STATE OF VERMONT

SUPERIOR COURT **ENVIRONMENTAL DIVISION**

BURTON CORPORATION, **Docket No. 20-ENV-00010**
APPEAL, CONDITIONAL USE PERMIT

BURTON CORPORATION, **Docket No. 22-ENV-00030**
APPEAL, ACT 250 DISTRICT COMMISSION DETERMINATION

DECISION

These appeals concern the proposed use of a portion of a property that is a lot with an industrial building in a district zoned for Enterprise and Light Manufacturing (ELM) in an area at the southern boundary of the City of Burlington adjacent to the City of South Burlington. Applicant Burton Corporation bought this property in 2007. It also owns the adjacent property to the north, which has housed its Burton Snowboards world headquarters since 1991. Burton uses a portion of the 83,000 square foot building on the subject property for its own purposes and plans to lease other spaces in it for mixed uses. It seeks approval for part of the building to be used as a performing arts center by Higher Ground, a concert organization, for a wide variety of types of musical performances. A performing arts center is allowable as a conditional use in the ELM district.

Burton obtained a Conditional Use Permit from the City of Burlington and an Act 250 permit from the District Commission for the performing arts use. Neighbors filed appeals of both permits. A joint *de novo* hearing on both appeals was held from April 17 through April 21, 2023. Attorneys Jonathan Rose, Malachi Brennan, and Geoff Hand represented Burton. Attorney James Dumont represented the Appellants, CRZ group (conditional use appeal) and several individual neighbors[1] (Act 250 appeal). In addition, the following interested parties participated through their attorneys: City of Burlington by Attorney Kimberlee Sturtevant, City of South Burlington by Attorney Collin McNeil, and Vermont Natural Resources Board by Attorneys Alison Milbury Stone and Jenny Ronis.

Findings of Fact are set forth below, followed by analysis of the issues as determined by the Statements of Questions filed by Appellants for each of the appeals, and for Applicant with

[1] Wendy Bratt, Diane de Terra, Janice Ellis, Doug Goodman, Stephanie Herrick, Almy Landauer, Luc Logan, Sharon O'Neill, Lawrence Smith, Michael Turner, Dana Walrath, and Laura Waters.

respect to Burton's Act 250 cross appeal. In general, with respect to the Conditional Use Permit, Appellants challenge whether Burton has met its burden to show that the use will not: change the character of the area, create noise and traffic problems, and comply with Burlington's Code of Ordinances with respect to noise and nuisances and food and beverage restrictions.[2] With respect to the Act 250 permit request, Appellants challenge whether Burton has met its burden to provide evidence sufficient to show compliance with Act 250 Criterion 1 (health impacts of nighttime noise), Criterion 5 (traffic safety), Criterion 8 (aesthetic impact of noise and use and public investment in Red Rocks Park), and Criterion 9 (conformance with public investments).[3] On cross-appeal, Burton challenges whether a condition imposed by the District Commission is justified under Criterion 5.

The full questions raised by the parties are set forth in full in the Conclusions of Law section below.

Appellants propose additional conditions in the event the permits are approved, and Applicant proposes three additional conditions. These proposals are discussed below within the topics to which they are related.

Findings of Fact

Industrial Avenue[4] runs north and south through the ELM district and is lined with manufacturing/industrial properties, business offices, and transit stations on both sides. On the west side, from north to south, is Barrett Trucking, a commercial trucking company; a regional bus maintenance barn for Green Mountain Transit; a Rhino frozen foods manufacturing plant; and an Edlund plant that manufactures commercial kitchen equipment. On the east side is the Burton Snowboards world headquarters to the north, and the subject property to the south.

The ELM district is surrounded as follows:

--on the east by a ravine in which a railroad track runs (used by Amtrak and freight trains), and further east from the railroad track and directly behind the subject property is a group of residences on a *cul de sac* called Arthur Court. Beyond that to the east is a bike path that connects with other bike paths in the larger Burlington area. Beyond the bike path is the route of the proposed Champlain Parkway that is intended to extend Interstate 89 further into Burlington;[5]

--on the south by Queen City Park Road, which is the boundary with South Burlington. On the opposite side of the Road is an electrical substation; a water treatment facility; the turnoff

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[2] In the Conditional Use appeal, #20-ENV-00010, Appellants withdrew some original questions prior to hearing: Questions 1, 25, 26, and 27. That left Appellants' Questions 2, 3, 4, 5, 6, 6.1, 6.4, and 28 for the court's review.

[3] In the Act 250 appeal, #22-ENV-0030, Appellants withdrew some questions prior to hearing: Questions 7 and 12. That left Appellants' Questions 1, 2, 5, 6, 8, 9, 10, 11, and 13 for the court's review. Question 13 was withdrawn following the hearing.

[4] It appears that at least a portion of it, which is an extension of Queen City Park Road, has been renamed Queen City Park Road.

[5] While there is apparently some uncertainty as to the future of completion of the Champlain Parkway, construction has begun.

to Central Avenue (which runs from Queen City Park Road downhill toward Lake Champlain to a dead end and serves a neighborhood with various side roads and many residences); and a portion of the western boundary of Red Rocks Park, a public park that is a natural area/city park with trails that is largely wooded and that extends downhill to Lake Champlain;

--Further to the west, past the Edlund plant, by a condominium complex and residential streets that continue down to Lake Champlain; and

--on the north by other residential neighborhoods.

Thus, the ELM district is industrial within itself, and is considered in the City's land use plan to be a major economic driver for Burlington and the region, but it is surrounded by the park and pockets of densely populated residential streets with owners who enjoy their neighborhoods and the easy access to the natural environments of Red Rocks Park and Lake Champlain. During the day, there is regular truck and vehicular traffic on Queen City Park Road/Industrial Avenue associated with the industrial businesses. Currently, the traffic lessens considerably after 6:00 pm as many of the businesses no longer run two or three shifts, although that occurred more commonly in the past.

The subject property is at 266 Queen City Park Road (hereinafter 266 QCPR). It is on the corner where Queen City Park Road takes a 90° right turn and heads north and runs between the other industrial properties (the portion still labeled Industrial Avenue on some maps). The building on it was formerly used for manufacturing by General Electric and then General Dynamics, and it has a large, paved parking area. General Dynamics manufactured radar components for military airplanes and tanks there until 2014. At one time it ran three shifts. Burton has used parts of the building but has not needed all of it and is seeking to find productive use for the space it does not use. It has developed a plan for a "hub project," whereby it would lease space for mixed uses, including shops, accessible from a common lobby inside the front (west) side of the building. Burton is currently required to make infrastructure changes related to stormwater as a result of legislation and would like to receive rental income from the currently unused space to pay for the required site work.

When Burlington added Performance Art Center as a permitted conditional use in the area in which the Burton property is located in 2019, this reflected an overall trend in the southern part of the city of lessening of manufacturing and expansion of arts activities as sources of economic growth. The unused portion of the building has a very large open space with a high ceiling. Higher Ground operates an existing performing arts venue in South Burlington on Williston Road but was looking for another space. The large open space with a high ceiling and no columns would suit its needs well. In addition, since most of its performances would be in the evening, access and parking would be unlikely to conflict with the daytime activities on other properties in the district. Burton and Higher Ground created a plan whereby Burton would convert an area of 11,560 square feet into a Performing Arts Center, which would also include an adjacent 2,380 square foot outdoor lounge to be leased by Higher Ground. Burton then sought the permits at issue in these appeals. Burton received a Conditional Use Permit from the Burlington Development Review Board (DRB) on September 4, 2020, and an Act 250 Permit Amendment on March 3, 2022.

Higher Ground would use the large high-ceilinged space for performances and would be responsible for fitting up the portions of the building it would use for sound control. Patrons would enter from the outside through three sets of double doors at the main entrance that faces west and go into a lobby common to all users of the entire building where security and ticket-taking would occur. There would be an adjacent shop between the lobby and the performance space. They would then proceed to the performance space. From the performance space, they would be able to go outdoors to an outdoor lounge surrounded by a stockade fence. They would not be free to leave the concert from the outdoor lounge but would be required to return to the performance space first and could only exit through the lobby and same doors through which they entered. There would be emergency exit doors from the performance space and outdoor lounge, but these doors would be closed during performances and could not be used to exit the facility except in an emergency, nor would the doors be allowed to be propped open during performances. These doors would be monitored by Higher Ground staff. In the performance space, there would be bars where alcoholic and other beverages would be served.

Higher Ground plans to schedule both daytime and evening performances. Appellant neighbors are concerned about disruption of their residential neighborhoods from noise and traffic effects of the operation of a large-scale performing arts center. Primary concerns are that sounds such as pulsing bass beats from late night hard rock, heavy metal, and electronic dance music would disturb sleep and peace and quiet; intermittent sounds of loud music would escape from the facility as doors open and close and people use the outdoor lounge; arriving drivers would be likely to park on quiet nearby residential streets; and late night disruptive sounds would come from people who have been drinking alcohol and are exuberant and boisterous from a concert, and are returning to their cars or motorcycles (or congregating before getting into their cars on side streets), shouting and slamming doors and peeling out. Another is that cars coming and going from the south on Queen City Park Road would have to cross a one-lane bridge over the railroad tracks, and thus vehicles would be lined up to cross the bridge creating a period of constant vehicle noise before and after concerts adjacent to the small residential *cul de sac* called Arthur Court.

Witnesses living in the area testified credibly about the kinds of ambient noises they hear as a matter of course that constitute the 'hum of the surrounding city.' These noises include the sounds of the rooftop HVAC and other equipment associated with the industrial buildings on and near Industrial Avenue, trucks and buses that come and go from the manufacturing buildings and bus garage, traffic from the busy thoroughfare of nearby Route 7, large trucks coming off Interstate 89 braking as they slow down, music from outdoor cafes and breweries in surrounding areas, lawn mowing, Amtrak and freight trains passing on the track behind the Burton lots, and occasional other sounds such as outdoor summer concerts from a nearby bar, drag racing in the Hannaford parking lot, and sounds of people at Burton's annual outdoor sales event.

Burton engaged experts on both noise and traffic issues in conjunction with designing the project. The permits issued by the Burlington DRB and the Act 250 District Commission contained many conditions with requirements on these issues. Appellants consider the conditions to be inadequate to address their concerns. Their issues are identified below in their Statements of Questions as to each permit.

Noise

A sound investigation and report was prepared for Burton by sound engineer Edward Duncan, a board certified noise control engineer who is the senior director in the acoustics practice at RSG, a national consulting firm. The court received evidence from the sound expert as to how sound is measured, which the court finds credible. A summary of how sound is measured can be found in Burton's Ex. 20, at 33–37 (document pagination 28–32).

Burton's expert measured the existing background noise at two monitoring locations, one behind Rhino foods between Rhino foods and the Red Rocks condominiums (Monitor A), and the other south of Queen City Park Road in a residential area off Central Avenue (Monitor B). He concluded that the primary sources of noise were from mechanical heating and cooling equipment on the roofs of the industrial buildings as well as traffic noises. He collected background sound level data from these two monitors, summarized into 10-minute intervals. The average daytime background sound level was 54 dBA at Monitor A, and 49 dBA at Monitor B. The average nighttime background sound level was 52 dBA at Monitor A, and 41 dBA at Monitor B. This reflects the *average* of noise levels over 9 days and 9 nights at monitor A, and 4 days and 3 nights at monitor B. At monitor B, the maximum sound levels (recorded as $Lmax_{10\text{-}min}$) during the day were generally between 50 and 70 dBA, and at night varied between 35 and 55 dBA, although there were some maximum sound levels between 60 and 70 dBA at night. It does not depict whether specific sounds are louder or at low frequency, or whether sounds are variable or constant.

