IN THE SUPREME COURT
OF THE
STATE OF VERMONT

DONALD AND SHIRLEY NELSON,	)	**SUPREME COURT Docket 2011-391**
Plaintiffs,	)	
	)	
v.	)	
	)	**Superior Court Civil Division,**
	)	**Orleans Unit**
	)	
	)	**Docket No. 256-10-11 Oscv**
	)	
GREEN MOUNTAIN POWER CORPORATION,	)	
Defendant.	)	

GREEN MOUNTAIN POWER CORPORATION'S MOTION TO DISMISS COMPLAINT FOR EXTRAORDINARY RELIEF

Green Mountain Power Corporation ("GMP"), Defendant herein and Plaintiff in the Superior Court, by and through its attorneys, Sheehey Furlong & Behm P.C., moves pursuant to V.R.A.P. 21(b) to dismiss the Plaintiff's Complaint for Extraordinary Relief ("Nelsons").

The Nelsons' Complaint for Extraordinary Relief is a thinly veiled, improper attempt to circumvent the normal appellate processes in order to obtain this Court's immediate and unnecessarily rushed review of the factual findings and legal conclusions reached by the Orleans Superior Court in issuing a preliminary injunction. That injunction imposes virtually no burden on the Nelsons and was necessary to prevent the Nelsons and their "guests" from irrevocably injuring GMP by derailing the construction of an electric generation project that the Vermont Public Service Board has found will promote the general public good.

The Nelsons admit that the purpose of the enjoined activity was to harm GMP by interfering with the construction of GMP's Project, which they oppose. Their position is that

they are free to use their property to injure GMP by stopping the Project so long as the injurious actions are conducted entirely upon their own land. Furthermore, they argue, the Superior Court's order restricting their intentionally harmful actions constitutes an unlawful ouster of their guests from the Nelson property. This over-stretched and illogical argument is at odds with Vermont's established nuisance and contract interference law governing the respective property rights of neighbors.

The Nelsons also attack the Superior Court's injunction as abridging their First Amendment rights by requiring their guests to move a relatively short distance on an undeveloped, wooded ridgeline for a few short periods during blasting on weekdays in November. The Nelsons, however, failed to articulate any First Amendment claim or to introduce any evidence to support it during the one and one-half days of hearings the trial court conducted on October 20 and 25 in this matter. Instead, they waited until virtually the last minute, at 4:30 on Friday, October 28, to raise the issue superficially in the last few paragraphs of an electronically filed "emergency motion." Notwithstanding their own dilatory conduct in raising their novel First Amendment claim, the Nelsons now tellingly assert to this Court that it must grant expedited, extraordinary relief because "the blasting in the area in question is likely to be completed in the next several days." Nelson's Complaint for Extraordinary Relief at ¶ 46. In other words, if this Court fails to act promptly, blasting near the Nelsons' land will be concluded and the Nelsons and their guests will have lost their ability to tortiously impede construction of GMP's Project. This allegation makes clear that the raison d'etre of the "guests'" activity is not speech, but, rather, injuring GMP.

As set forth below, the Nelsons' Complaint for Extraordinary Relief must be dismissed for a variety of independent and compelling reasons: they have not exhausted their remedies in

the Superior Court, they are requesting this Court to second guess the Superior Court's well factual findings in contravention of controlling legal principles, and their substantive legal arguments are fundamentally flawed.

MEMORANDUM

I. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

Events Leading to the Issuance of a TRO

GMP is a Vermont electric public utility. On May 31, 2011 the Vermont Public Service Board ("PSB") granted GMP a Certificate of Public Good ("CPG") under Act 248[1] to construct a wind powered electric generation facility in Lowell, Vermont (the "Project").[2] The Project, which will cost an estimated $156 million, includes 21 wind turbines situated along 3.2 miles of ridgeline ("Lowell Mountain") that will generate up to 63 megawatts of electricity. A key element to the economic viability of the Project is that it will receive approximately $48 million in federal production tax credits, which will be passed on to rate payers, if it is operational by December 31, 2012.

