STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 256-10-11 Oscv

GREEN MOUNTAIN POWER CORPORATION,
Plaintiff,

v.

DONALD AND SHIRLEY NELSON,
Defendants.

MOTION FOR RECONSIDERATION OF COURT'S PRELIMINARY INJUNCTION AND FOR AMENDMENT OF THE PRELIMINARY INJUNCTION ISSUED ON NOVEMBER 1, 2011

I. The Court's Injunction is over-broad and lacks a factual basis

The court has issued a broadly worded preliminary injunction. By its terms, the injunction bars all persons from being present on the Nelsons' property within 1,000 feet of the Nelsons' common boundary line with GMP's leased land during a two hour window of time when blasting is scheduled to occur. The injunction is overly broad. It goes far beyond the justification for issuance set forth in plaintiff's filing papers and far beyond the court's statement of reasons justifying its issuance. The court's order indicates that the injunction is intended to bar from the Nelsons' property protesters whose purpose is to stop the blasting. The scope of the injunction must be limited to protesters present with that purpose. There is no legal basis to bar persons who do not have that purpose.

The order as issued bars all persons, regardless of purpose, from being present on the Nelsons' land during blasting times, but such a broad scope is not supported by the nuisance claim that provides the legal justification for the order. The nuisance theory accepted by the

court is that the presence on the Nelsons' land of persons attempting to stop the blasting constitutes a nuisance. Persons present but lacking such purpose, such as members of the media, hunters, hikers and others interested only in monitoring and observing GMP's activities but without a purpose to stop the blasting, are, by GMP's own definition, not creating a nuisance; they lack the intent that is foundational to GMP's nuisance claim that the court has relied on in issuing the injunction.

Moreover, persons who wish to protest the turbine project from the vantage point of the Nelsons' property but who have no purpose to use their presence to stop the blasting,[1] have a First Amendment right to assemble and protest. That right is being violated by the court's injunction. The court should amend the injunction to substantially narrow its scope to apply only to persons who are present on the Nelson property for the purpose of stopping the blasting by their presence.

In addition, as noted below, the theory of nuisance supporting the courts' injunction order is fatally flawed in that GMP failed to produce at hearing any evidence that it had a right to use the Nelsons' property to support its turbine project. Without such a right, the Nelsons' occupancy of their property cannot, as a matter of law, constitute an interference with GMP's rights. The court should, therefore, reconsider its decision and dissolve the preliminary injunction.

II. The court's conclusion that protesters on the Nelsons' property are creating a nuisance is premised on GMP's right to use the Nelsons' land as a safety zone for its blasting, but there are no facts in the record to establish such a

[1] As discussed below in section VI B and C protestors who intend by their presence to prevent GMP from blasting also have a First Amendment right to assemble and protest as long as they do not trespass onto GMP's land and confine their protests to the Nelsons' land.

right; without it, there can be no nuisance, and the injunction should be dissolved

The nuisance underlying the court's decision is that the Nelsons and their invitees have been occupying the Nelson property near its boundary with GMP's property for the purpose of preventing GMP from using the Nelsons' land as a safety zone for GMP's blasting. The court has determined that such "conduct" by the Nelsons is violating GMP's reasonable use of GMP's property; but the physical presence of protesters on the Nelson land can only be a violation of GMP's reasonable use of GMP's property if GMP has a right to use the Nelson land as a safety zone.

Unless GMP can establish that it has a right to use the Nelsons' land to support it turbine project, the Nelsons' refusal to permit GMP to use the Nelsons' land cannot be deemed a legally cognizable interference with GMP's activities on GMP's land, regardless of the Nelsons' motivation. Stated another way, preventing GMP from using the Nelsons' land as a blast safety zone can only be an interference and nuisance if GMP has a right to use the Nelsons' property. GMP has no such right. GMP produced no evidence at hearing that it had any such right. GMP's only claim at hearing with respect to the Nelsons' land was that its blasters needed the Nelsons' land to use as a safety zone for their blasting. A "need" for additional land does not ripen into a "right," regardless of the magnitude of GMP's project. Moreover, GMP has admitted that its blasters could redesign their blasting plan to eliminate the need to use the Nelsons' property. As such, it is doubtful that GMP could prove "necessity" if it were to seek to condemn the Nelsons' property.

The court has granted GMP the use of the Nelsons' property on the basis of a theory that

has no factual basis. The "nuisance" enjoined by the court's injunction lacks an essential factual predicate, namely, evidence that GMP has a right to use the Nelsons' property. Without such a right, the Nelsons' refusal to make their property available to GMP is not a legally cognizable interference with GMP's use of its own land. The court should reconsider its decision and dissolve the injunctive relief.

III. The Preliminary Injunction is over-broad

The preliminary injunction issued by the court goes far beyond excluding persons whose sole purpose is to prevent GMP from carrying out its blasting. Rather, the order is phrased with broad sweep and bars all persons, regardless of their motivation or purpose, from being present on the Nelsons' land within the 1,000 foot area within two hours of scheduled blasts.