He then proceeded to model what the additional sound would be as a result of the proposed performance arts center. He assumed that the space would be developed with sound mitigation measures. Design specifications for building fit-up have not yet been identified but are required by the Act 250 permit to meet the following goals: have sound locks on the entrance/exit doors and on the doors leading to the outdoor lounge, additional wall construction to limit sound transmission from the building, and a stockade fence around the outdoor lounge. See Land Use Permit #4C0174-64C0368-3(Altered) at 6, ¶ 34. He did not model sounds escaping from open doors. It is unclear whether that means that the model was based on the assumption that all doors would be single doors leading to the outside or the assumption that entrance/exit doors would have multiple sets of doors to be sound-locked such that even if the outer set were open, the inner set would be closed. In any event, sound locks are required by permit conditions.

He attended a hard rock concert at the Higher Ground existing facility to measure sound outputs. His testimony is that the particular concert was selected to have high sound levels so that projections from that data could be used to develop a standard for performances that would be sufficiently conservative to address neighbors' concerns about concert noise. The measure of noise was modeled for the music of the concert and post-concert departure of vehicles from the parking lot on site. The levels represented by the modeling do not include existing background noise. In other words, study results do not indicate a total overall noise level. They also do not include noise occurring in the surrounding area off the subject property related to concert-goers parking off site.

The modeling showed that the loudest average level of sound produced would be at 20 Arthur Court, the residence right behind and closest to 266 QCPR. At the level of a second story window, that modeled sound level would be 42 dBA Leq from the project during a conservatively loud, sold-out concert event and 44 dBA $Leq_{1\text{-}hr}$ after the concert from vehicles moving in the parking lot. For the highest modeled residence (20 Arthur Court), the primary contributor to the overall sound level is rooftop mechanical equipment with the following breakdown of partial sound levels (Leq): rooftop mechanical equipment: 41 dBA; vehicles accessing the parking lot: 34 dBA; music from concert: 32 dBA; outdoor lounge: 8 dBA. The loudest noise from the proposed use is produced by HVAC equipment on the roof, which does not fluctuate in noise production significantly such that Leq was determined to be an appropriate metric for measuring the HVAC equipment.

Additionally, the modeling also showed that maximum noise at 20 Arthur Court would be 44 dBA L_{Smax} during the concert. This measurement used the Leq from rooftop mechanical equipment, vehicles accessing the parking lot, and outdoor lounge described above, but added the modeled L_{Smax} from the concert music (39 dBA L_{Smax}) to give an overall maximum concert noise.[6] His modeling assumed sold out performances with music as loud as the hard rock concert he attended. He made these assumptions in order to generate conservatively loud results. Using principles of sound analysis, he concluded that the additional sound produced by the new source of concert music would not raise the sound level more than one dBA over the existing background sound level currently generated in the area. Thus his conclusion was that the music from concerts and post-concert vehicles leaving the site would not perceivably increase the level of noise at the residence that is most likely to be affected by concert noise, and that at all other residences, the level would be either the same or lower. His analysis assumed all parking on the Burton property, and not on side streets in neighborhoods.

Burton's noise expert conducted additional maximum noise modeling for the parking lot under two scenarios: (Scenario 1) 150 loud voices spread throughout the parking lot, 20 cars starting their engines simultaneously, and 85 cars driving through the parking lot at the same time; and (Scenario 2) 300 loud voices spread throughout the parking lot, 85 cars starting their engines simultaneously, and 200 cars driving through the parking lot at the same time. Both scenarios assume all conditions occurring at the exact same time. The second, louder scenario produced a result of 53 dBA L_{Smax} (i.e., all events occurring within the same second) and 55 dBA L_{Fmax} (i.e., all events occurring within the same one-eighth of a second) at the boundary line. The court finds that these scenarios are conservatively loud, and finds them very unlikely to occur. Additionally, Burton showed that a single car door slamming would produce a maximum sound level of 41 dBA L_{Smax} or 44 dBA L_{Fmax} at the boundary with 20 Arthur Court.

Mr. Duncan's evidence showed that to avoid perceptible building rattle or vibrations, sound levels in the 31.5 Hz and 63 Hz octave bands should be lower than 65 dBZ and 70 dBZ, respectively, as measured indoors. Based on the model, Mr. Duncan concluded that, at the

[6] Based on the breakdown of sound levels from 20 Arthur Court, the sound levels using the Ls_{max} of music would be: rooftop mechanical equipment: 41 dBA; music from concert: 39 dBA; vehicles accessing the parking lot: 34 dBA; outdoor lounge: 8 dBA.

nearest residence, sound levels from *all* the proposed uses' sources (not just music) would likely only reach up to 60 dBZ measured outside the residence, making building rattle or vibrations at neighboring residences unlikely.

Burton developed an Operational Management Plan (OMP) based on the results of the modeling. It proposes to limit its noise output to the standard of 45 dBA $Leq_{1\text{-}hr}$, and as such, it maintains that the noise from the project will not increase the level of noise to be experienced by neighbors over the current level of noise. The level of sound at 45 dB Leq is consistent with the sound produced by a refrigerator. Higher Ground policies include using a "limiter" on amplifiers during performances to control the volume if it becomes too loud.

Appellants first note that Mr. Duncan's opinion is based on anticipated future effects rather than actual experience and they question whether the modeling will prove to be accurate or not. Secondly, Appellants question whether the analysis captured all of the types and sources of noise that could be reasonably anticipated to occur as a result of the proposed use and that could be anticipated to impact the environment. For example, Appellants raise concerns that modeling was limited to the music coming from the performers during concerts and departing traffic related to on-site parking, and did not address crowd noises either when patrons are queuing up to enter or leaving a concert. Appellants were also concerned the model did not address the escape of sudden noises during concerts when doors open as those attending go in and out of the performance space to the outdoor lounge, or as late arrivals enter, or as some guests leave during performances. Appellants noted that the report assumed that all doors were closed throughout the performance. Appellants raise the concern that the report did not address the behavior of noisy concert-goers returning to cars, whether parked in the parking lot on the subject property or on residential side streets.

Finally, Appellants also raised concerns that the report did not measure projected periodic noise events of maximum intensity. These are likely to occur during some of the times just described and include, for example, bursts of laughter from guests congregating in the outdoor lounge, shouts to friends or singing as people leave the concert or dawdle afterward before departing in vehicles, or the sounds of motorcycles or hot rods upon departure. Appellants are particularly concerned about the risk of constant bass note sounds disturbing sleep based on the experience of one resident who lives in the vicinity of Higher Ground's current venue.

The evidence shows that there are several ways in which sounds from the music and concert crowds inside the building can be controlled, including soundproofing of the interior and roof, limiters on the amplifiers, sound locks on all exterior doors, staff monitoring of emergency doors, and additional siding to contain building sounds. All of these except for the limiters are required by conditions in the permits as approved.

Higher Ground will be responsible for fitting up the building for sound containment. The plans so far are preliminary, and do not include construction specifications but it is projected that all these measures will be included, as required by the Act 250 permit and the Operational Management Plan, which is incorporated into the Conditional Use Permit and required by Condition #7. Burton/Higher Ground principals express assurance that the sound limitation standards included in the OMP will be used by the architects and engineers to make final design

plans if the permits are granted. Appellants worry that without specific conditions in the permits, there would be no effective enforcement mechanism.

Higher Ground has considerable experience managing music performances in a variety of venues. The existing Higher Ground facility in South Burlington has a maximum capacity of 1,050 divided between two separate spaces. The Burton building would have a maximum capacity of 1,500 in one space. Higher Ground has managed 8,500 concerts in Vermont, including crowd sizes of up to 3,000 to 5,000 outdoors (including traffic control and security), and 1,000 indoors. While maximum capacity permission is sought for 1,500, Higher Ground represents that audiences of that size would be rare. It has offered to add a condition that performances of that size could occur no more than 12 times per year.

Condition 35 of the Act 250 Permit requires that noise not exceed 60 dBA L_{Fmax} "measured facing the PAC [Performing Arts Center] within one meter of the exterior wall of any residential structure. The noise meter shall be set to the 'fast' setting." In addition, under Condition #34,"[b]reakout concert sound from of [sic] the building shall be mitigated by constructing the building to meet the acoustical performance standard outlined in Condition 35." Minimum requirements are established such as addition of drywall and insulation, double sets of sound lock doors at the main entrance and to the outdoor lounge, and a sound barrier around the outdoor lounge. The court finds that the permit conditions set standards that are reasonable and specify maximum allowable sound levels. The evidence is persuasive that the architects and engineers will implement a building fit-up in a manner that meets those standards.

As to impact on health from the possibility of sleep disturbance of neighborhood residents, Mr. Duncan relied on World Health Organization (WHO) guidelines as well as American National Standards Institute (ANSI) standards. Both have community noise guidelines that are quantitative. The ANSI standard addresses land use compatibility for different land uses. The WHO guidelines address potential health impacts. The WHO guideline for night (11 PM to 7 AM) is 45 dBA averaged over an 8-hour period to protect against sleep disturbance, measured outdoors. ANSI standard S12.9 Part 5, which provides ratings of compatibility for varying sound levels for different land uses, provides a day-night average sound level (DNL) of up to 55 dBA as being compatible and a DNL of up to 60 dBA as being marginally compatible in urban/suburban residential areas.

While it is understandable that the experience of the one neighbor near the present Higher Ground venue who was disturbed by recurring bass notes might cause concern on the part of the Appellants, Burton and Higher Ground have designed a plan for this space that is reasonably likely to prevent such a situation. The space will be constructed to specifications designed to mitigate noise effects beyond the Burton property, and Higher Ground has committed to using additional mitigation measures such as limiters on amplifiers during performances as necessary. While one person had disturbed sleep near Higher Ground's current facility, her partner was not also disturbed by the noise, and no other neighbors responded to her online query to note that they were also disturbed. The court cannot conclude that concern over possible bass note or low frequency sounds is a sufficient reason for denying permission for this project. It has been reasonably and carefully designed to minimize such risks. The Higher Ground venue in South

Burlington was not fit-up to curtail sound transmission in the same way, whereas the Burton building has been specifically designed to do so.

While there may on occasion be a random noise event that exceeds allowable standards, the evidence indicates that that would be an aberration and an isolated incident of a type normal in city life, such as fireworks or a low-flying airplane. The court finds that the concerns of Appellants—that there would be deep pulsating bass sounds keeping them awake at night on a regular basis—have been sufficiently addressed by the development of maximum required standards based on professional technical analysis, and that the standards are sufficient to prevent the feared occurrence.

Appellants request that if the Act 250 Permit is approved, the following condition be added: "The facility shall not generate noise after 10 pm that exceeds the 45 dBA L_{max} nighttime noise limits set by the Environmental Board in *Davis* and *Hannaford* for noise at the nearest residence or area of outdoor frequent use." The evidence submitted by Burton concerning the proposed fit-up of the building and the use of limiting mitigation measures as needed are sufficient to address nighttime noise levels, particularly given that the property is in an industrial zone in which manufacturing and transportation activities that generate noise after 10 pm have been and continue to be part of the fabric of the area.