The Nelsons were parties in the PSB proceedings and opposed the grant of the CPG through testimony and in briefs. Their residence is located about 4500 feet from the Project on 600 acres of land that shares a common boundary with the Project. Some of the Nelsons' land lies within 1000 feet of blasting sites on Project property necessary to construct the Project. The boundary area is uninhabited, contains no buildings, and requires a steep 45 minute hike to access.

In August 2011, GMP's blasting subcontractor, Maine Drilling & Basting ("MDB"), conducted meetings required by the CPG to inform persons of the blasting. At the meetings, the

[1] 30 V.S.A. § 248.
[2] The Vermont Electric Cooperative, Inc., Vermont Electric Power Company, Inc. and Vermont Transco LLC were also applicants for the CPG.

Nelsons learned that MDB would design the blasts so that all blast debris would fall in a blast area located entirely on Project property, but, given the ultrahazardous nature of blasting and the importance of human safety, MDB wanted a 1000 foot safety zone cleared of non-blasting personnel. The Nelsons recognized this meant that a portion of the safety zone for certain blast sites would encompass an area on their remote, uninhabited Lowell Mountain land.

On September 28, the Nelsons wrote to GMP's Chief Executive Officer, Mary Powell, "[t]his is to inform you that our guests will be camping on the ridgeline" where their property adjoins GMP's Project property for the "foreseeable future" and asked GMP to confirm that their guests' safety would not be endangered by blasting flyrock.[3] Shortly thereafter, newspaper, television, and radio media began reporting that the Nelsons and their guests intended to occupy an area on the Nelsons' property well within the safety zone in order to halt blasting and derail construction of the Project. GMP failed in its efforts to persuade the Nelsons to abandon their plans and to otherwise resolve the planned interference with blasting scheduled to begin the week of October 17.[4]

The TRO and Preliminary Injunction Hearing

On October 13, GMP filed a Complaint alleging nuisance and interference with contract in Orleans Superior Court. It also moved for a temporary restraining order and preliminary injunction prohibiting the Nelsons and those acting in concert with them from being present within 1,000 feet of the property boundary during blasting or inviting, encouraging, or permitting others to do so.[5] The Court issued the TRO on October 14 and set a preliminary injunction

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[3] Attached as Exhibit 4 to GMP's Motion for Temporary Restraining Order and Preliminary Injunction and Supporting Memorandum of Fact and Law, copy attached as Exhibit A.

[4] GMP urged the Nelsons to refrain from interfering with MDB's safety precautions and offered to purchase the Nelsons' property, which was and had been on the sales market for the preceding ten years for its full listed price of $1.25 million. The Nelsons refused and upped their list price to $2.25 million.

[5] *See* Plaintiff's Motion For A Temporary Restraining Order and Preliminary Injunction and Supporting Memorandum of Fact and Law, copy attached as Exhibit A.

hearing for October 20. The Nelsons' guests intentionally disobeyed the TRO on October 19 and 20 by refusing to move out of the safety zone after GMP had read and provided the TRO to them. The Nelsons moved to dissolve the TRO on October 17, and on October 19 they filed a counterclaim and their own Motion for a TRO aimed at halting blasting.[6]

The injunction hearing commenced but did not finish on October 20. At the end of the hearing, the Court having concluded that the Nelson guests were making a "mockery" of the October 14 TRO, modified the TRO to authorize and direct law enforcement to arrest persons who refused to clear the safety zone during blasting.[7] It continued the hearing to October 25.

The Orleans Sheriff's Department and the State Police requested clarification of the modified order prior to its enforcement. GMP moved to revise the TRO on October 24 and submitted a proposed revision and supporting memorandum of law.[8] Between October 20 and 25 the Nelson guests continued to intentionally disobey the Court's TRO.

