Board to do so. The letter also indicated the owner of land being used for habitat mitigation for the Project had cut dozens of trees, widened roads and filled wetlands without a permit and contrary to the expected protection of those parcels pursuant to the CPG for habitat mitigation. This led to a §1272 Remediation Order from ANR.

  - GMP later admitted that over 80 trees had been cut by its contractor, not 10.

- On October 5, 2011 the Vermont Agency of Natural Resources issued a Stop Work Order for violations of GMP's construction stormwater discharge permit and the Vermont Water Quality Standards.

- GMP continues to claim that any delay will result in a loss of Production Tax Credits and thereby harm ratepayers, even though it is clear from GMP's own arguments and the findings of the Board that the PTCs are no longer available to GMP, and the costs to GMP from the loss of these tax credits cannot be passed on to the consumers.
- GMP has already violated the TRO issued by this Court on October 14, 2011. It requires GMP to notify the defendants of the blasting schedule on the morning of any day GMP intends to blast. TRO at 3. On October 17, 2011, the first day GMP carried out blasting after obtaining the TRO, GMP failed to notify defendants that morning that it intended to blast that day, and defendants assumed there would be no blasting. GMP then called the defendants in the afternoon at 12:47 p.m. giving notice that it was going to begin blasting in less than 30 minutes at 1:15 p.m. Blasting actually did not take place until 1:24 p.m. Don Nelson Affidavit.

In light of this pattern of misconduct and deceit, defendants have good reason to be wary of GMP, whose prior actions would make any neighbor feel the need to keep an eye on the activities on the Project site to ensure that GMP follows the applicable laws, regulations and conditions of its permits. This, along with GMP's attempts to coerce the Nelson's into selling GMP their land through a disturbing and threatening letter from GMP counsel only hours after GMP had offered to buy defendants' land (Nelson Affidavit), provide ample reason for the defendants to mistrust GMP, and to want persons to be on site to ensure GMP follows the law.

The Nelsons have for several decades welcomed visitors to their property for hunting, hiking, snowmobiling, camping. These visitors have also served in recent weeks as eyes and ears for the Nelsons by observing the area where the blasting and clear-cutting is to occur. Allowing

persons to stay on the Nelson property in close proximity to the boundary with the GMP leased land cannot, as a matter of law, interfere with GMPs lawful activities because GMP is required to prevent any flyrock from reaching the Nelsons' property. GMP's claim that by allowing visitors on their property the Nelsons are preventing GMP from engaging in lawful activities is without any support. It may be that the presence of persons on the Nelson property will prevent GMP from engaging in *unlawful* blasting activities, but that is solely due to GMP's continued insistence on violating the terms of its CPG and its Amended Blasting Plan.

ARGUMENT

The criteria for issuance of a TRO are well-established in Vermont and are essentially identical to the requirements for a preliminary injunction, with the exception of the special notice requirements in Rule 65(a) of the Vermont Rules of Civil Procedure:

> Generally, preliminary injunctive relief is appropriate when movant shows irreparable harm and either likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Hoban v. State, 2005 Vt. Super. LEXIS 40, 2-3 (Vt. Super. Ct. Apr. 15, 2005)

A. Defendants Are Suffering Irreparable Harm

What GMP has sought, and so far has obtained, is the right to trespass on defendants' property (1) by using a portion of the property owned by defendants for construction of a road to transport an industrial crane and (2) by throwing debris and rocks from blasting activities onto defendants property. GMP has no legal right to blast and clear cut a portion of defendants' property for its crane path. No law permits a party to trespass and destroy property of another and GMP has cited no such authority. GMP has no permit that would allow it to blast into the

defendants' property, and it has no easement to permit it to do so. It is acting in bald defiance of the defendants' property rights.