Appellants also request a condition limiting hours of operation to 10:30 pm except for a limit of 11:30 pm on Friday and Saturday evenings. Again, such a limit is overly strict for an industrial, light industry zone which allows the proposed use and in which other businesses engage in nighttime activities.

Section 5.5.1 of the City of Burlington Comprehensive Development Ordinance requires demonstration of "compliance with the applicable nuisance regulations and performance standards pursuant to the requirements of the Burlington Code of Ordinances" at the property line. Burlington's noise control ordinance, contained in chapter 21 of the Burlington Code of Ordinances, prohibits "plainly audible" noise from amplified music after 10 pm. Appellants argue that Burton's sound expert has not analyzed whether this criterion can be satisfied. Burton contends that § 5.5.1 does not apply to conditional use review. These issues are addressed below in relation to questions raised on appeal.

Overall, the court finds that the RSG sound report and proposed standards required by the DRB and District Commission plus additional conditions described below are sufficiently reliable for on-site concert music and parking lot noise, but that additional management conditions should be imposed to control the kinds of noise effects that predictably would impact neighboring properties beyond the boundaries of the subject lot. These are described more specifically below.

Noise impact on Red Rocks Park

The northeast corner of Red Rocks Park borders Queen City Park Road directly across from the project site. People who walk on Double Dog Leg Trail, which runs within the park near that boundary, can hear the same background sounds of mechanical equipment and traffic

from existing industrial uses that can be heard on the road and at the monitoring sites and nearby houses. Users of the park can also hear other sounds from the surrounding city and lake environment such as boats, helicopters, airplanes, and traffic.

While Higher Ground may hold some concerts during the daytime, those concerts are not likely to have large audiences, and the noise impact on daytime users of the park is reasonably addressed by the modeling done by the sound study and likely to be confined to the area nearest the northwest boundary at the same level that currently occurs. Neither concert sound nor activities of daytime concert-goers are likely to significantly impact the park or its use during daytimes up to 6:00 pm. Conditions for the scheduling of performances are established in the Conditional Use Permit in Condition #6, and have not been challenged in the appeals.

While the park is formally open only from dawn to dusk (which can be as late as 9:30 pm in the summer), and there is a chain across the vehicle entrance at dusk, there is open access for walkers adjacent to the posts to which the chain is attached such that access remains available into the evening hours. Many people use the park until around 9:30 or 10:00 in the evening for walking, dog walking, enjoying the quiet of nature in the park, and viewing the sunset across Lake Champlain, especially in summer. The further into the park one goes, such as down the paths toward the lake, sounds from the ELM district disappear.

While there are places and times in the park that are exceedingly quiet, as in a remote area, in other places in the park the surrounding noises of the city can be heard. There is no evidence of frequent use of the northeast corner (Double Dog Leg Trail) into evening hours. Sounds that occur in connection with departure from the performing arts center at the end of late-night performances are unlikely to affect evening users of the park in a disturbing manner.

Parking/traffic/pedestrian safety

The standards in effect at the time of the application require Burton to have a minimum of 375 parking spaces. It has 426 parking spaces on site. It also has additional spaces that can be used, probably up to 500, because of open areas on the subject lot as well as availability of space in the adjacent world headquarters lot. It is near the bike path and intends to encourage bicycle use and ridesharing. It calculates that on average, there would be one vehicle for every 3 ticketholders, making 500 parking spaces reasonable (1,500 ÷3 = 500). It is willing to provide shuttle service on a voluntary basis from college campuses in Burlington for performances but is opposed to a mandatory requirement to do so for performances with ticket sales over 1,200 based on a concern that it would be obliged to pay for shuttle services that may go unused at the time of performance and result in unnecessary expense.

Jennifer Conley, a licensed civil and professional engineer with 30 years of experience in traffic engineering, studied the potential traffic impact of the Burton hub project, including the performing arts space, with and without completion of the Champlain Parkway. Her opinion, which the court finds credible, is that 500 spaces would be the maximum number of spaces needed for a full capacity crowd at concerts with the maximum number of tickets sold (1,500), because the 3 person-per-vehicle standard is reliable based on the experience of Higher Ground

at its existing facility which is located in the same city and has the same operator and type of event as the proposed project.

She also testified, and the court so finds, that when parking attendants are used, spaces fill to 100% capacity, whereas when drivers self-park, only 85% of spaces get filled. She testified, and the court finds, that shuttle service is likely to be very effective for this location because of the density of population in Burlington. She further testified that signage can be effective as a deterrent to improper parking, and that staff intervention is an even more effective deterrent. The OMP Pre-Event Management plan specifies the presence of event staff in the parking lot to oversee orderly parking. She testified, and the court finds, that if all available parking spaces are full on the Burton lot, the overflow of vehicles would need to be managed by staff on the ground, and this could be done by directing cars to park on grassy areas on the subject lot and on available space in the adjacent Burton lot.

Burton is confident that it has enough parking spaces and that therefore, there will not be any need for people to park in the Arthur Court or Central Avenue neighborhoods, nor need for shuttle service. However, just because there is adequate parking available does not mean people will park in the lot on site if they perceive that other locations suit their needs better.

There are two ways to approach the site, either from the north from Home Avenue to the intersection with the northern end of Queen City Park Road (Industrial Avenue), or from the south along Queen City Park Road to the site. If the southern route is chosen, there is a one-lane bridge over the railroad tracks that could cause a backup of traffic as cars wait to go across the bridge alternatively with oncoming vehicles. Human nature being what it is, some people in that line of cars are likely to see the side road into Arthur Court and turn into it to park along the edge of that *cul de sac*. From there it is a very short walk to the site, and a driver can anticipate being able to drive away promptly after the concert rather than be in a line of cars exiting the parking lot and having to cross the one-lane bridge.

If a car continues across the one-lane bridge and is in a line of cars waiting to get into the Burton parking lot, some people are likely to see Central Avenue going off to the left and turn down it to park along its shoulders, or on the side of residential streets that branch off it, including Maple Avenue, Lyons Avenue and others. They may also discover one of the two parking lots on Central Avenue that are private lots for owners and guests. (While the private lots are marked with signs prohibiting parking, it is not unusual for unauthorized strangers to park there). There is no City of South Burlington prohibition against parking along the side of Central Avenue or the side streets, even though they are not very wide. Residents and their guests routinely park there, and their vehicles tend to stick out into the roadway, narrowing the available road area. It is a short walk to the performance site, and drivers may reasonably project that parking in that area will allow them to have a faster exit than if they go to the parking lot.

These are concerns of neighbor Appellants at both locations, and the court finds that these are legitimate concerns, based on reasonably predictable human behavior. The OMP Pre-Event Management Plan does not call for robust staff action to prevent drivers from choosing to park in neighborhood side streets rather than proceeding to the parking lot. While it calls for Higher

Ground to "coordinate" with the Cities of Burlington and South Burlington, that is vague and only aspirational—no concrete action is required.

If energized concert goers return to cars parked in any of these residential neighborhood streets after performances, especially late at night, and talk or make noises as they walk down the street, or slam car doors shut, or even turn on their engines, they are likely to wake up sleeping residents, as the houses in both the Arthur Court and Central Avenue neighborhoods are extremely close to the road and each other. Many houses in the Central Avenue neighborhood were formerly summer camps and are as close as 10 feet to each other and to the road.

It is not the responsibility of Burton to monitor how concert goers conduct themselves when they park on public streets, but Burton can be required to proactively manage its patrons to prevent noises that might reasonably occur in residential neighborhoods as a result of its use of its property for late night performances. Availability of convenient parking and the conduct of concert-goers before and after performances present issues that are inherent in the use of a property for performance space. Thus, it makes sense to require the owner/operators to be responsible for assuring that activities and noises associated with its permitted use, including parking, take place on its own property and are not exported to affect and be absorbed by owners of neighboring properties.

In its post-hearing memo, Burton proposes an additional condition "that provides additional assurances that off-site parking will not occur." Burton's Proposed Findings of Fact, Conclusions of Law and Conditions, filed June 5, 2023, page 103:

> In addition to the measures outlined in the OMP, Burton shall coordinate with the Cities of Burlington and South Burlington as necessary to ensure that event parking does not take place in the Arthur Court or Queen City Park Road neighborhoods. Such coordination may entail support for residential-only parking in those neighborhoods, funding of tow-trucks to enforce compliance, or other appropriate measures reasonably aimed at ensuring that such off-site parking does not occur.

Id. Like the provision in the OMP, this is highly generalized and does not specify concrete action. The only specific alluded to is the possibility of paying for towing, but there has clearly been no implementation plan developed with either City.

Appellants request a permit condition "against overflow parking." Like Burton's proposal, the language is highly generalized and not specific enough for effective prevention or enforcement.

The court considers this issue to be important and addresses it below in relation to a specific appeal question.

With respect to pedestrian and cyclist safety, the Act 250 permit requires that until a permanent bicycle and pedestrian sidewalk or path is constructed along the length of Queen City Park Road (which is estimated to occur in 2028**),** Burton is required to install two crosswalks across Queen City Park Road, one near the intersection with Central Avenue and the other near the northern driveway to the Burton lot across from the bus facility (Condition #30). Appellants seek an additional requirement that Burton construct a sidewalk along Queen City Park Road

running from Pine Street to Home Avenue. Burton opposes this as unnecessary. There are several circumstances that indicate that safety risks to pedestrians and cyclists do not require such a response: sufficient on-site parking, the requirement that Higher Ground provide shuttling for large performances that will deliver patrons directly to the site, the crosswalks already required by permit conditions, the close proximity of the present bicycle path, the present existence of advisory lanes, and the fact that a pedestrian and bicycle path will be constructed in the reasonably near future. Appellants have not provided sufficient evidence of unaddressed safety risks to support a requirement of the additional sidewalk requested by Appellants.

Food and Beverage

Higher Ground proposes to serve alcoholic and other beverages at bars that would be constructed along the walls of the performance space and protrude approximately 10 feet into the space, and run approximately 20 feet long. The Performing Arts Center may include as many as three bars of this size, one in the Performing Arts Center, one in the common lobby, and one back near the outdoor lounge area. Generally, bars and restaurants are prohibited in the ELM district. Appellants contend that although a performing arts center is allowed to serve alcohol, that consumption can only occur in an "accessory space" which cannot use more than 50% of floor space. Many performances will be presented without seating, so that concert-goers will be free to move about the performance space with drinks. Appellants contend that because drinks may be consumed throughout the entire space, the plan does not comply with the required standard of "accessory use" limitation. Burton contends that the 50% limitation applies to the bar area only—i.e., where the drinks are served—and that the bar areas would constitute less than 50% of the open space. Drinks would be served only at the bar areas and not throughout the performance space.

Appellants also contend that gross receipts from an accessory space cannot exceed 25% of gross sales. Higher Ground estimates that 50% of its gross sales are likely to come from beverage sales, and that the 25% limitation does not apply because they are not seeking an accessory use permit. This issue calls for legal analysis, which is set forth below.

The Conditional Use Permit issued by the DRB prohibits food service on the property (Condition #10), and this condition was not appealed by Burton. During the trial, Higher Ground's representative noted that it would be required by the terms of its liquor license to offer food. Since this was not an issue raised for this appeal, it is not addressed in this decision. The opportunity is available to seek an amendment to any permit issued if necessary.