Don Nelson testified at the October 25 hearing.[9] He admitted that the purpose of the guest campers was to halt the blasting/Project construction.[10] He made no claim regarding an impingement of his freedom of speech. His wife had not been on the ridge in over a year, and he had rarely gone there in recent years. He had recently been to the ridge to mark the trail and lead his guests to the area where his property abutted the Project property.[11] He knew the names of the campers and had maintained a sign in sheet at his house. The intention of the Nelsons and

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[6] *See* Plaintiff Green Mountain Power Corporation's Opposition to Defendants' Motion To Dissolve The Temporary Restraining Order, copy attached as Exhibit B.

[7] At the end of testimony that day, the Court requested the parties to propose additional language to effect compliance with the TRO. Because the identity of the Nelson guests, who used aliases, was largely unknown, GMP requested that the Order direct the Nelsons to post and enforce no trespassing notices in the affected area, either directly or by assignment to GMP. The Court, apparently based upon the Nelsons assertions that they were doing all they could to effect compliance with the TRO, declined to require the Nelsons to take any such action.

[8] The VSP and Sheriffs' Departments, received GMP's request and the parties counsel met with the Court prior to the October 25 hearing to address revisions to the TRO. *See* Plaintiff's Motion To Revise The October 20 Addendum To The Temporary Restraining Order, copy attached as Exhibit C.

[9] Excerpts of the transcript of his testimony are attached as Exhibit D.

[10] Exhibit D at 127-35.

[11] Exhibit D at 138-39.

their guests, as of their September 28 letter to GMP's CEO, was for their guests to stay on the boundary for as long as there was blasting in that area. Mr. Nelson admitted that he had not at any time asked his guests to leave. He testified that if he asked them to stop the interference and leave, "they probably would." However, he stated that he had not asked his guests to obey the court's order and he indicated he did not intend to do so.[12]

The Superior Court's November 1, 2011 Orders

In its November 1 Order granting GMP's Motions for a TRO and a Preliminary Injunction, the Superior Court found that "the evidence is essentially uncontroverted that the goal of the campers is to delay or prevent the construction of the project," and that the Nelsons were aware of and had assisted the campers' efforts to achieve that purpose. *See* Order Re: Cross Motions for Temporary Injunctive Relief at 4 ("Order"), copy attached as Exh. 4 to Nelsons' Complaint for Extraordinary Relief. In finding that GMP had established a likelihood of success on the merits, the Superior Court concluded the evidence demonstrated that the Nelsons and their guests were acting out of a desire to injure GMP, and their interference with GMP's use of its Project property and its construction contracts was substantial, unreasonable and improper. *Id.* at 7-8. The Superior Court denied the Defendants' Motions for a TRO.

Between October 25 and November 3, the Nelson guests continued to disobey the Court's order by moving from the safety zone during blasting. On November 4, members of the VSP and Orleans and Lamoille Sheriffs' Departments began instructing the Nelsons' guests to comply with the preliminary injunction and to move from the safety zone during blasting. They have complied and there have been no arrests.

[12] *See* Exhibit D, Oct. 25th Preliminary Injunction Hearing Transcript at 150-151.

On November 2, the Nelsons filed Motions to Reconsider and for Permission to Seek an Interlocutory Appeal. Those motions were still pending when the instant Complaint for Extraordinary Relief was filed on November 8.

II. ARGUMENT

The Nelsons' Complaint for Extraordinary Relief is an improper and unnecessary attempt to circumvent the normal appellate process. The Complaint must be dismissed because:

(1) the Nelsons have failed to show that the Orleans Superior Court's shortly forthcoming decisions on their pending Motion for Reconsideration and Motion for Permission for Interlocutory Appeal will not provide adequate and timely relief;

(2) the issues presented by the Nelsons to this Court are premised upon a disputed and undeveloped factual record;

(3) the Nelsons have failed to show that the Orleans Superior Court's issuance of the preliminary injunction to GMP was a clear and arbitrary abuse of discretion.

