

VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 20-ENV-00011

Blue Flame Gas Co. Inc. SP & CU

ENTRY REGARDING MOTION

Title: Appellant's Motion for Summary Judgment (Motion: 6)

Filer: Mark F. Werle, Attorney for Appellant Blue Flame Gas Co., Inc.

Filed Date: January 28, 2022

Town of Landgrove's Opposition to Appellant's Motion for Summary Judgment, filed March 14, 2022, by Attorney Merrill E. Bent

Adjoining Landowner's Response to Appellant's Motion for Summary Judgment, filed March 22, 2022, by Attorney George T. McNaughton

Supplement to Adjoining Landowner's Opposition to Appellant's Motion for Summary Judgment, filed September 14, 2022, by Attorney Peter G. Raymond

Appellant's Reply Memorandum in Further Support of its Motion for Summary Judgment, filed September 29, 2022, by Attorney Mark F. Werle

The motion is GRANTED in part and DENIED in part.

Blue Flame Gas Company, Inc. ("Blue Flame") submitted a site plan and conditional use application to the Town of Landgrove ("Town") Zoning Board of Adjustment ("ZBA") to carry out its business operations, generally including the creation of a facility using an existing building for administrative offices, a service center, and related support facilities for its propane business at 3 Valley View Drive in the Town's Commercial District ("the Project"). Blue Flame appealed a ZBA decision denying Blue Flame's proposed site plan and application for a conditional use permit for the Project to this Court. Presently before the Court is Blue Flame's motion for summary judgment. Mot. Summ. J. (filed Jan. 28, 2022).

Blue Flame is represented by Attorney Mark F. Werle. The Town is represented by Attorney Merrill E. Bent. Attorney Peter G. Raymond now represents Interested Party Michael Toole (“Adjoining Landowner”), entering his appearance on June 10, 2022, following the passing of former-counsel Attorney George T. McNaughton. Due to the unique procedural circumstances here, and the absence of any challenges to the untimeliness of the parties’ filings, the Court accepts and considers all filings related to the present summary judgment motion. See Entry Order (entered Jan. 25, 2022) (contemplating an expanded summary judgment briefing schedule); see also Entry Order (entered Apr. 4, 2022) (expanding the briefing schedule further to provide the Adjoining Landowner time to obtain new counsel of record following the death of his attorney).¹

STATEMENT OF QUESTIONS

In the Environmental Division, the Statement of Questions provides notice to other parties and this Court of the issues to be determined within the case and limits the scope of the appeal. In re Conlon CU Permit, No. 2-1-12 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Aug. 30, 2012) (Durkin, J.). Blue Flame’s Statement of Questions presents the following questions for the Court’s review:

1. Is the principal use of Blue Flame’s proposed facility for its propane business (“the Project”) at 3 Valley View Drive in Landgrove (“the Project Site”) a singular “Retail Establishment” as defined in Article VII of the Landgrove Zoning Bylaws (the “Bylaws”), and therefore a permitted use in the Commercial District under § 243.1 of Bylaws, because
 - a. it will be engaged in selling propane, a good

¹ The adopted Summary Judgment Scheduling Order required any party opposing Blue Flame’s motion for summary judgment (to be filed no later than January 31, 2022) to file its opposition papers on or before March 14, 2022—i.e., providing an extended 42-day response period. On March 22, 2022, Adjoining Landowner filed his opposition, which was 8-days late. On April 4, 2022, however, the Court received and accepted a consented-to motion to enlarge the briefing schedule to give the Blue Flame until April 15, 2022, to file a Reply Memorandum. The basis of the enlargement of time was the death of Adjoining Landowner’s attorney, who passed away March 24, 2022. Blue Flame, however, did not file a reply by that deadline.

Rather, Attorney Raymond entered his appearance on June 10, 2022. On June 16, 2022, the Court held a status conference, wherein the parties agreed to a further 60-day extension to complete discussions/filing, and an additional 45-day extension for replies and responses after that (105-days total). See Hr’g Notes (June 16, 2022). Attorney Raymond filed his Supplemental Response to Adjacent Landowner’s opposition on September 14, 2022. Town filed no additional supplement. Blue Flame filed its reply to Adjacent Landowner’s opposition September 29, 2022.