Conclusions of Law

APPELLANTS' RULE 52(c) MOTION

At the close of Applicant's evidence, Appellants moved for judgment as a matter of law pursuant to V.R.C.P. 52(c) on the following issues based on Appellants' claims regarding applicable law:

(1) lack of evidence to support compliance with the "plainly audible" standard of Burlington's Code of Ordinances 21-13;

(2) lack of expert modeling evidence on level of noise with doors open;

(3) lack of expert evidence on the level of noise typically generated in the district for purposes of Zoning Ordinance 3.5.6(a)(3);

(4) lack of evidence that the serving of alcohol or beverages or food will use no more than 50% of the square footage of the space;

(5) lack of evidence that no more than 25% of sales will be derived from food and beverage sales; and

(6) lack of evidence of noise impact of overflow parking.

See Transcript, Day 4, at 135–141.

These issues impact Conditional Use Appeal questions 3, 5, 6, 6.1, 6.4, and 28, and Act 250 Appeal questions 1, 8, and 9.

Rule 52(c) states:

> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence.

Following Appellants' oral motion made during the trial after the close of Burton's evidence, the court deferred ruling, stating that it would analyze the motion based on the Burton's evidence introduced in its case in chief, and issue a written decision. For the reasons set forth below as to each of the issues identified above, the motion is denied.

(1) Lack of evidence to support compliance with the "plainly audible" standard of Burlington's Code of Ordinances 21-13

Appellants claim that Burlington's Comprehensive Development Ordinance (CDO) § 5.5.1 requires that Burton demonstrate that it will comply with Burlington's Noise Ordinance, and further claim that Burton has failed to produce evidence demonstrating that it complies with that noise ordinance. This raises a legal question regarding whether the noise ordinance applies as a performance standard that must be met in connection with a conditional use permit application.

Title 24 of the Vermont Statutes Annotated, entitled "Municipal and County Government," addresses Municipal and Regional Planning and Development in Chapter 117. Within Chapter 117, Section 4414 is entitled "Zoning: permissible types of regulations, and authorizes municipalities as follows: "Any of the following types of regulations may be adopted

by a municipality in its bylaws in conformance with the plan. . . ." It then authorizes (1) zoning districts, (2) overlay districts, (3) conditional uses, (4) parking and loading districts, and others, including Section (5) entitled "Performance standards." This Section 5 provides: "As an alternative or supplement to the listing of specific uses permitted in districts, including those in manufacturing or industrial districts, bylaws may specify acceptable standards or levels of performance that will be required in connection with any use. These bylaws shall specifically describe the levels of operation that are acceptable and not likely to affect adversely the use of the surrounding area by the emission of such dangerous or objectionable elements as noise, vibration, smoke, dust, odor, or other form of . . . disturbance . . . ." 24 V.S.A. 4414(5).

Under this authority, the City of Burlington adopted a Comprehensive Development Ordinance (CDO), also known as the Burlington Zoning and Subdivision Ordinance. Part 5 of the CDO is entitled "Performance Standards." Section 5.5.1 is entitled "Nuisance Regulations." It provides: "All applications for a zoning permit shall be required to demonstrate compliance with the applicable nuisance regulations and performance standards pursuant to the requirements of the Burlington Code of Ordinances. All standards shall be met and maintained for all uses . . . in all districts, as determined or measured at the property line." Applicants argue that this provision means that Burton must, in connection with its application for a conditional use permit, demonstrate that it will comply with Burlington's Noise Ordinance, and compliance must be at the property line.

Burlington's Noise Ordinance is an enforcement ordinance and is derived from separate legislative authority and for a different purpose than zoning bylaws. Enforcement ordinances are adopted pursuant 24 V.S.A. § 1971, which is in the Title 24 Chapter providing for the "Adoption and Enforcement of Ordinances and Rules." 24 V.S.A. § 1971, entitled "Authority to Adopt," provides that "(a) A municipality may adopt, amend, repeal, and enforce ordinances or rules for any purpose authorized by law. (b) An ordinance or rule adopted or amended by a municipality under this chapter or under its municipal charter authority shall be designated as either criminal or civil, but not both." Procedures are set forth for the filing of complaints for violations, and enforcement takes place in the Judicial Bureau of the Vermont Judiciary. Thus, the ordinances adopted under this authority are rules for governing a variety of forms of conduct in the city.[7] Appellants' argument is that the Noise Ordinance sets a performance standard that must be met under the CDO, and Burton has not produced evidence showing that a performance arts center can operate in compliance with the Noise Ordinance.

Burlington's Noise Control Ordinance prohibits:

> [T]he use or operation of any musical instrument, radio, television, phonograph, or other device for the production or reproduction of sound in such a manner as to be *plainly audible* through walls between units within the same building, from another property or from the street between the hours of 10:00 p.m. and 7:00 a.m. or in such a manner as to unreasonably disturb the peace, quiet or comfort of the public.

[7] This court does not have jurisdiction over these enforcement matters. 4 V.S.A. § 34.

Burlington Code of Ordinance § 21-13(b)(2)(a) (emphasis added). If the ordinance qualifies as an applicable "nuisance regulation" or "performance standard" under the CDO, Section 5.5.1 of the CDO requires its standard—prohibiting music from being *plainly audible* between 10:00 pm and 7:00 am—to be met as measured at the property line.

The issue is whether the project must demonstrate compliance with this enforcement ordinance as a "performance standard" required under the Burlington Code of Ordinances. For the court to accept that this noise ordinance applies, it must conclude that it sets forth a "specifically described" performance standard, i.e., that it "specifically describe[s] the levels of operation that are acceptable and [is] not likely to affect adversely the use of the surrounding area by the emission of such dangerous or objectionable elements as noise . . . ." 24 V.S.A. § 4414(5).

Analysis of this issue calls for the court to construe the terms of the CDO as a zoning ordinance. In interpreting zoning ordinances, the court applies the rules of construction applied to statutes. In re Appeal of Trahan, 2008 VT 90, ¶ 19, 184 Vt. 262. First, the court "construe[s] words according to their plain and ordinary meaning, giving effect to the whole and every part of the ordinance." Id. (citations omitted). The court presumes that all language in an ordinance "is inserted for a purpose." The court is "bound by the plain meaning of the words . . . unless the express language leads to an irrational result." In re Tyler Self-Storage Unit Permits, 2011 VT 66, ¶ 6, 190 Vt. 132 (quotation omitted).

In construing statutory or ordinance language, the court will "adopt a construction that implements the ordinance's legislative purpose and, in any event, will apply common sense." In re Laberge Moto-Cross Track, 2011 VT 1, ¶ 8, 189 Vt. 578; see also In re Bjerke Zoning Permit Denial, 2014 VT 13, ¶ 22 (quoting Lubinsky v. Fair Haven Zoning Bd., 148 Vt. 47, 49, 195 Vt. 586 (1986)) ("Our goal in interpreting [a zoning regulation], like a statute, 'is to give effect to the legislative intent.'"). Finally, "[b]ecause zoning ordinances limit common law property rights, any uncertainty must be resolved in favor of the property owner." Id.

The court cannot conclude that all music that is "plainly audible" at the property line is automatically likely to adversely affect the use of the surrounding area, nor does it specifically describe a level of operation that is sufficient to put an applicant on notice of what is required. Use of such a provision ('plainly audible at the property line') as a performance standard would exceed the scope of the City's authority to adopt performance standards, as 24 V.S.A. 4414(5) only authorizes the use of performance standards for zoning permits that "specifically describe the levels of operation that are acceptable and are not likely to affect adversely the use of the surrounding area."

First, "plainly audible" music may encompass sound that could be heard at some level at the property line, but not adversely affect the use of the surrounding area. 24 V.S.A. § 4414(5); see, e.g., State v. Yee, 523 A.2d 116 (NH 1987) (holding that a municipal ordinance exceeded the scope of the municipality's authority to regulate noise because that statutory authority empowered municipalities to prevent *unreasonable noise and disturbances* but not to regulate sound audible within the noisemaker's premises that was not unreasonably disturbing to people). Similarly, here, the "plainly audible" noise ordinance, when used as a performance standard, may

encompass noise that is "acceptable and not likely to affect adversely the use of the surrounding area . . . ." 24 V.S.A. § 4414(5). Burlington's noise expert provided evidence that music noise from the venue was modeled to produce sounds at 20 Arthur Court that would be quieter than sounds produced by a refrigerator or in a library. Such levels of music from the project may be "plainly audible" but not likely to affect adversely the use of the surrounding area, including the property at 20 Arthur Court, nor considered adverse under WHO and ANSI standards for nighttime noise. Such evidence has been provided by Burton.

Second, a "plainly audible" standard invites subjective and variable interpretation and application: what is plainly audible to one person may not be to the next, and therefore the phrase does not "specifically describe the levels of operation that are acceptable . . . ." 24 V.S.A. § 4414(5). While no Vermont court has addressed a "plainly audible" standard in a zoning ordinance or otherwise, several other jurisdictions have. Of those cases, most engaged in significant analysis of whether the ordinance is unconstitutionally vague or overbroad. This pattern of case law evaluating whether these "plainly audible" noise ordinances are unconstitutionally vague supports this court's conclusion that, if applied as a performance standard, "plainly audible" would not "specifically describe the levels of operation that are acceptable" sufficiently to provide adequate guidance and standards to applicants. 24 V.S.A. § 4414; In re Appeal of JAM Golf, LLC, 2008 VT 110, ¶¶ 12–17, 185 Vt. 201.

The legislature authorized municipalities to adopt performance standards as an alternative or supplement to listing specific permitted uses in districts.[8] 24 V.S.A. § 4414(5). However, that delegation provides that performance standards "shall specifically describe the levels of operation that are acceptable and not likely to affect adversely the use of the surrounding area by the emission of such dangerous or objectionable elements as noise . . . ." Id. Due process requires that the bylaws provide adequate guidance and set forth specific standards to guide applicants. See JAM Golf, LLC, 2008 VT 110, ¶¶ 12–17 ("Such standardless discretion violates property owners' due process rights."). The court cannot uphold a zoning ordinance that "'fail[s] to provide adequate guidance,' thus leading to 'unbridled discrimination' by the court and the planning board charged with its interpretation." Id. (concluding that an ordinance which requires

[8] Municipalities are given authority to adopt zoning bylaws pursuant a delegation of legislative authority. "[A] municipality has only those powers and functions specifically authorized by the legislature, and such additional functions as may be incident, subordinate or necessary to the exercise thereof." City of Montpelier v. Barnett, 2012 VT 32, ¶ 20, 191 Vt. 441 (quoting Hinesburg Sand & Gravel Co. v. Town of Hinesburg, 135 Vt. 484, 48 (1977)) ("Dillon's Rule"). Dillon's Rule functions as a "canon of construction requiring that grants of power to municipalities be read as *limited* to those clearly enumerated." Id. (emphasis added). Put another way, a legislative delegation of authority to a municipality to regulate its development defines the upper limits of the municipalities authority to regulate. "Dillon's rule calls for a strict construction of municipal function: '[I]f any fair, reasonable, substantial doubt exists concerning this question it must be resolved against the [grant of power].'" Petition of Ball Mountain Dam Hydroelectric Project, 154 Vt. 189, 192 (1990) (quoting Valcour v. Village of Morrisville, 104 Vt. 119, 130 (1932)). Cities do not have the power to enact Bylaws and Rules that exceed the scope of its authority. See City of Montpelier v. Barnett, 2012 VT 32, 191 Vt. 441 (concluding City did not have authority to regulate swimming, fishing, or boating pursuant its grant of authority to "acquire, construct, and maintain . . . reservoirs"); Ball Mountain, 154 Vt. 189 (holding towns did not have authority under General Municipal Plant Enabling Act to finance, construct, own and operate a qualifying small production facility and sell power to Vermont retail electric utility companies, where towns had no intention of offering power to towns themselves or their residents).

planned residential development designs to "protect important natural resources including streams, wetlands, scenic views, wildlife habitats and special features such as mature maple groves or unique geologic features" was "essentially standardless.").