V.R.A.P. 21 "allows a party to seek extraordinary relief in an original action in this Court where relief would have been available at common law through a writ of mandamus, prohibition, or quo warranto." *Ley v. Dall*, 150 Vt. 383, 385, 553 A.2d 562, 563 (1988). "Mandamus is a command from a higher authority to an administrator, executive, judicial officer or inferior tribunal to perform a particular act, to which the party seeking the relief has a clear right." *Id.*, 150 Vt. at 385-86, 553 A.2d at 563. In their Complaint for Extraordinary Relief, the Nelsons seek the equivalent of mandamus. *See* Compl. at 15 (requesting that this Court "direct the superior court to dissolve the injunction forthwith.").[13] "Mandamus is an extraordinary writ and invokes a drastic remedy." *Whiteman v. Brown*, 128 Vt. 384, 386, 264 A.2d 793, 794 (1970).

[13] The Nelsons do "not claim that the trial court has exceeded its jurisdiction as required for prohibition, nor do[] [they] claim that the trial court must be prevented from continuing to exercise an authority that has been unlawfully obtained for *quo warranto*." *Ley*, 150 Vt. at 385 n. 2, 553 A.2d at 563 n. 2.

A. The Nelsons Have Failed to Exhaust Their Remedies Before the Superior Court

"Extraordinary relief provides the proper avenue for redress where no other relief exists." *State v. Saari*, 152 Vt. 510, 513, 568 A.2d 344, 347 (1989). "[E]xtraordinary relief cannot be used to end run the appropriate limit on interlocutory review and thus must be available only sparingly in these circumstances." *Bjornberg v. Powell*, 169 Vt. 586, 733 A.2d 84 (1999) (Dooley, J., dissenting). Such relief "must be predicated upon more than the mere inability to secure ordinary review of a particular ruling." *State v. Forte*, 154 Vt. 46, 48, 572 A.2d 941, 942 (1990).

A petition under V.R.A.P. 21 is not justified simply because the petitioner claims that he will suffer some harm without immediate interlocutory review because "'[e]very interlocutory order involves, to some degree, a potential loss. That risk, however, must be balanced against the need for efficient . . . . judicial administration . . . .'" *Ley v. Dall*, 150 Vt. at 385, 553 A.2d at 563 (quoting *Borden Co. v. Sylk,* 410 F.2d 843, 846 (3d Cir.1969)).

Therefore, "[p]etitions for extraordinary relief should ordinarily be addressed to the superior courts." *Pfeil v. Rutland Dist. Court*, 147 Vt. 305, 308, 515 A.2d 1052, 1055 (1986). V.R.A.P. 21 "specifically requires that the petitioners demonstrate exhaustion of remedies in the superior court." *Vermont Supreme Court Admin. Directive No. 17 v. Vermont Supreme Court*, 154 Vt. 392, 398, 579 A.2d 1036, 1039 (1990). "One of the requirements of a proceeding under V.R.A.P. 21 is an allegation, verified or supported by an affidavit, stating why there is no adequate remedy by way of a proceeding for extraordinary relief in the superior court." *In re Carrier*, 148 Vt. 635, 635, 537 A.2d 135, 135 (1987).

Here, the Nelsons have both a Motion for Reconsideration and a Motion for Permission for Interlocutory Appeal pending before the Orleans Superior Court that address the very same

issues raised in their Complaint for Extraordinary Relief. Decisions on both these motions may reasonably be expected during the week of November 21st. Contrary to V.R.A.P. 21(b), the Nelsons' have not provided this Court with a verified allegation or affidavit testimony "setting forth the reasons why there is no adequate remedy by appeal under the [appellate rules] or by appeal or proceedings for extraordinary relief in the superior courts." The Nelsons' failure to comply with V.R.A.P. 21 is reason enough to dismiss their Complaint for Extraordinary Relief.

The Complaint does make the unverified, speculative and vague assertion that "[t]he blasting in the area in question is likely to be completed in the next several days." Compl. ¶ 46. The Nelsons claim that "[c]ompleting the blasting will render moot the enforcement of the Nelsons' rights because once the blasting is completed, GMP will no longer need to use the Nelsons' land as a blast safety zone." *Id.* ¶ 35.