- b. to the general public for personal or household consumption and
 - c. will be rendering services incidental to the sale of propane?
2. Alternatively, is the principal use of the Project a singular “Business Office” as defined in Article VII of the Bylaws, and therefore a permitted use in the Commercial District under § 243.1 of Bylaws, because it is an office from which a commercial or industrial purpose is operated?
 3. Does the Project’s use for the existing building at the Project Site constitute a “multi-use building,” as defined in Article VII of the Bylaws, if the building itself does not contain multiple uses?
 4. Is the Project’s propane storage tank “Bulk Fuel Storage,” as that term is specifically defined in Article VII of the Bylaws, if the tank is buried underground and the propane stored therein is not “for subsequent delivery to distributors or retail dealers or outlets”?
 5. Is the Project’s underground propane storage tank, for storing propane prior to delivery to households and other consumers, an “accessory structure” and/or “accessory use” as defined in § 239 and Article VII of the Bylaws because it is detached from the principal building on the same lot and customarily incidental and subordinate to the Project’s principal building or use?
 6. If the Project is not a “Retail Establishment,” or “Business Office” with an accessory structure or use, is it an “Industrial Use” as defined in Article VII of the Bylaws, and therefore a conditional use in the Commercial District under § 243.1 of Bylaws?
 7. If the Project is subject to Conditional Use review under § 148.1 of the Bylaws, must the Court apply the standard of 24 V.S.A. § 4414(3)(A) (“undue adverse effect”) or that articulated by the Vermont Supreme Court in In re Miller, 170 Vt. 64, 69 (1999) and In re Walker, 156 Vt. 639, 639 (1991) (mem.) (“substantial and material adverse effect”) to the Project instead of the General Condition Use standard of § 148.1 of the Bylaws (“[T]he proposed conditional use shall not affect...”) because the latter standard is impermissibly restrictive and/or prohibitive?
 8. If Conditional Use review is required for the Project, does it satisfy the General and Specific Conditional Use Standards of the Bylaws and is therefore entitled to a zoning permit?
 9. When evaluating the Project for compliance with the Performance Standards in § 320 of the Bylaws, must the Court apply 24 V.S.A. § 4414 (5) (the statute)’s standard of review (“the levels of operation that are acceptable and not likely to affect adversely the use of the surrounding area”) rather than the standard stated in the Bylaws (“to insure [sic] that

any activity on property in Landgrove will have a minimal impact on neighboring properties”) because the latter standard is impermissibly restrictive?

10. Whether as a permitted or conditional use, does the Project satisfy the individual General and Specific Performance Standards of § 320 of the Bylaws, and therefore is entitled to a zoning permit?

11. Whether as a permitted or conditional use, [does] the Project satisfy the requirements of § 420 of the Bylaws, “Commercial District Development”?

12. Whether as a permitted or conditional use, does the proposed site plan satisfy the Site Plan Approval requirements of the Bylaws, including, as applicable, the proposed site the landscaping requirements of § 330 of the Bylaws?

Blue Flame’s Am. Statement of Questions (filed Aug. 25, 2021).

Put briefly, Questions 1 through 6 all concern the proper use classification for the Project—i.e., whether it is a permitted use as a retail establishment or business office with an accessory structure, or a conditional use as a multi-use or industrial use building with an accessory structure. Questions 7 and 8 ask whether, if a conditional use permit is required, what legal standard is applicable when evaluating the Project’s effect on the area and whether the Project satisfies the specific conditional use standards under that threshold. Questions 9 through 12 ask whether the Project satisfies the Bylaws’ general and specific performance standards and requirements for the Commercial District.

DISCUSSION

Blue Flame argues that the undisputed facts entitle it to judgment as a matter of law on Questions 1 through 6 and 9 through 12, and that Questions 7 and 8 are moot because of that judgment. In the alternative, Blue Flame moves for summary judgment on Questions 7 and 8 if the Court concludes conditional use standards may apply. Specifically, Blue Flame argues that the undisputed material facts demonstrate that the Project’s use as a propane business is a permitted use in the Commercial District, and that the Project meets the Bylaws’ performance standards, requirements of the Commercial District, and site plan approval criteria, such that the Project should be permitted. In the alternative, Blue Flame argues that the Town’s conditional

use review is impermissibly restrictive based on applicable statutory law, and that the Project satisfies the general and specific conditional use standards when the considered in light of the less restrictive standards.