For these reasons, the court concludes that Burlington's noise control ordinance does not apply to the proposed use as a performance standard.[9] As such, Burton was not required to produce evidence that the project complied with Burlington Code of Ordinance § 21-13's "plainly audible" prohibition.[10] Appellants' V.R.C.P. 52(c) motion is denied on this issue.

(2) Lack of expert modeling evidence on level of noise with doors open

Burton's noise expert modeled the expected level of noise from music performances based on the assumption that doors would be closed throughout performances. Appellants reasonably note that such an assumption is not realistic. The nature of many of the performances is that people are not seated while music is played but rather on their feet and free to move around and go out to the outdoor lounge and return, or to leave early, resulting in the opening and closing of exterior doors and therefore the possible escape of sound through open doors, at least as applied to single doors leading to the outside.

The court understands Appellants' argument to be that (a) Burton's modeling evidence is unreliable because based on the incorrect premise that all doors would be closed, and (b) any expert modeling evidence should have been based on the assumption that doors would be periodically opened during performances. The fact that the modeling assumed closed doors does not require that the evidence be excluded as a matter of law, although it may affect the value of the evidence. Moreover, there is no legal requirement that expert modeling testimony be presented at all**,** or that if it is, the specifications of the model conform to those desired by the Appellants such that a failure to do so constitutes a lack of necessary evidence that compels judgment as a matter of law.

Permit conditions require entrance/exit doors to be double sets of sound locked doors.[11] Burton submitted evidence that other emergency doors leading to the outside would be closed during performances and not allowed to be propped open, and that staff would monitor them. It is up to the court to weigh the value of all evidence and reconcile it if possible or determine what evidence carries most weight. The court concludes that Burton has sufficiently met its burden to

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[9] This conclusion in no way applies to the noise ordinance *as a noise ordinance* for enforcement purposes. Noise Ordinances are adopted pursuant 24 V.S.A. § 1971, which is not enforced in the environmental court. 4 V.S.A. § 34. The noise ordinance, when applied as a noise ordinance, is beyond the jurisdiction of this court and beyond the scope of the court's review in the present appeal.

[10] This analysis is consistent with Burlington's application of the noise ordinance. Burlington demonstrated that its consistent practice is not to apply the Burlington Noise Ordinance to conditional use applications. Burlington's proffered interpretation is the same as the conclusion the court reaches today, and also consistent with the delegating statute.

[11] Condition 34(c) of the Act 250 Permit requires that "the main entrance and the exit to the outdoor lounge shall have double sets of doors that act as a sound lock."

provide evidence that is relevant on the issue of noise impact from the project in relation to noise emanating from doors. The fact that Appellants find Burton's evidence worthy of criticism does not mean it is without value and does not compel judgment for Appellants as a matter of law.

(3) Lack of expert evidence on the level of noise typically generated in the district for purposes of Zoning Ordinance 3.5.6(a)(3)

Appellants' Question 3 asks whether "applicant met its burden of proving that the development and the proposed use will not have nuisance impacts from noise and vibrations greater than typically generated by other permitted uses in the same zoning district." Burlington's conditional use review standards require that "[t]he proposed use will not have nuisance impacts from noise, odor, dust, heat, and vibrations greater than typically generated by other permitted uses in the same zoning district . . . ." CDO § 3.5.6(a)(3). Appellants' statement of Questions only raised the issue of whether the Applicant had demonstrated that the project will not have nuisance impacts from noise and vibrations.

In the ELM district in which the subject property is located, permitted uses include food and beverage processing, office (both general and technical), manufacturing and light manufacturing, bus operations center, public transit terminal, public works yard, and garage. The court received evidence regarding several different actual uses in the area, including Rhino Foods (a food processing center), Burton (Offices (general or technical)), Edlund (manufacturing), Green Mountain Transit Station (a bus operations center/transit terminal), and a water treatment facility and electric grid station (public works yards). The Burton building at 266 QCPR was formerly used by General Dynamics for military manufacturing. All these uses are permitted uses in the zoning district, though the water treatment and electrical grid are located in South Burlington.

Burton's noise analysis includes background noise monitoring from the sounds these uses in the area produce. The analysis showed that the sound levels from other uses in the area—i.e., the noise typically generated—was consistent with the noise the proposed use will produce. Additionally, the court received testimony regarding low-frequency noise capable of causing vibrations. Burton's sound engineer demonstrated that those sounds are not strong enough to cause vibrations or perceptible building rattle, and that those frequencies and levels are consistent with the other sounds in the area. As such, the court received evidence on which it could conclude that Burton met its burden to provide evidence on Appellants' Conditional Use Question 3, and denies Appellants 52(c) motion on this issue.

(4) Lack of evidence that the serving of alcohol or beverages or food will use no more than 50 % of the square footage of the space

Applicant argues that because alcohol will be consumed in more than 50% of the Performing Arts Center space, as conceded by Burton, Burton has failed to demonstrate that it satisfies this requirement for performing arts centers. Burton disputes this requirement, arguing that the plain language contemplates that the accessory space is only that space used for

preparing and serving the food and beverages, not the entirety of the space where it may be consumed. This legal issue calls for interpretation of the applicable zoning ordinance, for which the court applies the rules of statutory construction as set forth above.

The Use Table establishes that "Performing Arts Centers" are a conditional use in the ELM, and that such uses "may contain accessory space *for preparation and serving* food and beverages, including alcohol, provided this accessory space comprises less than 50% of the entire establishment." Burlington CDO, App. A at 6, n. 32 (emphasis added). By its ordinary language, this accessory space is only that space where the food and beverages would be prepared and served. The language does not contemplate including additional space where it may be consumed.

The Performing Arts Center subject to this proposal would be 11,560 square feet. Accessory space used for preparing and serving the alcoholic and nonalcoholic beverages would come out from the wall approximately 10 feet, and run approximately 20 feet long. As such, each bar would occupy approximately 200 square feet, or 1.7% of the space in the Performing Arts Center. During testimony, the court heard evidence that the Performing Arts Center may include as many as three bars of this size, one in the Performing Arts Center, one in the common lobby, and one back near the outdoor lounge area. Even assuming all three bars are implemented in the final plan, the accessory space used for preparing and serving the alcohol will not exceed 50% of the entire establishment. As such, Burton has presented sufficient evidence to overcome a V.R.C.P. 52(c) motion.

(5) Lack of evidence that no more than 25 % of sales will be derived from food and beverage sales

Applicants argue that because evidence showed that more than 25% of project sales would be derived from beverage sales, the project as proposed is not approvable. This presents a legal issue that calls for interpretation of the zoning ordinances, for which the court applies the same rules of statutory construction as set forth above.

The 25% requirement Appellants rely on comes from the definition of "accessory use" in the general "Definitions" section of the zoning ordinance (CDO):

> **Accessory Appurtenance, Building or Use**: A use or detached building that:
>
> (a) Is located on the same lot as the principal use or building served;
>
> (b) Is clearly incidental to and customarily found in connection with the principal use or building; and
>
> (c) Is subordinate in area, extent, or purpose to the principal use or building served, *and is not to exceed twenty-five percent (25%) of the gross area or sales of the principal use or building served*.

CDO § 13.1.2 (emphasis added). Thus, this is the general definition applicable to accessory uses of all types governed by the CDO.

The Use Table, which is also part of the CDO, is more specific with respect to Performing Arts Centers in the ELM zone. It states:

> Performing Arts Centers in the ELM zone shall be limited to properties with frontage on Pine Street up to 5,000 square feet in size, and to properties with frontage on Industrial Parkway up to 15,000 square feet in size. Performing Arts Centers may contain accessory *space* for preparation and serving food and beverages, including alcohol, provided this accessory space comprises less than 50% of the entire establishment.

CDO, App. A at 6, n. 32 (emphasis added).

The term used in the Use Table, specific to Performance Arts Centers on Industrial Avenue, is "accessory space." It is not the term "accessory use." The court cannot read that as an error, but rather as an intentional distinction. The Use Table uses the term "accessory use" in a different footnote when limiting a use in a district to an accessory use. *Compare* CDO, App. A at 6, n. 17 (noting that childcare in the ELM district is "[a]llowed only as an accessory use" *with* CDO, App. A at 6, n. 32 (using term "accessory space" to describe the bar space in performing arts centers) (emphasis added)). If Burlington had intended for alcohol service to be an accessory use in Performing Arts Centers, it would have done so in a similar manner.

In addressing what restrictions to place on provision for service of beverages and food in performing arts centers on Industrial Avenue, Burlington did not use the term "accessory use," which would have triggered the general definition as applicable. Rather, it used the term "accessory space." Accessory space does not have a separate definition in the "Definitions" section of the CDO, but is defined by its use in the sentence: the "accessory space" is "for preparation and serving food and beverages, including alcohol," and is specifically limited to less than 50% of the entire establishment." Burlington CDO, App. A at 6, n. 32.

The court concludes that the "accessory use" general definition is inapplicable to the project, which is governed by the specific restriction in the Use Table.[12] Therefore, the request for judgment as a matter of law on this issue must be denied.

(6) Lack of evidence of noise impact of overflow parking

Applicant's expert modeled predicted noise impact in the parking lot on the Burton lot. While he did not specifically model noise occurring on neighborhood streets, to the extent patrons park at locations other than the Burton lot, it is reasonable to infer that vehicle noise at such locations would be comparable. The court cannot conclude that the lack of more specific evidence on this issue compels judgment as a matter of law in favor of Appellants.

Summary of Rule 52(c) Motion:

For the reasons set forth above, Appellants' motion for judgment as a matter of law pursuant to V.R.C.P. 52 (c) is denied. The court hereafter analyzes the issues on appeal on the basis of all the evidence introduced at trial.

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[12] Moreover, to the extent the existence of the general definition and existence of the provision in the Use Table may be considered to create an ambiguity, any ambiguity is interpreted in the Applicant's favor. See Bjerke Zoning Permit Denial, 2014 VT 13, ¶ 22 ("[A]ny uncertainty must be resolved in favor of the property owner.").

APPELLANTS' CONDITIONAL USE APPEAL QUESTIONS

The court rules on the Appellants' questions as set forth below.

Question 2: Has the applicant met its burden of proving that the development and the proposed use will have no undue adverse effect on the character of the area?

Burton has satisfactorily shown that the use of the space in its building for performing arts will not have an undue adverse effect on the character of the area as long as certain conditions are met and complied with for the purpose of containing both music noise and patron noise primarily within the Burton lot as opposed to allowing those effects to spill out into neighborhoods nearby. Part of the character of the ELM district is that a certain amount of noise is inherent in the uses for which the district is designed, and the district and nearby residential streets are also surrounded by other features of a city that generate ambient noise inherent in city life: an interstate highway, train and truck traffic, other music venues, and occasional other events that take place in urban areas. While the Higher Ground use is likely to generate sounds and traffic, the effects have not been shown to unduly change the character of the area as long as proposed and additional conditions are met.