GMP's sole "justification" for being allowed by the court to cast blast debris onto the defendants' property and to clear cut and blast on defendants' property is GMP's assertion that to conduct its activities in a manner that will avoid such interference with the defendants' property will be more expensive and time-consuming. This assertion is belied by the fact that GMP failed to disclose to the court that its CPG and Amended Blasting Plan require that it confine any blast debris within the permit boundary and that it use blast mats to accomplish that mandate. GMP had an obligation to apprise the court of the limitations imposed on its blasting by the CPG and its Amended Blasting Plan. Equally, if not more importantly, regardless of the terms of its CPG or its Amended Blasting Plan, they cannot give GMP rights over property it does not own or control and does not take precedence over the property rights of the defendants.

GMP has attempted to the discussion on its head by characterizing the issue as one of whether GMPs right to the use and enjoyment of its land is being infringed by defendants occupancy of the defendants' land. GMP's argument ignores the long-standing and well-settled primacy of the right of Vermont landowners to be free from invasions of that land and from any interference with the landowners complete dominion and control over their own land, a primacy that makes any invasion of a persons land, particularly where the invasion may create permanent damage, an irreparable injury that is actionable.

Those who drafted and ratified Vermont's Constitutions of 1777, 1786, and 1793, like those who framed the federal constitution between 1787 and 1791, understood that "every citizen" has the "the natural, inherent, and inalienable right" to "the enjoyment of his liberty and

property," and that this natural right is not only "a fundamental principle of justice" for individuals, but is "essential to every free government . . . ." *Ex parte Allen*, 82 Vt. 365, 373 (1909) (internal quotation marks and citations omitted; emphasis added).

The roots of that understanding date back nearly a millennium, to King John's Magna Charta of 1215. The depth of that understanding is reflected in the fact that Vermont's Constitution contains at least four provisions safeguarding private property[3], and that "[p]rotection of citizens' rights to security in their land [and other property] was a key motivating force in creating the Vermont Constitution." *State v. Kirchoff*, 156 Vt. 1, 17 (1991) (Springer, J. concurring). Indeed, "the security in property is central to the Vermont Constitution." *Id.*

Influenced by Locke and Blackstone, leaders of the American Revolution came to regard "the security of property as the principal function of government." Ely, THE GUARDIAN OF

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[3] Vermont Const., Chapter I, "A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE STATE OF VERMONT," recognizes, in Art. 1, "That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." Art. 2 guarantees "That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money." Art. 4 specifies that "Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformability to the laws." Art. 9 promises "That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute the member's proportion towards the expense of that protection, and yield personal service, when necessary, or an equivalent thereto, but no part of any person's property can be justly taken, or applied to public uses, without the person's own consent, or that of the Representative Body, nor can any person who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if such person will pay such equivalent; nor are the people bound by any law but such as they have in like manner assented to, for their common good: and previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the Legislature to be of more service to community than the money would be if not collected."

EVERY OTHER RIGHT 28. Liberty and property, now and inseparable, became the first motto of the revolutionary movement. *Id.* at 25. The new Americans emphasized the centrality and importance of the right to property in constitutional thought. Protection of property ownership was integral in formation of the constitutional limits on governmental authority. *Id.* at 26. As English policies continued to threaten colonial economic interests, Revolutionary theoreticians elaborated upon and strengthened the philosophical link between property ownership and the enjoyment of political liberty in American's eyes. In fact, the acquisition of property and the pursuit of happiness were so closely transposed that the founding generation found the naming of either one sufficient to invoke both. Willi Paul Adams, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 193 (1980).

The Framers of the Federal Constitution recognized that "principles of good government started with the protection of private property[.]" Richard A. Epstein, The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case, 2002 CATO SUP. CT. REV. 5 (2002). For instance, relying on Locke's teachings, John Rutledge of South Carolina told the delegates at the Philadelphia Convention that "[p]roperty was certainly the principal object of Society." The Guardian of Every Other Right 43 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 534 (Max Farrand ed. 1937)). Likewise, Alexander Hamilton stated the "[o]ne great objt. of Govt. is personal protection and the security of Property." *Id.* (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 302). Thus, the Framers saw "property ownership as a buffer protecting individuals from government coercion." *Id.*