The Town and Adjoining Landowner oppose the motion. In support of Town's Opposition, the Town argues that none of the uses of the Property are "incidental" to the other, and as such Blue Flame cannot satisfy Bylaws § 231.1, requiring a lot may only have one principal building and one principal use, and that the Project does not comply with all the performance standards. Similarly, Adjoining Landowner argues that: (1) the 30,000-gallon underground propane tank is not an "accessory structure" but rather the primary use of this parcel, and that the Project's use is as a warehouse, constituting an "industrial use" requiring a conditional use permit; and (2) the Project does not satisfy all the performance standards, specifically as they relate to traffic safety. Neither the Town nor Adjoining Landowner produced any evidence capable of creating a genuine dispute of material fact. See generally Town's Resp. to Blue Flame's Statement of Undisputed Material Facts (filed Mar. 14, 2022) [hereinafter Town's SDMF] (citing Blue Flame's exhibits to argue they do not establish the absence of a genuine dispute or are not admissible but not presenting any evidence itself); see also Adjoining Landowner's Disputed Issues (filed Mar. 22, 2022) (failing to follow procedures outlined in V.R.C.P. 56(c)(2) or otherwise present any evidence supporting a dispute of material fact). As such, both the Town and the Adjoining Landowner's arguments rely on Blue Flame's failure to meet its burden of demonstrating that it is entitled to summary judgment.

Summary Judgment Standard

"Summary judgment is appropriate only where the moving party establishes that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law." Samplid Enters., Inc. v. First Vermont Bank, 165 Vt. 22, 25 (1996) (citations omitted); V.R.C.P. 56(a). Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. Couture v. Trainer, 2017 VT 73, ¶ 9 (citing V.R.C.P. 56(a)). For the purposes of the motion, the Court "will accept as true the allegations made in opposition to . . . summary

judgment, so long as they are supported by affidavits or other evidentiary material.” Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356.

Once the moving party has made that showing, the burden shifts to the non-moving party. Mello v. Cohen, 168 Vt. 639, 639–40 (1998) (mem.). The party opposing a motion for summary judgment “cannot simply rely on mere allegations in the pleadings to rebut credible documentary evidence or affidavits . . . but must respond with specific facts that would justify submitting [their] claims to the factfinder.” Robertson, 2004 VT 15, ¶ 15 (citing Gore v. Green Mtn. Lakes, Inc., 140 Vt. 262, 266 (1981); V.R.C.P. 56(e); State v. G.S. Blodgett Co., 163 Vt. 175, 180 (1995)). In responding to a statement of undisputed material facts, the nonmoving party may present evidence demonstrating a genuine dispute, establish that the evidence does not demonstrate the absence of a genuine dispute, or argue that the evidence supporting the moving party’s assertion is inadmissible. V.R.C.P. 56(c)(2). The format must be “a paragraph-by-paragraph response, with specific citations to particular parts of materials in the record that the responding party asserts demonstrate a dispute” or the moving party’s failure to meet its burden.” Id. “The responding party must reproduce each numbered paragraph of the moving party’s statement before including the response thereto.” Id.

The evidence, on either side, must be admissible. See V.R.C.P. 56(c)(2), (4); Gross v. Turner, 2018 VT 80, ¶ 8. If a party asserts that the evidence cited in support of a dispute of a fact could not be presented in an admissible form, the party may object to the material. V.R.C.P. 56(c)(4).

Undisputed Material Facts

On January 28, 2022, Blue Flame filed a Statement of Undisputed Material Facts (Blue Flame’s SUMF) in support of their Motion. Town responded with their Statement of Disputed Facts (Town’s SDMF) on March 14, 2022.² On March 22, 2022, Adjoining Landowner filed a “Disputed Issues,” statement. However, the filing identified no specific disputed material facts,

² The Town objected to the admissibility of Blue Flame’s Exhibits 3 and 11, on the basis that these reports were responsive and not produced to the Town during discovery, and requests that the Court not consider these Exhibits. Town’s Opp. at 3–4. Because the Court does not rely upon Exhibits 3 and 11 when ruling upon the pending motion, we need not address the admissibility of these Exhibits in relation to the pending motion.

objections, or shortcomings within Blue Flame's SUMF, and failed to comply with the paragraph-by-paragraph formatting. Instead, the filing appears to rephrase Blue Flame's Statement of Questions. On September 14, 2022, Adjoining Landowner filed a supplement to his original opposition, but in so doing, still did not come forward with any independent objections or disputes with Blue Flame's SUMF, but rather relies on the Town's SDMF.