However, the Nelsons cannot reasonably claim that any legitimate property or First Amendment right will be irrevocably lost or irreparably harmed pending the Orleans Superior Court's decisions on the Nelsons' pending Motion for Reconsideration and Motion for Permission for Interlocutory Appeal. The Nelsons will not lose ownership or economically viable use of their property, nor will their right to protest construction of the Project, subject to reasonable time, place and manner restrictions, be foreclosed given that Project construction is anticipated to continue until December 2012. Rather, what the Nelsons are really arguing under the guise of mootness is that, if this Court does not act immediately to exempt them from the normal appeal process, their practical ability to impede and prevent construction of the Project may be diminished. However, the Nelsons' purely malicious desire to prevent GMP's exercise of its own legal rights on its own property is not a protectable legal interest that justifies extraordinary relief from this Court.

B. Extraordinary Relief is Inappropriate Given Unresolved Factual Disputes Concerning Nuisance and First Amendment Issues

Resolution of factual disputes by this Court is not an appropriate subject of extraordinary relief. *See State v. Batchelder*, 165 Vt. 326, 328, 683 A.2d 1002, 1003 (1996). Only when "no further facts are necessary in order to consider the merits of the issues raised" will this Court grant a petition for extraordinary relief. *Saari*, 152 Vt. at 515, 568 A.2d at 347.

In this case, the crux of the Nelsons' claim is that their use of their property to "prevent GMP from carrying out its blasting plan . . . cannot, without more, constitute a nuisance." Compl. ¶ 26. The Nelsons assert that their conduct "does not, as a matter of law, constitute an unreasonable use of [their] property or a legally cognizable or unreasonable interference with GMP's use of its property." *Id.* ¶ 25.

The Nelsons' ostensible 'legal' argument is nothing more than a veiled disagreement with the Superior Court's factual findings. A "court's inquiry in the nuisance context is heavily fact-bound . . . ." *Wild v. Brooks*, 2004 VT 74 ¶ 10, 177 Vt. 171, 175, 862 A.2d 225, 228 (2004). To determine the existence of a nuisance, "courts must consider both the extent of the interference and the reasonableness of the challenged activities in light of the particular circumstances of the case." *Trickett v. Ochs*, 2003 VT 91 ¶37, 176 Vt. 89, 103, 838 A.2d 66, 78 (2003) (internal citation omitted).

In assessing the reasonableness of the Nelsons' conduct, the Orleans Superior Court considered the purpose the Nelsons' actions, *i.e.* whether they were intended to interfere with the use of GMP's property. *See* Order at 7. The Orleans Superior Court made the factual determination "that the Nelsons and their guests are acting out of a desire to injure GMP" and that their activities are therefore "unreasonable given the circumstances of this case." Order at 8.

The Nelsons obviously dispute the Orleans Superior Court's factual finding that they are motivated by nothing more than a desire to injure GMP, although they now admit that their intent was to stop the blasting. *See* Compl. ¶ 27. The Nelsons instead allege that their primary intent is to express and vindicate their own property and First Amendment rights. *See* Compl. ¶ 36. The Nelsons explicitly argue that the Orleans Superior Court lacked a sufficient factual basis to conclude that their activities constituted a nuisance. *See id.* ¶¶ 22, 24.

To the extent that the Nelsons deny that they were motivated by a desire to injure GMP, then there is a core factual dispute that would preclude this Court from determining in the context of a petition for extraordinary relief whether the Nelsons are committing a nuisance that must be enjoined, or are instead expressing protected legal rights. Conversely, if the Nelsons were to concede that their only intent is a desire to injure GMP, then there is no genuine property or First Amendment interest at stake for this Court to protect.

Unresolved questions of fact also preclude this Court from addressing the Nelsons' First Amendment objections. In their various pleadings and submissions to The Orleans Superior Court prior to the hearing on GMP's Motion for Preliminary Injunction on October 20 and 25th, the Nelsons never suggested that their activities were protected under the federal or Vermont constitutional provisions conferring rights to free speech, expression or assembly. At the Preliminary Injunction hearing on October 20th and 25th, the Nelsons adduced no evidence and made no argument that the purpose of the Nelsons and their guests in positioning themselves in close proximity to GMP's blasting was to exercise any First Amendment right.