Alexander Hamilton summed up the thinking of the Founding generation when, in 1795,

he wrote: if we are obliged to bid "Adieu to the security of property," we also most bid "adieu to the security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, The Defense of the Funding System, in 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973).[4]

The United States Supreme Court has recognized the predominant status of property rights for all citizens:

> Due protection of the rights of property has been regarded as a vital principle of republican institutions. "Next in degree to the right of personal liberty . . . is that of enjoying private property without undue interference or molestation." The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235-36 (1897) (citations omitted). Seventy-five years later, the Court again emphasized that private property was an essential component to liberty:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) (citing, *inter alia*, Locke,

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[4] *See also* Joseph Story, The Value and Importance of Legal Studies (1829), in MISCELLANEOUS WRITINGS OF JOSEPH STORY 503, 519 (William W. Story ed., 1852) ("The sacred rights of property are to be guarded at every point. I call them sacred, because, if they are unprotected, all other rights become worthless or visionary.").

Blackstone, and Adams). *See also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2613 (U.S. 2010) (Kennedy & Sotomayor, JJ., concurring) ("the right to own and hold property is necessary to the exercise and preservation of freedom.").

The Vermont Constitution recognizes and "restate[s]" these "general requirement[s]" regarding the relationship between private rights to property and private and public liberty. *Shields v. Gerhart*, 163 Vt. 219, 226 (1995). *See generally Londonderry v. Acton*, 3 Vt. 122, 129-30 (1830); *Lincoln v. Smith*, 27 Vt. 328-329-30 (1855); *Raynes v. Rogers*, 183 Vt. 513, 519 (2008). Indeed, if anything, the Vermont Constitution is more "liberal" in its definition of--and more pro-active in--the protection of property. *See Allen*, 82 Vt. at 373; *Kirchoff*, 156 Vt. at 17. In the final analysis, those who initially drafted and ratified, and those who since have construed the Vermont Constitution have stressed that the existence and defense of property is "essential to every free government . . . ." *Allen*, 82 Vt. at 373.

In sum, GMPs use of a portion of defendants' land for construction of a road, including blasting on that land and clear cutting, as well as its use of defendants' property to throw debris and rocks from blasting constitutes an irreparable injury to a most fundamental right of defendants and does damage to the land that cannot be repaired and for which mere monetary compensation would be inadequate because no amount of money could return their land to the natural state it has been in, and which they have used and enjoyed for generations.

Defendants seek to enjoin GMP from actions that constitute a present and continuing trespass. The courts have been particularly inclined to grant injunctions to prevent a trespass. *See State v. Preseault*, 163 Vt. 38, 43 (Vt. 1994) ("We are also unpersuaded that one instance of encroachment does not equal a continuing trespass. Vermont law is clear that even the threat of

continuous trespass entitles a party to injunctive relief. *See, e.g., Barrell v. Renehan*, 114 Vt. 23, 25, 39 A.2d 330, 332 (1944) (permanent injunction appropriate if trespass is threatened); *Kasuba v. Graves*, 109 Vt. 191, 199, 194 A. 455, 458 (1937) (equity will not refuse relief where a trespass is likely to be continued under a claim of right).") A trespass itself is deemed an irreparable injury, particularly where, as here, the trespass will result in a major alteration in the invaded land by blasting on that property, clear cutting on that property and the throwing of debris and rocks onto that property.

> It is the general rule in this Commonwealth that the owner of land is entitled to a mandatory injunction to require the removal of buildings and structures that have been unlawfully placed upon his land, and the fact that the plaintiff has suffered little or no damage on account of the offending buildings or structures, or that the wrongdoer was acting in good faith, or that the cost of removing the building or structure will be greatly disproportionate to the benefit to the plaintiff resulting from their removal is ordinarily no bar to the granting of injunctive relief. *Geragosian v. Union Realty Co.* 289 Mass. 104, 109, 193 N.E. 726. *Westhampton Reservoir Recreation Corp. v. Hodder*, 307 Mass. 288, 290, 29 N.E.2d 913. A continuing trespass wrongfully interferes with the legal rights of the owner, and in the usual case those rights cannot be adequately protected except by an injunction which will eliminate the trespass. The rule does not apply in those exceptional cases where the substantial rights of the landowner may be properly safeguarded without recourse to an injunction which in such cases would operate oppressively and inequitably. *Gray v. Howell*, 292 Mass. 400, 403, 404, 198 N.E. 516. *Triulzi v. Costa*, 296 Mass. 24, 28, 4 N.E.2d 617.