The Court sets out the following facts for the sole purpose of deciding the pending motion, adopting those facts that are undisputed or inadequately disputed, adjusting the facts accordingly. What follows is not a list of the Court's factual findings, since findings of fact may only be announced after a merits hearing. See Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) ("It is not the function of the trial court to find facts on a motion for summary judgment").

1. Blue Flame owns the property at 3 Valley View Drive, and owns Valley View Drive, a private road, in the Town of Landgrove (the Property).

2. Blue Flame plans to construct a facility using the existing building at the Property for administrative offices, a service center, and related facilities support for its propane business (the Project). Eugair Aff. at ¶¶ 12–13.

3. Improvements to the Property include a parking/loading area for the office, service, and delivery staff, and delivery and service trucks; and a fenced/screened area for consumer tank storage. Id. at ¶ 13; Ex. 1: Drawing C-2.

4. The Project will also include the installation of an underground 30,000-gallon propane tank for the storage of propane inventory prior to its delivery to retail customers in the surrounding area. Id.

5. The Project will not emit smoke other than what is customary for heating the existing building with propane and exhaust from vehicles visiting the site. Eugair Aff. at ¶ 48. This type of smoke does not exceed the density set by Chart No. 2 of the Ringlemann Smoke Chart. Id. at ¶ 49; Ex. 4.

6. Propane is nontoxic and not considered a noxious gas. Eugair Aff. At ¶ 50; Ex. 5 at 7.

7. The only time any propane gas would be released from the proposed underground storage tank is during product transfer between tank and truck. Eugair Aff. at ¶ 54.

8. The transfer hoses at this facility will be equipped with low fugitive emission fittings which release 0.09 cubic centimeter of liquid propane when disconnecting. Id. at ¶ 55; Ex. 6.

9. This amount dissipates immediately within a few feet of the transfer point. Eugair Aff. at ¶ 56.

10. The limited fugitive emissions will not cause propane or propane odor to be detectable at the property line, which is at least 189 feet from where propane would be transferred. Id. at ¶ 56; Ex. 1: Drawing 1; Ex. 2:SO; Ex. 2:4.

11. The propane storage facility has been designed to minimize the potential for inadvertent propane releases from storage containers during transfer operations. Eugair Aff. at ¶ 52; Ex. 7.

12. Vibration from the Project will be limited and the only potential source of vibration from the Project will be from the vehicular traffic from office staff, weekly deliveries, and Blue Flame's delivery and service trucks. Eugair Aff. at ¶ 61. All of these vehicles are slow-moving.

13. The project does not involve blasting, drilling, or construction activity that would cause vibration. Eugair Aff. at ¶ 60.

14. This limited potential for vibration will not cause vibration displacement at or beyond the property line, this includes one property line approximately 189-feet away (north/uphill) from the proposed tank loading area, and the Project's line with Route 11, which is approximately 135-feet downhill from the proposed tank loading area. Eugair Aff. at ¶ 64; Ex. 1: Drawing 1.

15. The Project proposes no additional exterior lighting than what is already installed on the existing building. Id. at ¶ 65.

16. The only sign for the project would have dimensions of 66" x 42" or 19.25 sq/ft., smaller than 20 square feet. Id. at ¶ 81; Ex. 8.

17. The sign will not be illuminated, will be installed on the existing signpost at the property, and will otherwise be constructed to comply with the Bylaws § 365-Sign Standards.³ Eugair Aff. at ¶ 82.

18. The storage and transfer of propane does not result in any discharges into sewers or bodies of water. Id. at ¶ 57.

19. The Project's administrative offices will use the existing building and its septic system. Id. at ¶ 58.

20. The Project will not emit odor.

21. While propane contains an additive odor as a safety feature to detect leaks, should they occur, the propane storage tanks are unlikely to emit propane. Should leakage occur, this is immediately corrected.

22. During normal operation, a minimal amount of propane is released during product transfer between tank and truck. Id. at ¶ 54.

23. As discussed in ¶¶ 7 through 11, fugitive emissions are limited and undetectable at the property line.

24. The Project will not result in the dumping of refuse or waste material for landfill beyond normal trash and recycling use. Eugair Aff. at ¶ 59.

25. The Project has received a permit from the Department of Public Safety's Division of Fire Safety. Id. at ¶ 45; Ex. 10.