Noise. The neighboring industrial uses in the ELM district generate a certain level of noise with which the projected noise is compatible (e.g., rooftop mechanisms, truck traffic, etc.), assuming the construction specifications are followed and the sound monitoring plans in the permits (including the OMP) are implemented. The existing background nighttime noise in the area is between 41 to 52 dBA Leq, with a nighttime Lmax ranging between 35 and 55 dBA $Lmax_{10\text{-}min}$. The project model demonstrated that the sounds produced from the project would be on average 41 dBA Leq, with a Lmax of 44 dBA, and that the parking lot noise from vehicles moving around the parking lot would be 44 dBA $Leq_{1\text{-}hr}$ with an L_{Smax} of 53 dBA under a very conservatively loud scenario.[13] These sounds are consistent with the sounds already occurring in the neighborhood. However, to ensure that the general character of the area is maintained, the court will require the following additional conditions:

- Conditional Use Permit Condition #3 is enlarged from 6 months to one year and the three events of noise assessment shall occur at least 3 months apart. The purpose is to capture experience in all seasons of the year, including summer, when sound escaping from the building may be more likely to be heard.
- Burton's proposed additional condition is added as Condition #20 as follows: "In addition to the sound monitoring required by the Operational Management Plan ("OMP"), Burton will install one or more permanent sound monitors at its property line to monitor project sound levels on an ongoing basis. In the event such monitor(s) detect sound levels that correlate to an exceedance of the

[13] Burton provided testimony about Lmax noise in the parking lots under two scenarios in both fast and slow $_{Lmax}$. The court notes that while the L_{Fmax} scenario reached 55 dBA, it finds this scenario highly unlikely, as it would require 85 cars all starting within the same eighth of a second while 300 loud male voices were speaking and another 200 cars were driving in the parking lot.

equivalent project sound level limit established by the OMP (45 dBA $Leq_{1\text{-}hr}$) or the World Health Organization sleep disturbance guideline (60 dBA L_{Fmax}) at nearby residences, Burton will take immediate steps to correct such exceedance."

Parking. As long as patron parking can be managed to occur on the Burton lot as opposed to on narrow residential side streets, the character of the area is not likely to change. See Question 4 below. The court concludes that, with the changes in conditions described in Question 4 below, Burton will be able to manage traffic accordingly to prevent those changes from occurring.

Question 3: Has the applicant met its burden of proving that the development and the proposed use will not have nuisance impacts from noise and vibrations greater than typically generated by other permitted uses in the same zoning district?

Burlington's conditional use review standards require that "[t]he proposed use will not have nuisance impacts from noise, odor, dust, heat, and vibrations greater than typically generated by other permitted uses in the same zoning district . . . ." CDO § 3.5.6(a)(3). Appellants' Question specifically asks about nuisance impacts from noise and vibrations.

As discussed above, several ELM permitted uses already exist in the area. As part of Burton's sound analysis, Burton conducted monitoring of the background sounds these uses in the area produce, as well as from the city sounds that already exist in the area. Burton's sound analysis showed that the sound levels from other uses in the area—i.e., the noise typically generated—was consistent with the noise the proposed use will produce. Specifically, the expert report showed that the primary sources of noise were from mechanical heating and cooling equipment on the roofs of the industrial buildings as well as traffic noises. Background sound level data from two monitors, summarized into 10-minute intervals demonstrated that the average daytime background sound level was 52 dBA at Monitor A, and 49 dBA at Monitor B. The average nighttime background sound level was 52 dBA at Monitor A, and 41 dBA at Monitor B. This is consistent with (or louder than) the noise produced from the project. Burton's modeling found that the proposed use would produce sounds on the nearest property up to 44 dBA, with rooftop mechanical equipment producing 41 dBA, music from concert producing up to 39 dBA (L_{max}), vehicles accessing the parking lot producing 34 dBA, and the outdoor lounge producing 8 dBA.

Additionally, the court received testimony regarding low-frequency noise capable of causing vibrations. To avoid perceptible building rattle (i.e., vibrations), sound levels in the 31.5 Hz and 63 Hz octave bands should be lower than 65 dBZ and 70 dBZ, respectively, as measured indoors. Burton's sound expert's model concluded that, at the nearest residence, those sound levels from all the proposed uses' sources could reach up to be 60 dBZ, as measured outside the residence. As such, the court concludes that the project will not cause vibrations.

As long as parking is concentrated on the Burton lots and the building is fit up properly for sound control, as it is required to be by the Act 250 permit conditions, Burton has adequately shown that noise impacts are likely to be consistent with those typical of the other industrial

facilities in the district, even though they may be of a different character. As to the possibility of vibrations from the type of sound occasionally generated in the projected music performances, the required sound fit-up is designed to have a preventive effect, but an additional protection is Burton's proposed additional condition of a permanent sound monitor, and the possibility of responding to actual occurrences with mitigation measures. The court concludes that Burton has met its burden on this issue.

Question 4: Has the applicant met its burden of proving that the development and the proposed use will have no undue adverse effect on the transportation system including street capacity; level of service and other performance measures; access to arterial roadways; connectivity; transit availability; parking and access; impacts on pedestrian, bicycle and transit circulation; safety for all modes; and adequate transportation demand management strategies?

For the most part, the traffic needs of the performance venue will involve use of the roads and parking lots in the evenings and on weekends and thus will complement rather than conflict with the use of roads and parking lots in the district for other industrial uses. There is sufficient parking available on the Burton lots for reasonably projected needs. The property is located close to a bike path that will allow for bicycle access, and bicycle parking is built into the plan. Shuttle service is required for large audience events.

Even though Burton has adequate parking spaces, it has not shown sufficiently that patrons arriving from the south will refrain from parking in Arthur Court or Central Avenue or the side streets and private parking spaces off Central Avenue. The court finds it highly likely that many will do that unless prevented from doing so by active management on the part of Burton/Higher Ground, as drivers are likely to anticipate that both arriving and leaving will be quicker by doing so, and the walk to the performance is short. Condition # 7 of the Conditional Use Permit requires implementation of the Operational Management Plan, which "must include provision for event traffic control at the intersection of Home Avenue and Pine Street, Central Avenue, and the nearby 1-lane bridge." The OMP includes the following provisions:

"Event staff in the lots will direct traffic, ensure orderly parking, direct pedestrians into the Hub lobby, and oversee the arrival of bicyclists and rideshares."

"Prior to large events (750 patrons or more), Higher Ground will place a partial barrier at the end of Central Avenue that indicates *Dead End No Event Parking* (pending approval and coordination with the City of South Burlington."

The court concludes that these measures are not sufficiently strong for management of off-site parking. They only require event staff to be "in the lots," rather than at the intersections of Arthur Court and Central Avenue which are the critical spots for parking choices of patrons arriving for large audience events. The signage is not as directive as it could be. More active management can occur through a strengthened condition requiring (a) more forceful signage prior to events on the entrances to Arthur Court and Central Avenue so as to train patrons to go to the parking lot, (b) mandatory presence of event staff at such locations prior to large events, and

(c) the condition proposed by Burton to cooperate with and support City parking control efforts. Thus, the following conditions are added to the Conditional Use Permit:

- Condition # 21: "Prior to events of 300 or more patrons, Higher Ground will place a partial barrier at the entrance to Central Avenue and another at the entrance to Arthur Court with a large sign that states NO EVENT PARKING. PROCEED TO PARKING LOT (pending approval and coordination with the City of South Burlington for Central Avenue and the City of Burlington for Arthur Court). Prior to events of 750 or more patrons, Higher Ground shall provide traffic control staff at the entrances to Central Avenue and Arthur Court.

- Condition #22: "In addition to the measures outlined in the OMP, Burton shall coordinate with the Cities of Burlington and South Burlington as necessary to ensure that event parking does not take place in the Arthur Court or Queen City Park Road neighborhoods. Such coordination may entail support for residential-only parking in those neighborhoods, funding of tow-trucks to enforce compliance, or other appropriate measures reasonably aimed at ensuring that such off-site parking does not occur."

Due to adequate parking spaces, the shuttling requirement for the largest events, and the additional condition for protecting residential side streets from being used for parking, the court declines to add a condition of a sidewalk on Queen City Park Road. Most patrons will be delivered by car, bicycle, or shuttle and will park vehicles within the Burton lots or be dropped off or picked up by shuttle or transport on site.

Questions 5, 6, 6.1, and 6.4: Performance Standards, Nuisance Regulations, and Burlington's Noise Ordinance

Collectively, these Questions ask whether Burton has demonstrated that the proposed use will comply with CDO § 5.5.1, which references other Ordinances, including specifically Burlington's Noise Ordinance which prohibits "plainly audible" music after 10 PM. Specifically Question 5 asks whether Burton "met its burden of proving that the development and the proposed use will have no undue adverse effect on any standards or factors set forth in existing City bylaws and city and state ordinances, specifically including, without limitation, section 5.5.1 of the [CDO] and Chapter 21-13 of the Burlington Code of Ordinances." Question 6 asks whether "the development and proposed use comply with section 5.5.1 of the CDO, which requires applicants for all zoning permits to demonstrate compliance with applicable nuisance regulations and performance standards, as determined or measured at the property line." Question 6.1, asking as a subpart to Question 6, asks whether "the Burlington Noise Ordinance, Ordinance § 21-13, prohibiting 'plainly audible' noise after 10 pm from music and social gatherings, appl[ies] to the proposed use," and presumably, if it does apply, Question 6.4 asks whether "Burton has demonstrated that it will comply with the Burlington Noise Ordinance, prohibiting 'plainly audible' noise after 10 pm from music and social gatherings, as measured and determined at the Burton property line." Due to the interrelated nature of these questions, they are addressed together.

First, as discussed in greater detail above in the court's analysis on the Appellants' V.R.C.P. 52(c) motion, the court concludes that Burlington's Noise Ordinance § 21-13 does not apply to the permitting of this project. This ordinance is used for enforcement purposes, but not in permitting and development decisions. Thus the question in Question 6.1 relies on a legal premise that is inapplicable. Accordingly, there is no need to reach the merits of Question 6.4.[14]

Having determined that the Noise Ordinance does not apply as a performance standard to this project, there remains the question of whether Burton has demonstrated that the development and the proposed use will have no undue adverse effect on any standards or factors set forth in existing City bylaws and city and state ordinances. The evidence shows no undue effect with respect to all issues identified by Appellants.

As discussed above, the evidence demonstrated that the background nighttime noise in the area was between 41 to 52 dBA, with a nighttime L_{max} up to 67 dBA. While other noises from the city— primary sources of noise are local and distant traffic, aircraft flyovers, and equipment at the surrounding industrial, utility, and transportation facilities—the primary contributor to the background noise in the area was other rooftop mechanical equipment. Similarly, the HVAC noise produced from the project was the greatest contributor of sound from the project, modelled at 41 Leq. The noise level from the music was lower, modelled at 32 Leq, with an Lmax of 39 dBA. This means the noise from the HVAC and background noises is consistent with the noise that already exists in the area, and is of the type contemplated and permissible in the CDO. As such, the court concludes that Burton has demonstrated that the development and the proposed use will have no undue adverse effect on any standards or factors set forth in existing City bylaws and city and state ordinances.