Rather, the purpose of the Nelsons' guests in camping on the property line with GMP's property was to sabotage construction, not to legitimately express their views. *See also* Order at 4 ("Donald Nelson testified that he knew the campers planned 'to put a monkey wrench' into the

construction."). The Nelsons initially raised a First Amendment issue in an October 28th post-hearing filing styled "Defendants' Emergency Request for a Decision on Defendants' Motion to Dissolve the TRO Issued Against Defendants."

The Nelsons offered no evidence or asserted any First Amendment claim during Orleans Superior Court's evidentiary hearings. Thus the record is devoid of evidence addressing such essential issues as the nature, location, duration and other logistical aspects of any purported speech, as well as the practical extent to which the imposition of any blast safety precautions might have on such speech. As a result, neither the Superior Court nor this Court has an evidentiary basis to assess whether temporarily enjoining the Nelsons and others from entering a 1,000 foot safety zone on the Nelsons' property for a few hours a day over the course of several weeks was a "reasonable restriction[] on the time, place, or manner of protected speech." *Costello v. City of Burlington*, 708 F. Supp. 2d 438, 445 (D. Vt. 2010).

C. The Nelsons Have Not Demonstrated the Orleans Superior Court Clearly and Arbitrarily Abused its Discretion

To obtain extraordinary relief, the Nelsons must show that in granting the Preliminary Injunction to GMP, the Orleans Superior Court committed a usurpation of judicial power, a clear abuse of discretion, or an arbitrary abuse of power. *See State v. Pratt*, 173 Vt. 562, 563, 795 A.2d 1148, 1149 (2002).[14] The Nelsons "must show more than that the trial court was wrong or gave the wrong reason for its action" because extraordinary relief under V.R.A.P. 21 will be denied "if there is any ground for the trial court action, even if it is not the ground used by the trial court." *Douglas v. Windham Superior Court*, 157 Vt. 34, 39, 597 A.2d 774, 777 (1991). The Nelsons have not met their heavy burden under V.R.A.P 21 to receive the drastic and

[14] This Court has noted that a finding of *clear* abuse of discretion sufficient to justify extraordinary relief is not the "normal abuse of discretion standard." *Douglas*, 157 Vt. at 39 n.3, 597 A.2d at 777 n.3.

extraordinary remedy of ordering the Orleans Superior Court to immediately dissolve the Preliminary Injunction before it has been able to rule on the Nelsons' pending Motion for Reconsideration and Motion for Permission for Interlocutory Appeal.

1. The Superior Court Properly Concluded that the Nelsons Would Not Be Unconstitutionally 'Ousted' from their Property by Issuance of the Preliminary Injunction

The Orleans Superior Court essentially held that a defendant who takes up a position along the boundary line of his own property for the sole purpose of preventing the owner of a neighboring property from proceeding with a lawfully approved blasting plan commits a nuisance that may be preliminarily enjoined through the creation of a temporary exclusionary 'buffer zone' on the defendant's property. *See* Order at 7. The Nelsons claim that this conclusion is "unprecedented," Compl. ¶ 33, and "has no legal basis . . . ." *Id.* ¶ 48. However, these statements are, quite literally, untrue because the very same conclusion was reached on nearly identical facts in *Brewster v. Highway Materials Inc.*, 7 Pa. D. & C. 5th 514, 2009 WL 2055951 (Pa. Ct. C.P. 2009), *aff'd*, 987 A.2d 231 (Pa. Commw. Ct. 2010). The Orleans Superior Court discussed the *Brewster* decision in finding that the Nelsons and their guests were committing a nuisance that must be preliminarily enjoined. *See* Order at 7. The Nelsons have failed to explain how the Orleans Superior Court's reliance upon the only directly analogous case cited by any of the parties can constitute such a clear abuse of discretion as to warrant extraordinary and immediate relief from this Court.