26. The Project's underground propane storage tank is within the one-thousand-foot radius of Flood Brook School's well, a groundwater Source Protection Area ("SPA"). Eugair Aff. at ¶ 47; Ex. 1: Drawing 1; Ex. 12.

27. The propane storage facility is not a prohibited land use in a Non-Transient Non-Community Source Protection Area under the Vermont Water Supply Rules. Eugair Aff. at ¶ 47; Ex. 12.

³ No party asserts that Blue Flame's proposed sign Does not conform to the sign standards contained in Bylaws § 365-Sign Standards. The Court, therefore, sees no need to detail them here for review.

28. The Project complies with the minimum separation distances required by the Vermont Water Supply Rules. Eugair Aff. at ¶ 47; Ex. 1: Drawing 1; Ex. 1: Drawing C-2.

29. There is no grading in excess one (1) foot vertical to two (2) feet horizontal. Eugair Aff. at ¶ 80; Ex.1: Drawing C-2.

30. The Property will be accessed by a single driveway that will connect to Valley View Drive (approximately 55-feet from where it meets Route 11), which will continue to serve as the single access point to the Property as well as the existing properties to the north of the Property. Eugair Aff. at ¶ 67; Ex. 1: Drawing C-2; Ex. 1: Drawing A.

31. The Project uses the existing building, which has an existing 40-foot front yard setback with lawn and existing vegetation. Eugair Aff. at ¶ 63; Ex. 1: Drawing 1; Ex. 2:2, 6.

32. The parking/loading areas will be located at the rear of the building. Eugair Aff. at ¶ 74; Ex. 1: Drawing 1, Drawing C-2.

33. The parking/loading area is at least 189 feet from the nearest residential property line. Eugair Aff. at ¶ 74; Ex. 1: Drawing 1, Drawing C-2.

34. Blue Flame intends to transition to renewable propane once it becomes available in the Northeast. *Id.* at ¶ 20. The facility planned at the Property will be able to store and facilitate propane produced from renewable sources because storage of renewable propane is identical to conventional propane. *Id.*

35. The Property was evaluated by a Professional Wetland Scientist from Otter Creek Engineering. *Id.* at ¶ 32.

36. There are no recognized wetlands in the Project Site. *Id.* at ¶ 34; Ex. 15.

Conclusions of Law

I. Use Classification of this Project (Questions 1–6)

The Property and the Project will be housed in the Town's Commercial District. Relevant to the present matter, permitted uses in the Commercial District include retail establishments or

business offices and those uses' accessory uses and structures.⁴ Bylaws § 243.1. Conditional uses in this district include multi-use buildings or industrial uses, along with those uses' accessory uses and structures. *Id.* Bulk fuel storage is a prohibited use in the Commercial District. Compare Bylaws § 238.1 ("Prohibited Uses") with § 243.1 (Commercial Districts Permitted and Conditionally Permitted). Blue Flame's Questions 1 through 6 all concern the proper use classification for this project—i.e., whether it is a permitted use as a retail establishment or business office with an accessory structure, a conditional use as a multi-use or industrial use building with an accessory structure, or unpermitted bulk fuel storage.

This determination relies on interpreting the Bylaws. In interpreting zoning ordinances, the Court applies the rules of statutory construction. *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," and therefore the interpretation "must not allow a significant part of [an ordinance] to be rendered surplusage or irrelevant." *In re Miller*, 2009 VT 36, ¶ 14, 185 Vt. 550. If there is no plain meaning, the Court will "attempt to discern the intent from other sources without being limited by an isolated sentence." *In re Stowe Club Highlands*, 164 Vt. 272, 280 (1995). In construing statutory or ordinance language, the paramount goal is to implement the intent of its drafters. *Morin v. Essex Optical/The Hartford*, 2005 VT 15, ¶ 7, 178 Vt. 29. The Court will therefore "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." *Bjerke Zoning Permit Denial*, 2014

⁴ Accessory uses and accessory structures are considered a permitted use only when they are accessory to a permitted use and are considered a conditional use requiring approval from the Zoning Board of Adjustment when they are accessory to a conditional use.