Question 28: Does the proposed serving of food and beverages, including alcohol, comply with the CDO Appendix A-Use Table and the Definitions in Article 13, governing the uses allowed in this zoning district?

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[14] However, even if the "plainly audible" standard was within the scope of the City's authority to adopt performance standards, the Applicant demonstrated that the project as proposed would not violate the noise ordinance. The noise expert demonstrated that the project produces several different types of noise from different sources: (1) music, (2) people talking in the lounge, (3) cars, and (4) HVAC. The "plainly audible" standard would only apply to the music produced in the venue, which the noise expert testified would not be heard over the background noises produced from other uses in the area and the project's HVAC. See Burlington Code of Ordinances § 21-13(b)(a). The other noises—people talking in the lounge, vehicles starting and leaving the venue, and the HVAC—would fall under the "general prohibition." Burlington Noise Ordinance § 21-13(b)(1). This general prohibition only prohibits "any loud or unreasonable noise. Noise shall be deemed to be unreasonable when it disturbs, injures or endangers the peace or health of another or when it endangers the health, safety or welfare of the community." Id. The evidence demonstrated that the background nighttime noise in the area was between 41 to 52 dBA, with a nighttime L_{max} up to 67 dBA. The HVAC noise produced from the project was modelled at 41 Leq. The noise level from the music, however, was only modelled at 32 Leq, with an L_{max} of 39 dBA. This means the noise from the HVAC and background noises will likely "mask" the noise from the music, and therefore demonstrates that the music would not be "plainly audible" at the property line.

The Use Table establishes that "Performing Arts Centers" are a conditional use in the ELM, and that such uses "may contain accessory space for preparation and serving food and beverages, including alcohol, provided this accessory space comprises less than 50% of the entire establishment." Burlington CDO, App. A at 6, n. 32 (emphasis added). Thus, pursuant to this ordinary language, Performing Arts Centers may have space for preparing and serving alcohol.

The evidence is that this Performing Arts Center would be 11,560 square feet. The accessory space used for preparing and serving the alcoholic and nonalcoholic beverages would come out from the wall approximately 10 feet and run approximately 20 feet long. As such, each bar would occupy approximately 200 square feet, or 1.7% of the space in the Performing Arts Center. There would be no wait staff serving drinks throughout the space, and as such, preparation and service would only occur at these bars. During testimony, the court heard evidence that the Performing Arts Center may include as many as three bars of this size, one in the Performing Arts Center, one in the common lobby, and one back near the outdoor lounge area. Even assuming all three bars are implemented in the final plan, the accessory space used for preparing and serving the alcohol will not exceed 50% of the entire establishment. As such, Burton has demonstrated that the Performing Arts Center will comply with this 50% limitation.

To the extent that Appellants argue that the project is not approvable because the evidence demonstrates that more than 25% of the revenue will be generated from drink sales, the court concludes that this argument conflates approving a conditional use as a Performing Arts Center with approving an accessory use as a bar. An accessory use permit is not before the court, and as noted above, Performing Arts Centers allow for accessory space for preparation and serving food and beverages. Thus, for the reasons discussed above in the courts reasoning in the V.R.C.P. 52(c) motion, the court declines to apply any such 25% restriction.

As such, the court concludes that the serving of alcoholic and nonalcoholic beverages pursuant to the project plan is an allowable part of the Performing Arts Center, and therefore allowable in this district. It is noted that the Conditional Use Permit issued by the DRB prohibits food service on the property (Condition #10), and this condition was not appealed by Burton. During the trial, Higher Ground's representative testified that it would be required by the terms of its liquor license to offer food. Since this was not an issue raised for this appeal, it is not addressed in this decision.

APPELLANTS' ACT 250 APPEAL QUESTIONS

Appellants raise questions concerning compliance of the project with several of the 10 criteria set forth in Act 250 for purposes of permit application review. For some, Appellants challenge whether Applicant has met its burden to show compliance, whereas for others, the Appellant has a burden of persuasion regarding adverse effect: "The burden shall be on the applicant with respect to subdivisions 6086(a)(1), (2), (3), (4), (9), and (10) of this title." 10 V.S.A. § 6088(a). "The burden shall be on any party opposing the applicant with respect to subdivisions 6086(a)(5) through (8) of this title to show an unreasonable or adverse effect." 10 V.S.A. § 6088(b). While "[t]he party opposing the applicant has the ultimate burden of persuasion with respect to [Criteria 5–8], . . . the applicant has the initial burden of production regarding [those criteria.]" In re Hinesburg Hannaford Act 250 Permit, 2017 VT 106, ¶ 55, 206

Vt. 118 (citing 10 V.S.A. § 6088(b); In re Champlain Parkway Act 250 Permit, 2015 VT 105, ¶ 15, 200 Vt. 158); see also State v. Baker, 154 Vt. 411, 414 (1990) (noting that "burden of production" is generally carried by establishing "prima facie case on each of the elements").

The purpose of Act 250 is that it generally serves to "protect and conserve the lands and environment of the state from the impacts of unplanned and uncontrolled changes in land use." In re Audet, 2004 VT 30, ¶ 14, 176 Vt. 617. The court rules on the Appellants' questions as set forth below.

Question 1: Will the proposed land use comply with Criterion 1 with regard to the health impacts of night-time noise from the project site—including the low-frequency noise from performances, the A-weighted noise from performances, the noise from building air conditioners, and, after midnight, the voices of up to 1500 patrons who have been listening to loud music and consuming alcohol, talking as they leave the building and walk to their vehicles, and the noises of patrons starting their vehicles, closing their car doors, and driving away?

Criterion 1 addresses water and air pollution, and does not expressly or impliedly contemplate noise pollution. See 10 V.S.A. § 6086(a)(1)(A)–(G); In re CVPS/Verizon Act 250 Land Use Permit, 2009 VT 71, ¶ 14, 186 Vt. 289 ("We are also mindful, when considering Act 250's jurisdictional threshold, that 'legislation in derogation of common law property rights will be strictly construed.'"); Comm. to Save the Bishop's House, Inc. v. Med. Ctr. Hosp. of Vermont, Inc., 137 Vt. 142, 152 (1979) ("The court's true function is to give effect to the legislative intent, and in this endeavor, we are guided by rules of general applicability, evolved through long judicial experience. One of these is that legislation in derogation of common law property rights will be strictly construed.").

The Environmental Court has recognized that noise from a proposed project could "be of such an adverse level as to constitute air pollution." Katzenbach A250 Permit #7R1374-1, No. 79-7-18 Vtec, slip op. at 30 (Vt. Super. Ct. Envtl. Div. Apr. 16, 2021) (Walsh, J.) citing (Re: Bull's-Eye Sporting Center, No. 5W0743-EB, Findings of Fact, Concl. of Law, and Order, at 14 (Vt. Envtl. Bd. Feb. 27, 1997) ("The test for undue air pollution caused by noise is whether the noise has impacts rising above annoyance and aggravation to cause adverse health effects such as hearing damage.") (quotation omitted)). While the Environmental Court's decision was affirmed on appeal, In re Katzenback A250 Permit #7R1374-1, 2022 VT 42, the analysis as to noise was considered in relation to Criterion 8 rather than Criterion 1.

The Environmental Court has opined that "Noise analysis under Criterion 1 focuses primarily on the health and safety impacts of noise, rather than on its welfare and aesthetic impacts, which are considered under Criterion 8." Goddard Coll. Conditional Use, Nos. 175-12-11 Vtec and 173-12-12 Vtec, slip op. at 10 (Vt. Super. Ct. Envtl. Div. Jan. 6, 2014) (Walsh, J.) (citation omitted). When evaluating noise impacts under Criterion 1, the Environmental Court has relied on prior decisions of the Environmental Board. The Environmental Board relied on the United States Environmental Protection Agency (EPA) Report, Information on Levels of Environmental Noise Requisite to Protect Public Health and Welfare with an Adequate Margin of Safety, EPA document No. 5 50/9-74-0004, dated March 1974, for guidance. See Re: Paul and Dale Percy, No. 5L0799-EB, Findings of Fact, Conclusions of Law, and Order, at 7–8, 17 (Vt.

Envtl. Bd. Mar. 20, 1986). Specifically, the Environmental Board adopted EPA's standard based on the risk of hearing loss or other adverse health effects caused by nearly continuous exposure to noise. Bull's Eye Sporting Center, No. 5W0743-2-EB, at 14. Pursuant to 10 V.S.A. § 8504(m), prior decisions of the Environmental Board are given the same weight and consideration as prior decisions of this court.

The Board considered noise to be air pollution under Criterion 1 if it exceeded a maximum Leq of 70 dBA for 24 hours a day, 365 days a year over a lifetime. Re: Pike Indus., Inc. and Inez M. Lemieux, No. 5R1415-EB, Findings of Fact, Conclusions of Law, and Order, at 32 (Vt. Envtl. Bd. June 7, 2005); Re: Casella Waste Mgmt. and E.C. Crosby & Sons, Inc, No. 8B0301-7-WFP, Findings of Fact, Conclusions of Law, and Order, at 29-30 (Vt. Envtl. Bd. May 16, 2000). Furthermore, the Environmental Board determined that maximum noise levels consistently lower than 90 decibels did not constitute air pollution under Criterion 1. Casella Waste Mgmt., No. 8B0301-7-WFP, at 30; Re: Wildcat Constr. Co., No. 6F0283-1-EB, Findings of Fact, Conclusions of Law, and Order (Vt. Envtl. Bd. Oct. 4, 1991), *aff'd,* 160 Vt. 631 (1993), although analysis of noise pollution under Criterion 1 was not an issue considered by the Vermont Supreme Court.

Assuming that noise pollution sufficient to cause health effects such as hearing loss may appropriately be considered under Criterion 1, an applicant bears the burden of proving that project noise will not rise to the level of "air pollution."

Burton has adequately shown that the projected nighttime noise from the music falls within the WHO and ANSI standards to prevent disturbed sleep, which are well below the standards applied by the Environmental Board and this court in considering whether sound amounts to noise pollution. Burton offered to add an additional condition limiting the termination time of most performances as well as the number of large performances to protect its neighbors from possible health impacts such as disturbed sleep from nighttime noise. The court finds it appropriate to adopt the following proposed condition offered by Burton, and will add it to Condition #14 of the Act 250 Permit:

- All paid, ticketed Performing Arts Center performances shall end by 12:00 am, except that twelve (12) performances per year are permitted to end by 2:00 am. Those performances may take place only on Fridays and Saturdays, except that performances may take place on any evening preceding a holiday.

Question 2: Will the proposed land use comply with Criterion 1 with regard to the health impacts of night-time noise from off-site parking on residential streets—including the voices of patrons, after midnight, who have been listening to loud music and consuming alcohol, talking as they walk to their cars, and the noises of patrons starting their vehicles, closing car doors, and driving away?

The same standards and burdens as noted above in the discussion of Question 1 apply to the court's decision as it relates to Question 2, as both questions ask the court to evaluate the proposed use's compliance with Criterion 1.

Permit conditions have been strengthened by this court as described above to require Higher Ground to proactively control off-site parking to make sure it takes place at 266 QCPR and thus will not disturb the sleep of residents who live on Arthur Court or off Central Avenue or at other nearby locations. See response to Conditional Use Question 4 for a more detailed discussion. The court concludes that with these additional conditions, Burton will meet its burden with respect to limited nighttime noise from off-site parking.