Ferrone v. Rossi, 311 Mass. 591, 593 (Mass. 1942). In this case, defendants rights cannot be safeguarded in any way other than by an injunction because once the blasting and clear cutting has occurred on their land, it cannot be undone.

B. Any Harm To GMP Is Self-Inflicted

In its TRO pleading GMP asserts that it will suffer great harm if it is not allowed to use defendants' adjoining property for disposal of debris and rocks from its blasting activity. GMP admits that such use of defendants' land for this purpose is avoidable, but states that it will be

extremely expensive for GMP to avoid such disposal of debris and rocks on defendants' land. These claims are without any legal force.

GMP's first claim is that to now take the measures required to avoid throwing debris and rocks onto defendants property, would delay the completion of its project which would jeopardize GMP's eligibility for government production tax credits that are set to expire at the end of December 2012. Whether or not this claim is true, the truth is that GMP, not the defendants, is the cause of its own dilemma. Indeed, based on representations that GMP earlier made to the Public Service Board, GMP's project is already too delayed to meet the deadline and the delays have been caused solely by GMP's misconduct.

GMP told the Public Service Board, and it so found, that the only way it could meet its December 31, 2012 deadline was if construction began on August 1, 2011.

> 50. The proposed project must be in service by December 31, 2012, in order to take advantage of the federal production tax credit. In order to meet that deadline, project construction *must* commence by the beginning of August, 2011. Tr. 2/3/11 at 93, 99, 120 (Pughe).

PSB Order (5/31/11) at 21 (emphasis added). GMP reaffirmed this finding in post-CPG briefs, stating that "[t]he Order further indicates that GMP must begin construction by the beginning of August, 2011 in order to secure the PTC (federal production tax credit), and generally imposes requirements that would facilitate construction by then." GMP's Reply to the Towns' (of Craftsbury and Albany) Opposition to GMP's Motion for Reconsideration at 2. In addition, GMP sought and obtained modifications to the CPG by elimination of certain pre-construction conditions imposed by the Board, based on GMP's continued assertion that unless it could begin construction by August 1, 2011 it would lose the federal production tax credits. PSB Order

(7/12/11) at 7-8 ("In the instant case, GMP has pointed out that, despite its efforts, it will be unable to complete the acquisition of the fragmentation-connectivity easements prior to August 1, 2011, meaning that construction will be delayed and the PTCs will be at risk.")

However, GMP did not begin construction of this project on August 1, 2011. In fact, GMP did not commence construction until September 6, 2011, according to GMP's Press Release of that date. Less than one month later its construction was shut down by Vermont's Department of Environmental Conservation due to GMP's flagrant disregard of the obligations of the conditions of its stormwater discharge permits. The Department found that:

> the Agency has determined that discharges and potential discharges from construction activities at the site present a current and potential threat of harm to the environment. The observed non-compliance included but was not limited to the failure by the permittees to construct the necessary permanent stormwater dry ponds, wet ponds, and/or level lip spreaders to serve as temporary sedimentation traps and/or basins in order to manage stormwater runoff from contributing earth disturbance, as specified in the approved erosion prevention and sediment control (EPSC) plan. The permittees are hereby directed to immediately cease all construction activity at the site, except for work necessary to bring the site back into compliance with the approved erosion prevention and sediment control (EPSC) plan.