VT 13, ¶ 22. With these provisions of interpretation in mind, the Court turns to the applicable provisions.

a. Unpermitted Use: Bulk Fuel Storage

The undisputed material facts demonstrate that no part of the Project can be classified as “Bulk Fuel Storage” as defined in the Bylaws. The Bylaws define “Bulk Fuel Storage” as “[t]he storage of chemicals, petroleum products, and other similar materials in above-ground containers for the subsequent resale to distributors or retail dealers or outlets.” Bylaws, Art. VII (“Bulk Fuel Storage”). Here, the undisputed material facts demonstrate that the propane will be stored in a below-ground storage container, and that Blue Flame’s customers are end users—i.e., it does not wholesale propane to distributors, retail dealers, or outlets. As such, the undisputed material facts demonstrate that no part of the Project is “Bulk Fuel Storage.” The Court therefore **GRANTS** summary judgment to Blue Flame on Question 4.

b. Permitted or Conditional Uses

Giving the nonmoving parties the benefits of all reasonable doubts and inferences, however, the undisputed material facts do not demonstrate that Blue Flame is entitled to summary judgment on Questions 1, 2, 3, or 6. These Questions concern whether the Project is a permitted or conditional use in the Commercial District. Relevant to this consideration, Blue Flame argues that the Project could be defined as a “retail establishment” or “business office” and therefore regarded as permitted uses. Bylaws § 238.1. Alternatively, Blue Flame argues that the Project could constitute a conditional use as an “industrial use” or a “multi-use building.” Bylaws § 238.1.

From the undisputed material facts, with appropriate doubts and inferences afforded to the non-moving parties, the Court cannot determine which one of these uses encompasses the Project. Even so, the undisputed material facts demonstrate that the Project could satisfy any one of these definitions,⁵ though the Court finds it unlikely that the Project satisfies the “industrial use” definition. As such, Blue Flame has failed to meet its burden of demonstrating

⁵ If the Court concluded that the undisputed material facts demonstrate that the Project is both a retail establishment and a business office, then the proper conclusion is that it is a “multi-use building.”

that the undisputed material facts entitle it to summary judgment. While it is largely a legal conclusion that remains disputed, the Court finds that this conclusion is best determined after a merits hearing and within the context of determined facts. Accordingly, the Court **DECLINES** to enter summary judgment on Blue Flame's Questions 1, 2, 3, or 6.

c. Accessory Use or Structure

Finally, the parties dispute whether the 30,000-gallon buried propane tank is an accessory use and/or structure, or the primary use and/or structure for the Project.

Because accessory structures, in the context of the Bylaws, are necessarily defined by the primary use of the Property, and the Court concludes that summary judgment with respect to the overall use of the Project here is premature; the Court cannot reach a conclusion as to whether the underground tank is accessory or primary based on the facts presented. Further, the Court finds that this, like the resolution of Questions 1 through 3 and 6, are disputed legal conclusions best determined through the merits process. To the extent the Town disputes that the tank is not an accessory use, but rather a primary use, the Court finds that this legal issue is best resolved in the context of determined facts. Accordingly, the Court **DECLINES** to enter summary judgment on Blue Flame's Question 5.

II. Conditional Use Review (Questions 7–8)

In the event that the Court finds that conditional use review applies to this project, Blue Flame moves for summary judgment on Question 7 and 8, arguing that the Town's conditional use review is impermissibly restrictive, and that the project satisfies the general and specific conditional use standards when the considered in light of the less restrictive statutes and case law. The Court concludes that the plain language of the Bylaws is impermissibly restrictive and applies the standard directed in 24 V.S.A. § 4414(3)(A); but that there remains a dispute of material fact as to whether the project satisfies the general and specific conditional use standards.

With regards to Blue Flame's Question 7, the parties do not dispute which conditional use criteria the Project must satisfy, should this Court conclude that the Project constitutes a conditional use as opposed to a permitted use, but rather Blue Flame's burden in demonstrating

that the Project satisfies those criteria. Specifically, Question 7 asks whether the Bylaws requirement that the Project “shall not affect” the criteria is impermissibly restrictive.

“[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”). See also, Hunters, Anglers & Trappers Ass’n of Vt., 2006 VT 82, ¶ 23, 181 Vt. 12 (Burgess, J., concurring) (quoting Hinesburg, 135 Vt. at 486 (1977) (quotations omitted)). As such, 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 defines the upper limits of the municipalities authority to regulate.