This broad and all encompassing language goes far beyond the scope of relief justified by GMP's application. GMP has advanced no theory that would justify an order barring all persons from the Nelson property. Invitees have a right to use the Nelson property as a vantage point to observe GMP's operations and to monitor whether GMP is trespassing on the area that the Nelsons claim as their own land. Nor has GMP advanced a theory for excluding members of the press who may wish to document this story and who have no motivation with respect to GMP's intended blasting. As noted below, the order also bars persons who wish to protest GMP's activity on the mountain and whose protest rights are protected by the Vermont and Federal Constitutions.

IV. Limits to the Application of the Law of Nuisance

Using nuisance law to oust neighboring landowners from portions of their property, even

if only for two hours a day, is unprecedented in Vermont.[2] Any restriction on the landowners' use of their own property must be narrowly tailored to the specific nuisance alleged by GMP. Here, according to GMP, the nuisance-creating conduct is the Nelsons' and their invitees' presence on the Nelsons' land coupled with the purpose of being present "solely in order to stop MDB's blasting." Plaintiff's Memorandum in Support of Motion for Temporary Restraining Order at page 14 (emphasis added). If the law of nuisance applies to such circumstance – which defendants strongly deny – any injunctive relief must be framed narrowly to enjoin only the offending conduct, and not other reasonable uses that the Nelsons and their invitees may choose to engage in. The existing TRO is not limited to enjoining only those persons whose purpose is to prevent GMP from blasting.

The law of nuisance requires a showing that an activity deemed to interfere with the use and enjoyment of another's property must be unreasonable and substantial. *Coty v. Ramsey*, 149 Vt. 451, 457 (1988), cited in plaintiff's memorandum at page 16 and in the court's order re cross-motions for relief at page 6. Particularly important to determining the scope of any injunction is the definition of the term "substantial" discussed by the court in *Coty*. The court stated:

> The standard for determining whether a particular type of interference is substantial is that of "definite offensiveness, inconvenience or annoyance to the normal person in the community ...".

Coty at 457 quoting Prosser, Law of Torts, §87, 4th Ed. 1971 at p. 578 (emphasis added).

In *Coty*, the offending landowner had created a nuisance by establishing a sham pig farm.

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[2] Every case found by the Nelsons' counsel that resulted in a finding of nuisance involved activities that were offensive to common sensibilities of persons in the community, as required by the court's decision in *Coty v. Ramsey*, 149 Vt. 451, 457 (1988). No Vermont decision has been found where mere presence on one's own land constitutes a nuisance.

The owner dumped on his own land loads of highly odoriferous manure and placed it around the boundary line to maximize its offensiveness to neighbors. The owner then brought in dozens of pigs and allowed at least 22 of them to die and then left their carcasses strewn around the owner's land to create conditions offensive to the neighbors. The court found that the offending landowner's actions created an infestation of flies and odors that infected the neighbors' lands. The court also found that the farm was not operated for reasonable farm purposes but the malicious purpose of interfering with the neighbor's use and enjoyment of their property. Any "normal person in the community" knowing of the facts of *Coty* would conclude that the offending landowner created conditions of "definite offensiveness." Here, by way of contrast, the Nelsons and their invitees, even those who are acting with the purpose of denying GMP the use of the Nelsons' land as a blast safety zone, are engaged in no conduct that a normal person would find offensive.[3] The Nelsons maintain that their mere lawful occupancy of land, in the absence of any active or patently offensive conduct, cannot be characterized as a nuisance. Any other view would allow any landowner to assert a need to use part of a neighbor's land for the landowner's benefit and then claim a nuisance if the neighbor refused. That is not the law in this state or in any state.

V. The Preliminary Injunction should not extend to persons who are present without a purpose to prevent GMP's blasting

Even if the court continues to view as a nuisance the Nelsons' occupancy of their own

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[3] Defendants would again note that an essential underpinning to GMP's claim of nuisance is a required showing that GMP has a right to use the Nelsons' property as a blast safety zone. Without such a right, the Nelsons' occupancy of their own land cannot, as a matter of law, constitute a nuisance. If GMP has no right to use the Nelsons' land as a safety zone, then occupancy of that land for any purpose not in itself noxious cannot constitute an infringement on GMP's rights. GMP has asserted no such right to the use, even temporarily, of the Nelsons' land.

land when coupled with an intent to prevent GMP from using the Nelsons' land as a blast safety zone, the same cannot be said for occupants of the Nelsons' land who do not have that intent or purpose. Occupancy alone, without a purpose to interfere with GMP's blasting, cannot constitute a nuisance.[4] Persons may go onto the Nelsons' property at any time for the purpose of observing GMP's activities and for the purpose of reporting to the Nelsons any observed GMP trespass on the Nelson's land. Such persons lack the purpose and motivation that is an essential element of GMP's nuisance theory. There is no basis for enjoining such persons from being present on the Nelson property during the blasting.