In the Matter Of: Kingdom Community Wind (KCW) Lowell Mountain Wind Farm Construction Site Lowell, Vermont Construction Stormwater Discharge Permit No. 6216-INDC NPDES No: VTS0000108,) October 5, 2011 at p. 1. It took GMP a week to fix the problem and restart construction. *See* http://www.reformer.com/latestnews/ci_19096452 in which a GMP spokeswoman, Dorothy Schnure, indicated that construction would resume on October 13th.

Thus, if its earlier representations made to the PSB on at least two occasions, which the PSB relied upon in granting the CPG and in relaxing pre-construction conditions, are to be taken at face value, GMP misled the Court when it once again claimed that if it was not permitted to

move forward immediately – by beginning blasting on October 17, 2011 – it would miss its December 31, 2012 deadline. By its own prior representations to the PSB it has already missed that deadline by six weeks - five weeks of delay in starting construction and a further one week delay as a result of its violation of its storm water permit. Taking the time now to determine the correct boundary of the land GMP is leasing for its project, making any revisions necessary to its site plan once the true boundary is determined and taking adequate precautions to complete the blasting with safeguards to prevent casting debris and rock on defendants' property will not cause any significant harm to GMP because the delays to date, none of which were caused by defendants, GMP admits, have put them beyond the deadline for the production tax credit.

The previous factual discussion at pp. 3-5, describes in detail the obligations that GMP imposed on itself and that the CPG imposed on it to prevent flyrock from leaving the permitted site. For example, in the Amended Blasting Plan the blaster agreed that it would "follow all local, state and federal regulations related to transportation and use of explosives". *Id.* at 3. The Vermont Division of Fire Safety imposes various conditions on those conducting blasting activities in Vermont and its website confirms that "Regulations on the safety, storage and use of explosive materials are contained in the National Fire Protection Association (NFPA) Standard 495, Explosives Material Code, 2006 edition, adopted under the Vermont Fire & Building Safety Code." Pursuant to NFPA 495, "[f]lyrock shall not be propelled from the blast site onto property not contracted by the blasting operation or onto property for which the owner has not provided a written waiver to the blasting operation." NFPA 495-39 § 11.3.2. *See also* NFPA 495 11.3.1 ("flyrock travelling through the air or along the ground shall not be cast from the blast site in an uncontrolled manner that could result in personal injury or property damage.") Thus, GMP has

known for months it would need to take steps to prevent debris and rocks from its blasting from being cast onto defendants' property, but it did nothing to address that issue until last Friday when, rather than move to comply with Vermont law, it sought a TRO from this Court without disclosing that it was obligated by Vermont law and its Amended Blasting Plan to assure that flyrock would not leave its permitted site. GMP cannot credibly claim that the time it will take now to do what it should have done months ago is a harm for which the defendants should be held responsible.

Furthermore, while GMP has claimed that any delay would cause increased costs to its ratepayers from the loss of PTCs, this is clearly not the case. As discussed above, GMP can no longer qualify for the PTCs. Additionally, the Public Service Board recently ruled that the PTCs are not related to the economic benefits of the Project, and therefore do not implicate any criteria under 30 V.S.A. §248. Order Re Motions for Reconsideration and Revocation at 7-9 (Oct. 3, 2011). The Board stated that the PTCs only pertain to the economic viability of the Project, not the economic benefits to the public, and that "economic viability for this project refers to whether it makes economic sense from GMP's perspective to construct the project…." Id. at 8-9. The Board found that the risk of moving forward without the PTCs was on GMP, and that any attempts to pass on additional costs from the loss of the PTCs to the ratepayers would be subject to challenge. Id. This contradicts the claims made by GMP regarding the impacts to the public of further delay in the construction of the Project.

GMP is apparently attempting to move forward as quickly as possible in order to try to get the Project constructed prior to the deadline for the PTCs, and in doing so has violated its construction stormwater permits, and now its CPG, which as discussed above requires GMP to

prevent flyrock from intruding on adjacent properties. GMP should not be allowed to flagrantly flaunt well established law of trespass, nuisance and property rights, as well as their permits, in order to secure tax credits that are no longer available pursuant to its own testimony and arguments before the Public Service Board. GMP's campaign of fear mongering against the Nelson's is unsupported by logic and law, and their attempts to prevent the Nelson's and their guests from peaceably using their own property is untenable. While GMP has been granted, based on half-truths and misinformation, an injunction preventing the Nelson's from occupying their own land so that GMP can violate established law and the permits for the Project, it is GMP that must be kept from continuing to violate the law, their permits, and the Nelson's well established property rights.