The establishment on a defendant's property of exclusionary 'buffer zones' adjacent to the plaintiff's property in order to abate a private nuisance created by the defendant is an acceptable exercise of a court's discretion to craft effective injunctive relief. *See, e.g. Mark v. State of Oregon*, 84 P.3d 155, 161, 165 (Or. Ct. App. 2004) (affirming permanent injunction

issued to abate private nuisance created on state-owned property by "clothing optional" beach adjacent to private property by directing state "to establish a buffer of sufficient length to avoid viewing of nude sunbathers on Collins Beach from plaintiff's real property."); *Heston v. Ousler*, 398 A.2d 536, 539 (N.H. 1979) (upholding special master's recommendation that, in order to abate private nuisance created by location and use of defendant's lakefront dock adjacent to plaintiff's property, defendant's dock must be removed and permanent 30-foot "buffer zone" must be created between properties where neither party could build a dock).

It has also been held that a pre-existing use of property adjacent to utility-owned land may be permanently enjoined as a nuisance to utility operations and that such an injunction does not constitute an unconstitutional taking of private property without just compensation. *See Brenteson Wholesale, Inc. v. Arizona Pub. Serv. Co.*, 803 P.2d 930, 934, 936 (Ariz. Ct. App. 1990) (upholding summary judgment for utility company on its counterclaim request that plaintiff be permanently enjoined from use of 1950-foot long airstrip on its property adjacent to utility-owned transmission line on grounds that use of airstrip, which predated transmission line, constituted nuisance due to unreasonable risk that aircraft might trespass on to utility property and strike transmission line; concluding that such injunction did not constitute government taking despite utility's statutory power to condemn airstrip through eminent domain).[15]

Although the Nelsons allege that the Preliminary Injunction unconstitutionally "ousts the Nelsons from their land during the periods of time specified in the injunction," *see* Compl. ¶ 34(a), the Orleans Superior Court's rejection of this argument was well-founded. In its Ruling, the Superior Court noted that "'[t]emporary, repeated incursions can sometimes rise to the level of a taking, but only in instances where the incursions amount to a taking of an easement . . . .

[15] As noted by the Superior Court, GMP has the statutory power to condemn the Nelsons' property under 30 V.S.A. §§ 110, 112. *See* Order at 10.

When the intrusion is 'limited and transient' in nature and occurs for legitimate governmental reasons, it does not amount to a taking.'" Order at 6 (quoting *Ondovchik Family Ltd. Partnership v. Agency of Transp.*, 2010 VT 35 ¶ 18, 187 Vt. 556, 566, 996 A.2d 1179, 1186 (2010)) (internal citations omitted); *cf. OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533, 758 A.2d 777, 780 (2000) (noting that to prevail on claim that land use regulations constitute a taking of property, "plaintiffs must show either that the regulation in question does not substantially advance a legitimate state interest or that it denies the owner an economically viable use of his land."). The Superior Court found that:

> The Nelsons and their guests will be prevented from occupying a small, uninhabited, remote portion of their property for a few hours a day for roughly one month. This is an intrusion that is limited and transient in nature, and occurs for legitimate government reason: public safety. Accordingly, it does not amount to a taking.

Order at 6. With respect to whether the Preliminary Injunction denied the Nelsons all economically viable use of their 600 acre property, the Superior Court also concluded that "[a]ny harm" to the Nelsons from this brief displacement is "temporary in nature." *Id.*

2. The Nelsons' First Amendment Claim Lacks Necessary Evidentiary Support, Was Not Properly Presented to the Superior Court, and is Legally Flawed

As discussed above, the Nelsons did not timely or meaningfully raise their First Amendment concerns before the Superior Court, nor make any effort to establish the necessary evidentiary record to support such a claim. Moreover, the Nelsons' First Amendment claim in their Complaint for Extraordinary Relief is so patently implausible that the extreme remedy of mandamus is utterly unjustified.