The Town’s authority to adopt zoning ordinances exists by virtue of authority delegated in Chapter 117 of Title 24, which contains terms, limits, and conditions to that authority. State v. Sanguinetti, 141 Vt. 349, 353 (1982) (citing Town of Waterford v. Pike Industries, Inc., 135 Vt. 193, 195 (1977)). Relevant to this Question, one such permissible zoning ordinance that municipalities may adopt are conditional uses within each zoning district. 24 V.S.A. § 4414(3) (“Any of the following types of regulations may be adopted by a municipality in its bylaws” including “conditional uses”). The statute provides that “general standards *shall require that the proposed conditional use shall not result in an undue adverse effect* on any of the” five enumerated general criteria. 24 V.S.A § 4414(3)(A).

Here, while the Bylaws closely mirror this conditional use authorization, it contains a critical distinction. The Bylaw’s require that “[t]he proposed conditional use *shall not affect*” the six⁶ enumerated conditional use standards. Blue Flame argues that this is impermissibly restrictive, as the delegating statute requires that the “the proposed conditional use shall not

⁶ While the Bylaws include an additional general standard not contemplated by the delegating statute—i.e., the requirement that the reviewing body determine whether there is an effect on “[t]he quality of the environment of the area”—that standard is not in dispute here, and as such, the Court declines to comment on its appropriateness. Baker v. Town of Goshen, 169 Vt. 145, 152 (1999) (stating that questions on appeal “must be a necessary part of the final disposition of the case to which it pertains”).

result in an *undue adverse effect*” on these criteria, which is less restrictive than “shall not affect.” The Town argues that the standard is consistent because the ZBA’s findings included words like “significantly impact” and “undesirable impact,” thus showing that the Town interprets § 148.1 to require that the Project not have a “substantial and material adverse effects,” which is the test used to determine whether there is an “undue adverse effect” in our case law. See Town’s Opp. at 12 (citing In re Miller, 170 Vt. 64, 69 (1999) (reiterating the holding “that the adverse effect test must be applied reasonably to prohibit only substantial and material adverse effects”)).

As such, the Court concludes that there is no dispute of material (or legal) fact here. The plain language of the § 148.1 exceeds the scope of what the Town may regulate by making the Bylaw more restrictive than permitted by statute. Compare 24 V.S.A. § 4414 (“shall not result in an undue adverse effect”) with Bylaws § 148.1 (“shall not affect”). While the plain language of the Bylaw is unduly restrictive on its face, the Town concedes that the proper application requires it not have “substantial and material adverse effect,” as consistent with § 4414. Miller, 170 Vt. at 69. Thus, the parties agree that the Bylaws require that the Project not have a substantial and material adverse effect on any of the conditional use standards, applying the language from 24 V.S.A. § 4414(3) and Miller and In re Walker, 156 Vt. 639, 639 (1991) (mem.) rather than the Bylaw. As such, the Court **GRANTS** summary judgment to Blue Flame on Question 7 and, should the Court conclude that the Project proposes a conditional use, a determination of compliance with the conditional use standards will be based on whether the Project will have an “undue adverse effect” on any of the conditional use criteria as mandated by 24 V.S.A. § 4414(3), applying the appropriate “substantial and material adverse effect” test from our case law to any conditional review analysis, if necessary. See Miller, 170 Vt. at 69; Walker, 156 Vt. 639. Because the Court cannot conclude if conditional use review will be necessary, however, the Court declines to consider whether the Project satisfies the general and specific conditional use standards. See Baker v. Town of Goshen, 169 Vt. 145, 152 (1999) (stating that issues before the Court “must be a necessary part of the final disposition of the case to which it pertains”). Accordingly, the Court **DECLINES** to enter summary judgment for Blue Flame on Question 8.

III. Performance Standards (Questions 9–10)

Blue Flame asserts that it is entitled to summary judgment on Question 9 and 10. Question 9 again asks if the Bylaw's impose an impermissibly restrictive legal standard for reviewing whether a Project complies with the performance standards criteria. Question 10 asks whether the Project satisfies the general and specific performance standards enumerated in § 320 of the Bylaws.

a. Applicable Performance Standards Legal Review

Blue Flame asks whether the Court should apply the Bylaws' performance standard review requirement or if it is impermissibly restrictive, requiring it to apply the review standard outlined in 24 V.S.A. § 4414(5). Specifically, the Town's adopted standards notes that they were adopted to ensure projects will have "minimal impact on neighboring properties." Bylaws § 320. Blue Flame argues that this standard provides no effective guidance as to how the standards will be measured, gives "unbridled discretion" to the Town in approving projects, and exceeds the scope of authorizing municipalities to adopt zoning standards that are "acceptable and not likely to affect adversely the use of the surrounding area" 24 V.S.A. § 4414(5).