In its second claim, GMP argues that the steps needed to avoid trespassing on defendants' property through debris and rock from blasting will be very expensive noting the cost of blasting mats and the additional labor and equipment use required to reduce the size of the blast to accommodate the requirement that it not throw debris and rocks on defendants' property. But these are conditions it must meet to comply with its CPG and its Amended Blasting Plan; these are not conditions that defendants are forcing it to adopt. GMP cannot use those costs as an excuse to unilaterally expropriate a portion of defendants' property or to trespass on defendants' property by throwing debris and rocks onto it and force the defendants to vacate their own property. Rather, GMP must conduct the blasting in compliance with its CPG and Amended Blasting Plan and in compliance with the well-settled property rights of the defendants.

C. Defendants Are Likely To Prevail On the Merits

GMP's legal case depends upon two critical facts. First, it must demonstrate that what it

intends to do is lawful and second it must demonstrate that defendants are intentionally engaged in conduct that has its sole or primary purpose to "destroy GMP's Project". GMP TRO Motion at 16. As the preceding discussion amply demonstrates, GMP is incapable of demonstrating either of these critical facts.

As the previous discussion demonstrates, *see* pp. 8-9, and as explained in the Nelson Affidavit, defendants motivations are not, as GMP has surmised, to destroy the GMP project, as objectionable as it may be, but to 1) assure that GMP conforms to the commitments it made in order to obtain the CPG by having first hand information on the activities of GMP at the boundary of defendants' land and 2) document the extent to which GMP trespasses on defendants' property including clear cutting and blasting on land that belongs to defendants.

In order to establish that defendants' lawful use of their land is creating an actionable nuisance, GMP would have to meet the stringent tests for such claims laid down by well-established Vermont case law. In *Trickett v. Ochs*, 2003 VT 91 on which GMP places principal reliance, the conduct that formed the basis for the nuisance claim bears no resemblance to the activities involved here:

> Plaintiffs brought this action in November 2000, alleging that (1) the noise from defendants' operations, specifically the trucks and packing equipment and machinery, interfered with the use and enjoyment of plaintiffs' property; (2) defendants had al-lowed pesticides and polluted surface water from their operations to flow onto plaintiffs' property; (3) the trucks and defendants' dogs had trespassed on plaintiffs' property; and (4) defendants had shouted obscenities at plaintiffs and assaulted them.

Id. at ¶ 8. That case requires a balancing of the reasonableness of the activities of the two parties. In this case, GMP is trespassing on defendants' property in violation of the defendants' property rights and is operating in violation of its CPG and its own Amended Blasting Plan. Such activities are inherently unreasonable; indeed, they are unlawful. On the other hand, defendants have allowed persons on their property for the lawful purpose of ascertaining whether GMP is abiding by its CPG, a concern well-justified given GMPs conduct to date, as detailed above.

The Pennsylvania case on which GMP also relies is similarly inapposite here. *Brewster v. Highway Materials Inc.*, 7 Pa. D&C 5th 514,2009 WL 2055951 (Pa. Ct. C.P. 2009), *aff'd*, 987 A.2d 23 1 (Pa. Commw. Ct. 2010). In *Brewster,* the court found that defendant's sole purpose in standing on his land in the vicinity of the blasting was to interfere with the blasting. As noted above, the campers present on defendants' property have the very different purpose and right to monitor GMP's activities. They and the Nelsons have a right to do so[5].

GMP also ignores Vermont precedent establishing the right of an individual to engage in actions, even tortious actions, in defense of the individual's property.