Question 5: Will the proposed land use comply with Criterion 5(A) with regard to traffic and pedestrian safety?

Under Criterion 5(A), an applicant is required to initially produce evidence sufficient to demonstrate that the proposed use "will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed." 10 V.S.A. § 6086(a)(5)(A); Hinesburg Hannaford Act 250 Permit, 2017 VT 106, ¶ 55. A party opposing the project has the burden of persuading otherwise. The court may not deny a project solely based on this criterion, but it may impose reasonable conditions. 10 V.S.A. § 6087(b).

Burton's traffic expert, Jennifer Conley, provided an expert traffic study and supporting memoranda which demonstrated that the proposed use will not cause unreasonable congestion. The evaluation provided a conservative opinion assessment of the use, which did not consider the mitigating effects of construction of the Champlain Parkway, any permit conditions imposed to prevent traffic, and the use of traffic control from Burton staff. Still, it was her opinion that the proposed use would only result in minor delays at area intersections, and even those minor delays are expected to be alleviated during actual operation. See Burton Exs. 34, 38.

Appellants evidence was not sufficient to overcome the evidence from Burton's traffic expert and thus have not sustained the burden of persuading the court that conditions are inadequate for traffic and pedestrian safety related to the performing arts use. As such, the court finds the proposed use complies with Criterion 5(A).

Question 6: Will the proposed land use comply with Criterion 5(B) with regard to alternative transportation?

Under Criterion 5(B), a project must "[a]s appropriate, incorporate transportation demand management strategies and provide safe access and connections to adjacent lands and facilities and to existing and planned pedestrian, bicycle, and transit networks and services." 10 V.S.A. § 6086(a)(5)(B). As above, the burden is on the Appellants to show an adverse effect after Burton makes its initial burden of production. 10 V.S.A. § 6088(b). The court may not deny a project solely based on this criterion, but it may impose reasonable conditions. 10 V.S.A. § 6087(b).

Burton demonstrated that it satisfies the final requirement of Criterion 5(B) with regard to alternative transportation. Cycling, walking, carpooling, and alternative transit methods such as

shuttling are all encouraged. Additionally, Higher Ground was drawn to this location to take advantage of the walkable and bikeable location of the property. The proposed facility is more easily accessible by these alternative modes than its current facility. Further, Burton demonstrated that Higher Ground has been successful at managing transportation demand at its current location and the other locations where it has produced performances. Finally, as a condition of the permits, shuttling for large audiences is required, and the shuttle or other public transit service is expected to be an integral part of the transportation strategy for performances.

Appellants have not overcome the evidence from Burton's traffic expert and thus have not sustained the burden of persuading the court that conditions are inadequate for traffic and pedestrian safety related to the performing arts use.

Question 8: Will the proposed land use comply with Criterion 8 with regard to night-time noise from the project site—including the low-frequency noise from performances, the A-weighted noise from performances, the noise from building air conditioners, and, after midnight, the voices of up to 1500 patrons who have been listening to loud music and consuming alcohol, talking as they leave the building and walk to their vehicles, and the noises of patrons starting their vehicles, closing their car doors, and driving away?

With regards to Criterion 8, Burton must provide sufficient evidence to allow the court to find that the proposed project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas. Appellants have the burden of persuasion regarding the aesthetic effects of night-time noise (in contrast to the health effects, which are considered under Criterion 1) from both performance-related noise and noise from patrons. Notably, "Criterion 8 is not . . . a guarantee that aesthetics in an area will never change but ensures that such change will be reasonable." NE Materials Grp., LLC, No. 75-6-17 Vtec, 2018 WL 4200947, at *23 (Vt. Super. Ct. Envtl. Div. June 20, 2018).

A two-part test called the "Quechee test" is used to determine whether a project meets the portion of Criterion 8 relating to aesthetics. In re Katzenbach at ¶ 16. First, the court determines whether the proposed project "will be in harmony with its surroundings—in other words, will it fit the context within which it will be located?" Id. at ¶ 17. If the court finds an adverse impact to aesthetics, the question then becomes whether this adverse impact would be "undue." An adverse impact is not undue if three conditions are satisfied. First, the project must not violate "a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area." Id. at ¶ 20. Second, it must not "offend[ ] the sensibilities of the average person." Id. Finally, the applicant must take "generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings." Id.

The court concludes that given the strengthened conditions imposed as a result of this decision, Appellants have not met the burden to show that nighttime noise resulting from the performance use would be *unduly* adverse. While there may occasionally be sounds that exceed the required standards, as a result of the immediate use of mitigation measures at the time of performance if music becomes too loud, and information that will be obtained from the required permanent sound monitor, incidents of disruptive noise are likely to be rare and remediated,

resulting in occasional noise events that occur no more frequently than unplanned noise events from other sources that occur in a city environment.

Question 9: Will the proposed land use comply with Criterion 8 with regard to night-time noise from off-site parking on residential streets—including the voices of patrons, after midnight, who have been listening to loud music and consuming alcohol, talking as they walk to their cars, and the noises of patrons starting their vehicles, closing car doors, and driving away?

Question 9 again asks if the proposed use satisfies Criterion 8, this time with respect to noise from patrons leaving performances.

Considering the permit conditions imposed by the DRB and District Commission, and the additional conditions imposed in this decision, it is reasonably foreseeable that all activities associated with performance space use on the 266 QCPR property, including patron parking and post-performance conduct of patrons, will occur on site at 266 QCPR under the management of Burton/Higher Ground. The permit conditions are designed to prevent externalization of aspects of the performance use in the form of patron conduct to be absorbed by neighboring properties. Therefore, Appellants have not sustained the burden of demonstrating an unduly adverse effect from the proposed use, and have thus failed to persuade the court that the permits should not be granted.

Question 10: Will the proposed land use comply with Criterion 8 with regard to noise and overuse of Red Rocks Park?

Question 10 again asks if the proposed use satisfies Criterion 8, this time with respect to noise and overuse of Red Rocks Park.

Burton's noise expert, Mr. Duncan, persuasively showed that noise in Red Rocks Park from the proposed use will be minimal, and certainly not unduly adverse. The highest project sound levels in the park are consistent with background noise that already occurs in the area. Noise impacts will occur primarily in a section of the park that is near industrial uses and traffic, and already subject to the HVAC and traffic noises from the ELM. Appellants acknowledged that the section of the park with the highest noise impacts, Double Dog Leg Trail, already experiences various traffic and industrial sounds due to its proximity to Queen City Park Road. Even there, Burton demonstrated that the noise from the project, predominately HVAC noise, would be between 35 to 45 dBA. Project-related noise in the more remote sections of the park will fall well below existing noise levels.

The court does not find Appellants' evidence sufficiently persuasive to show undue adverse noise effects on Red Rocks Park, as described more particularly in the Findings of Fact above. The evidence did not show that the proposed use would cause overuse, particularly in light of the fact that the part closes at dusk and would be closed during much of the time performances would take place, and it is a large city park.

Question 11: Will the proposed land use comply with Criterion 9(K) with regard to the public investment in Red Rocks Park?

Criterion 9(K) requires that the court find that, when a proposed use is located adjacent to governmental and public utility facilities, or other such facilities in which the public has an investment, the use "will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands." 10 V.S.A. § 6086(a)(9)(K) ("Development affecting public investments."). The purpose of Criterion 9(K) is to protect government finances from the burdens that can be caused by new development. Re: St. Albans Grp. & Wal*Mart Stores, Inc., No. 6F0471-EB, 1995 WL 404828 at *19 (Vt. Envtl. Bd. June 27, 1995).

Based on the Findings of Fact and the answer to Question 10 above, the proposed land use will not compromise the public investment in Red Rocks Park.

CROSS-APPELLANT BURTON'S ACT 250 APPEAL QUESTION

Question 1: Does the proposed land use comply with Act 250 Criterion 5 without Permit Condition No. 28, which requires the permittee to provide shuttle services for attendees?

Burton's Question asks if the proposed use satisfies Criterion 5 without the shuttle requirement imposed by the District Commission in Condition #28. The court applies the same rules and tests associated with Appellants' Act 250 Questions 5 and 6, discussed above, to this Question.

The court concludes that for reasons stated above, containment of traffic to and from the site, and keeping predictable traffic on site, is Burton/Higher Ground's responsibility. Given that there is a potential negative impact from patrons using neighboring side streets, and given the importance of the policy of promoting environmentally sound practices, provision of shuttle services needs to be required for large audiences. The condition is appropriate. Burton asks the court to modify the condition by making it "sunset" after a period of time. The court declines to do so in advance as it is unknown what will occur over time. If experience supports the request, Burton can apply for a modification.

SUMMARY AND ORDER

Based on the foregoing, it is hereby ordered:

1. The following conditions are revised or added to the Conditional Use Permit:
   Condition #3 is enlarged from 6 months to one year and the three events of noise assessment shall occur at least 3 months apart.

   Condition #20 is added as follows:
   "In addition to the sound monitoring required by the Operational Management Plan ("OMP"), Burton will install one or more permanent sound monitors at its property line to monitor project sound levels on an ongoing basis. In the event

such monitor(s) detect sound levels that correlate to an exceedance of the equivalent project sound level limit established by the OMP (45 dBA $Leq_{1\text{-}hr}$) or the World Health Organization sleep disturbance guideline (60 dBA L_{Fmax}) at nearby residences, Burton will take immediate steps to correct such exceedance."

Condition # 21 is added as follows:

"Prior to events of 300 or more patrons, Higher Ground will place a partial barrier at the entrance to Central Avenue and another at the entrance to Arthur Court with a large sign that states NO EVENT PARKING. PROCEED TO PARKING LOT (pending approval and coordination with the City of South Burlington for Central Avenue and the City of Burlington for Arthur Court). Prior to events of 750 or more patrons, Higher Ground shall provide traffic control staff at the entrances to Central Avenue and Arthur Court."

Condition #22 is added as follows:

"In addition to the measures outlined in the OMP, Burton shall coordinate with the Cities of Burlington and South Burlington as necessary to ensure that event parking does not take place in the Arthur Court or Queen City Park Road neighborhoods. Such coordination may entail support for residential-only parking in those neighborhoods, funding of tow-trucks to enforce compliance, or other appropriate measures reasonably aimed at ensuring that such off-site parking does not occur."

2. Condition #14 in the Act 250 Permit is modified so that it shall be:

Condition #14:

"On weekdays doors will open for evening events no earlier than 6:30 PM, and on weekends and holidays, no earlier than 6:00 PM. All paid, ticketed Performing Arts Center performances shall end by 12:00 am, except that twelve (12) performances per year are permitted to end by 2:00 am. Those performances may take place only on Fridays and Saturdays, except that performances may take place on any evening preceding a holiday."

3. Subject to the addition of the above conditions, the Appellants' appeals of both the Conditional Use Permit (20-ENV-00010) and the Act 250 Permit (22-ENV-00030) are *denied.* Additionally, Burton's cross-appeal of the shuttle service condition in the Act 250 Permit (22-ENV-00030) is *denied.*

Electronically signed July 10, 2023 pursuant to V.R.E.F. 9 (d).

Mary Miles Teachout

Mary Miles Teachout
Superior Judge (Ret.), Specially Assigned