With no citation to any legal authority, the Nelsons make the wholly conclusory claims that the Preliminary Injunction "violates the Nelsons' constitutional rights to free speech and

assembly," and "violates state and federal constitutional rights of the Nelsons and their guests and invitees." Compl. at 2 & ¶ 16. The Nelsons fail to identify any specific activity they claim is being restricted other than stating that the injunction "prohibits the Nelsons from assembling with others on the Nelsons' land in the area of the so-called safety zone to protest the activities of GMP during the specified periods." Compl. ¶ 18. The Nelson's offered no evidence at the hearing that they even wanted to participate in such "assembling."

While these arguments by the Nelsons should be summarily rejected as unsupported and baseless, to the extent they are considered at all, they must be rejected, as neither the uncontested facts nor the law support the Nelsons' newfound argument that their First Amendment rights are being violated by the injunction.

First, the First Amendment protects speech, not conduct. The United States Supreme Court has recognized that just because an individual believes or intends its conduct to communicate an idea does not necessarily make it speech. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). In this case, the Preliminary Injunction does not regulate any speech, but rather prohibits the Nelsons and those acting in concert with them from " being present within 1000 feet of the northwesterly boundary of Donald and Shirley Nelson's Lowell, Vermont property and adjoining GMP's land" during the blasting period.

Second, the Nelsons make no argument and cite no supporting authority for the notion that positioning oneself in proximity to an area to be blasted by an adjoining property owner is the type of expressive conduct courts have found constitutes protected First Amendment speech. *See id.* Even if, for the sake of argument, the Nelsons had stated a colorable First Amendment claim here, the Preliminary Injunction in no way violates First Amendment rights of the Nelsons and their guests.

"[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. "*Heffron v. International Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640, 647 (1981). It is long and well established that, "the government may impose reasonable restrictions on the time, place, or manner of protected speech." *Costello*, 708 F. Supp. 2d at 445 (quoting *Ward v. Rock Against Racism,* 491 U.S. 781 791 (1989)); *see also State v. Arbeitman*, 131 Vt. 596, 602-603 (1973) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) for the proposition that, "[o]ur cases make equally clear that reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted.").

As described above, the Preliminary Injunction contains no restriction on speech. And while GMP disputes that being present within the 1,000 foot area is the type of expressive conduct considered protected speech, even if it were, such conduct is subject to reasonable restrictions on time, place, and manner. Here, the Nelsons and their guests can "protest" 24 hours a day on the Nelsons' property, but for two hours a day (or four if there are two blasts a day) they have to do so 1,000 feet from the border of the Nelsons' property with GMP land. For the other 22 or 20 hours of the day, these individuals are able to stand with their feet at the border and protest. The restriction on the conduct of the Nelsons and their guests is minor, to say the least.

To the extent the Nelsons intended to set forth a First Amendment claim for violating their right to assembly, that too fails. "The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 776 (1994). The Superior Court has already determined that the Nelsons and their guests are acting for the

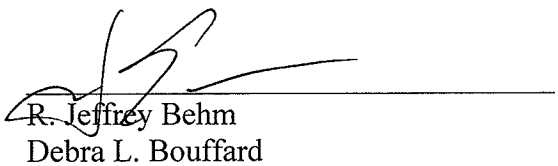
purpose of depriving GMP of its lawful rights. As the Court explained, the Nelsons and their guests "are deliberately exposing themselves to potential blasting hazards. Donald Nelson admitted at the October 25 hearing that the campers' sole purpose for remaining in the safety zone is to interfere with the project because they oppose large-scale ridgeline wind projects." The First Amendment does not protect this activity.

WHEREFORE, Green Mountain Power Corporation respectfully requests that Donald and Shirley Nelson's Complaint for Extraordinary Relief be DISMISSED and that the Court order such other further relief as is appropriate.

Respectfully submitted,

Dated at Burlington, Vermont this 9th day of November 2011.

Green Mountain Power Corporation

By: 

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