> Defense of property historically arose in the context of common-law criminal and tort actions. *See, e.g., State v. Patch*, 145 Vt. 344, 349-51, 488 A.2d 755, 759-60 (1985); *State v. Bean*, 107 Vt. 513, 518-19, 180 A. 882, 884 (1935); *State v. Cleaveland*, 82 Vt. 158, 160, 72 A. 321, 321 (1909); *Johnson v. Perry*, 56 Vt. 703, 706-07 (1884); *Hodgeden v. Hubbard*, 18 Vt. 504, 507 (1846). Such actions were concerned with determining the property owner's liability, potentially exposing him to either criminal sentencing or monetary damages. In this context, the common-law defense of property reinforced the importance of citizens' private property rights by exempting property owners from liability for protecting their property against the criminal or tortious invasion of others. *See generally* E. Volokh, State Constitutional Rights of Self-Defense and Defense of Property, 11 Tex. Rev. L. & Pol. 399, 400-09 (2007) (discussing defense of property in

[5] The defendants would note that while they have permitted interested parties to enter on their land, they have not directed or influenced the actions of such parties other than to insist that they remain on the defendants' land and not trespass onto the land leased by GMP.

> context of state constitutional provisions granting right to protect property); L. Alsup, The Right to Protect Property, 21 Envtl. L. 209, 217 (1991) (stating that primary common-law right of private property "would have been meaningless without the means to secure [its] enjoyment" by defense of property).

Raynes v. Rogers, 2008 VT 52, ¶12 (Vt. 2008)(emphasis added). *Raynes* underscores the fact that even if the defendants were to occupy their property to prevent GMP from trespassing on the defendants' land by blasting and casting flyrock onto the defendants' land, their actions would not create a nuisance but would represent a lawful effort to protect their property from an unlawful trespass.

GMPs claim of an intentional interference with contractual relations is equally flawed. Its claim cannot stand unless the underlying activities which it and its contractors are engaged in are lawful. As discussed above, GMP is acting in violation of its CPG and in violation of the defendants' property rights. Therefore, it has no basis to make a claim of tortious interference. GMP has no cause of action based on a theory of torious interference with contractual relations.

On the other hand defendants' claims rest on the unequivocal evidence that 1) under the terms of the CPG and the Amended Blasting Plan GMP is prohibited from allowing debris and flyrock from leaving its permitted site and 2), based on the testimony of their surveyor, Paul Hannan the property on which a 300 foot plus portion of the crane road is to be constructed - using blasting and clear cutting - is on land owned by defendants and at least two of the tower sites, also where considerable blasting and clearing will be required, are located considerably less than 60 meters from defendants' property line, thus violating the CPG condition 23 which provides that "[t]he turbines shall be set back a distance of at least 60 meters from the nearest property line".

In addition, the activity that GMP seeks to pursue is one that has come under the most intense judicial scrutiny because of the dangers inherent in blasting. The law relating to blasting activities in Vermont was laid down 80 years ago in a landmark decision which held:

> in the so-called "blasting" cases an absolute liability, without regard to fault, has uniformly been imposed by the American courts wherever there has been an actual invasion of property by rocks or debris. [Citations omitted] And the rule of absolute liability for direct injury from blasting has been applied, not only to damage to property, but to the person. [Citations omitted]

Exner v Sherman Power Construction Co., 54 F 2d 510, 513 (2d Cir. 1931). In *Dean Thompson v. Green Mountain Power Corporation*, 144 A.2d 786 (1958) the Vermont Supreme Court held that "the law preserves dynamite in the category of highly dangerous agencies and demands of its use the highest degree of care and caution. *Tinney v. Crosby*, 112 Vt. 95, 104, 22 A.2d 145; *Goupiel v. Grand Trunk R. Co.*, 94 Vt. 337, 342, 111 A. 346." In addition, when engaging in an ultra hazardous activity, such as blasting, GMP is obligated "to take all necessary precautions to avoid foreseeable injury". *Malloy v. Lane Constr. Corp.*, 123 Vt. 500, 502 (Vt. 1963).