Here, as evidenced by the affidavits submitted by Fred Scholz and his wife, Margot Kempers, persons residing in the greater Lowell Mountain area have an interest in Lowell Mountain and in the activities being carried out by GMP on the mountain. They may wish to observe GMP's activities first hand through the vantage point afforded by the Nelsons' property. Such persons are violating no rights of GMP and must not be included within the scope of the court's injunction. Equally, an independent filmmaker who is filming a documentary about the GMP turbine project on Lowell Mountain and the community reaction to it. The filmmaker has no position pro or con as to whether the project should go forward and has no purpose to enable or prevent GMP from continuing its blasting. The filmmaker has a right to be on the Nelsons' property, with the Nelsons' permission, in order to film events to be used in the documentary.

VI. Preliminary injunction must not bar the exercise of First Amendment rights

As noted in the various news articles that GMP has filed with the court in this matter, the

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[4] GMP has never made a claim that mere occupancy would support a finding of nuisance or issuance of injunctive relief.

area of the Nelsons' land covered by the court's injunction has been visited by protestors and members of the media. Each of those groups are entitled to First Amendment protections under the United States and Vermont Constitutions. Each have a constitutional right to exercise their freedom of assembly and freedom of speech.

A. News media have a right to unrestricted presence on the Nelson land

News media from around the state have been drawn to the site. They have a Constitutional right to be on the Nelsons' property, with the Nelsons' permission. There has been no suggestion, let alone proof, that the members of the media are present for the sole purpose of preventing GMP from blasting. Members of the media have a right to be present on the Nelson land near the boundary to document "news in the making" in order to inform their readers and viewers. Such conduct is Constitutionally protected. It does not and cannot constitute a nuisance or an interference with GMP's contractual rights and GMP has made no such claim. The sweep of the preliminary injunction is unconstitutionally over-broad. It must be significantly restricted in its scope, if not wholly dissolved.

B. The Nelsons and the protesters have a Constitutional right to be present on the Nelsons' land to protest GMP's actions

The Nelsons and the protesters also have a right to protest GMP's activities. They have a right to do so on the Nelsons' land, regardless of their motive. The law is well-settled that organized political protest is "classically political speech" which "operates at the core of the First Amendment." *Jones v Parmley*, 465 F.3d 46, ___ (2nd Cir. 2006). The *Parmley* decision further noted that, "First Amendment protections, furthermore, are especially strong where an individual engages in speech activity from his or her own private property. *See*, e.g. *City of Ladue v. Gilleo*,

512 U.S. 43, 58 (1994)." Id at __ (emphasis added).

The protesters are taking no actions on the Nelsons' land that could be deemed by a "normal person in the community" to constitute an offensive or noxious act causing substantial interference with GMP's use of its land. Their desire to occupy their land and to invite others to occupy their land may well deprive GMP of a safety zone that GMP would like to use to facilitate GMP's blasting, but GMP has failed to allege, let alone prove, that it has a right by permit, or by easement, or by agreement or by any other authority to use the Nelsons' land as part of its construction project. Apart from its novel nuisance theory, GMP has presented no factual or legal authority to obtain by court order a right that it does not otherwise possess. Whether GMP has a pressing need to use the Nelson property as a safety blast zone or as a staging ground for its equipment or to provide better access to its project site, it is not entitled to expropriate land of the Nelsons by merely asserting that without the Nelsons' land its project would be delayed. Yet that is exactly what GMP has claimed to the court in justifying its request for injunctive relief, and that is what the court has relied upon in granted injunctive relief. The Nelsons request that the court reconsider its decision granting injunctive relief.

C. Nuisance theory does not override the protection and exercise of First Amendment Rights

The Nelsons and their invitees have a Constitutional right to assemble on the Nelsons' property to protest the actions of GMP, even if that protest has the intended effect of denying GMP the use of the Nelsons' property for its blast safety zone. The situation would be different if the protests were occurring on GMP's property, but GMP is not permitted to shut down a Constitutionally protected protest taking place on adjoining property by claiming that the protest

is denying GMP the use of the adjoining land unless GMP can establish that it has authorization from the neighbor or from some other lawful source to the exclusive use of that land. When a nuisance is claimed for activities that are protected by the First Amendment, the nuisance claim must be narrowly drawn and cautiously applied because "the sword of public nuisance is ... ill suited to the delicate sphere of the First Amendment where legal overkill is fatal." *Napro Development Corp. v. Town of Berlin*, 155 Vt. 353, 362 (1977) quoting the dissent in "*People ex rel. Bush v. Projection Room Theater*, 550 P.2d 600, 620 (1976).

WHEREFORE, the Nelsons request that the court reconsider its decision and dissolve the injunction; but if the injunction is not dissolved, the Nelsons ask the court to restrict its terms to apply only to persons who are occupying the Nelsons' property for the sole purpose of preventing GMP from using the property as a blast safety zone.

The Nelsons ask that the court act upon this request on an emergency basis because the existing order is interfering with the protected Constitutional rights of the Nelsons and their invitees, including protestors and members of the media.

Dated at Hartford, Vermont this 2 day of November, 2011.

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