GMP has conceded in papers it filed in support of its TRO that there are additional precautions that it could take to avoid debris and rock trespassing on defendants property. In short, GMP has not taken "all necessary precautions" to prevent harm to persons on defendants property. Under these well-established precedents, GMP does not have the option of not using these precautions merely because their cost is substantial. This is particularly true here where GMP is under an obligation in its CPG and its Amended Blasting Plan to take just such precautions to prevent flyrock from landing on defendants' property including the use of blasting mats.

CONCLUSION

Contrary to GMP's argument, this case is not about whether an approved wind turbine project will be allowed to be built. This case is about whether a large, well-funded and well-connected utility company, GMP, will be permitted to violate its permits, its CPG and its Amended Blasting Plan and violate its neighbors' property rights simply because it is a big company that has a new mission. No company, no matter how big and no matter what its motive, should be permitted to act as GMP has acted here. As the previous discussion has demonstrated, preservation of the right of property owners to be free from invasions of that property is a fundamental right of every Vermont citizen. The public interest cannot be served if GMP is allowed to trample on the basic right by using its economic needs - most of which have been created by its own failures to act prudently and to comply with the mandates of its CPG and its Amended Blasting Plan - to eviscerate the fundamental rights of defendants. "Protection of citizens' rights to security in their land [and other property] was a key motivating force in creating the Vermont Constitution." *State v. Kirchoff*, 156 Vt. 1, 17 (1991) (Springer, J. concurring). Indeed, "the security in property is central to the Vermont Constitution." *Id.* Granting defendants the injunction they seek is the only way to preserve defendants' "security in their land".

For all the stated reasons, and in the interest of justice, defendants should be granted injunctive relief to prevent GMP from entering upon, blasting or clear cutting on, defendants' property or from allowing debris and rocks from blasting on GMP's property to be deposited on defendants' property.

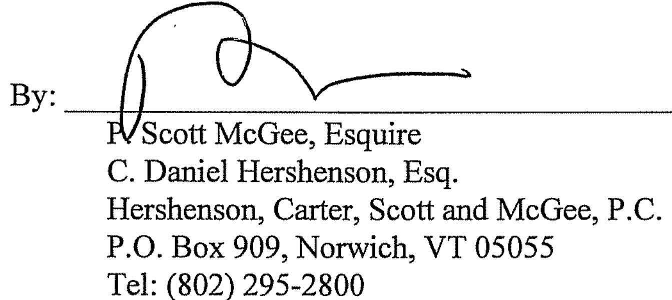
Wherefore, defendants request that this court grant a TRO in their favor enjoining GMP from entering on the land of defendants as depicted in the map attached to the Hannon affidavit

and that GMP not proceed with any construction in that area until such time as title to the area has been agreed to or determined by the court, and that the court enjoin GMP and its agents from blasting without first ensuring through the use of appropriate blast mats and other techniques that no blast debris or flyrock will travel beyond the boundary established by the survey work performed by surveyor Hannan and for such other or further relief as the court may deem just.

And the defendants request that they not be required to post any security given that the issues addressed here have been created by GMP's violation of its CPG and its Amended Blasting Plan and its violation of the defendants' property rights in their Lowell farm.

Dated at Hartford, Vermont this 19 day of October, 2011.

DONALD NELSON and SHIRLEY NELSON



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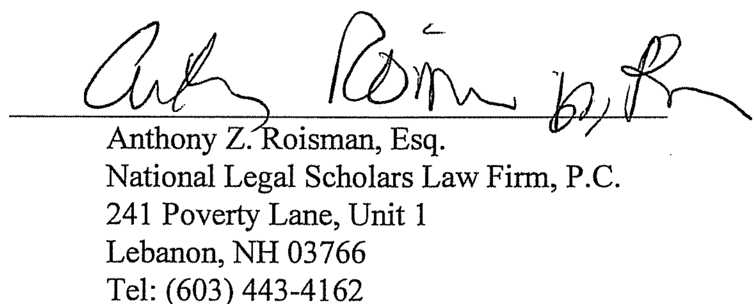

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