On this issue, the Court again notes that "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." Montpelier, 2012 VT 32, ¶ 20; see *supra*, Discussion of Dillon's Rule. Section 4414(5) authorizes municipalities to "specify acceptable standards or levels of performance" so long as the municipality "specifically describe[s] the levels of operation that are acceptable and not likely to affect adversely the use of the surrounding area" by emitting any of the enumerated pollutants. 24 V.S.A. § 4414(5).

Here, the Town adopted its acceptable performance standards to ensure "that any activity on property in Landgrove will have a *minimal impact* on neighboring properties," rather than creating those standards to guard against *adversely* affecting the surrounding area. Bylaws § 320 (emphasis added). While this plain language is impermissibly restrictive, the Court cannot conclude from the undisputed material facts that the actual standards adopted within § 320, including specific limits and standards relative to various pollutants and impacts, are

impermissibly restrictive, as the Court does not have evidence tending to show that the actual standards exceed the scope of permissible restrictions. Cf., e.g., JSCL, LLC CU Permit, 2021 VT 22, ¶ 18, 214 Vt. 359 (noting the Town of Ferrisburgh set its noise performance standard as 70 dBA at the property line as “likely based on decisions from the former Environmental Board and this Court that addressed whether noise from proposed projects would have *unduly adverse* aesthetic impacts in violation of Criterion 8 of Act 250” (emphasis added)).

The Court now turns to Blue Flame’s assertion that the performance standards provide no effective guidance as to how the standards will be measured and gives “unbridled discretion” to the zoning board in approving projects. Of the adopted performance standards, only some provide specific levels: noise, smoke, noxious gases, and vibrations. Performance standards relative to lighting and odor offer a more subjective interpretation for acceptable levels. Bylaws § 321 (restricting uses which “exceed . . . [l]ighting or signs which create glare, which *could impair* the vision of a driver of any motor vehicle, or which *unnecessarily illuminate* beyond the property boundaries,” or “[e]mit any non-agricultural odor which is *considered offensive*.” (emphasis added)).⁷ Finally, the performance standards outright prohibit any use that may cause a fire, explosion, or safety hazard; harmful wastes to be discharged; or result in the dumping of refuse and waste material for landfill. Id. All these standards or restrictions are to be measured at the individual property line. Id.

The Court finds that the Town clearly provided the permissible levels of sound, smoke, noxious gases, and vibrations that a project may emit at the Property line. These levels provide effective guidance as to how an operation is measure and appropriately limits the local boards discretion in reviewing a project. To the extent that Blue Flame argues that these standards were impermissibly adopted to ensure “minimal impact” rather than to guard against “adverse effects,” Blue Flame has not demonstrated that these standards are impermissibly restrictive. As such, the Court must **DECLINE** to issue summary judgment to Blue Flame on the appropriate legal analysis at this time as it pertains to sound, smoke, noxious gases, and vibrations.

⁷ Yes. It is truly so artlessly drafted.

As to the Town’s outright prohibition of projects that may cause a fire, explosion, or safety hazard; harmful wastes to be discharged; or result in the dumping of refuse and waste material for landfill at the property line, the Court again cannot conclude that these standards fail to provide guidance or limit discretion. Rather, these standards demonstrate that the acceptable level of hazard, waste, or refuse from any project at the property line is none. Again, to the extent that Blue Flame argues that these standards were impermissibly adopted to ensure “minimal impact” rather than to guard against “adverse effects,” the Court concludes that Blue Flame has not demonstrated that these standards are impermissibly restrictive. Again, the Court must **DECLINE** to issue summary judgment to Blue Flame on the appropriate legal analysis at this time as it pertains to safety hazards, discharges of harmful wastes, and dumping of refuse.

Finally, to the extent that light and odor provide vague standards here, the Court concludes these performance standards are inconsistent with the delegating statute because they do not “specifically describe the levels of operation that are acceptable and not likely to affect adversely the use of the surrounding area” 24 V.S.A. § 4414(5). Rather, these standards only offer subjective restrictions, such as that the project cannot emit an odor that is “*considered offensive*” or “*unnecessarily illuminate[s]*” light beyond the property boundaries. To the extent that the Court must conclude that the project satisfies these performance standards,⁸ the Court will consider whether the odor or light are not likely to affect adversely the use of the surrounding area for the same reasons discussed above in the discussion of the conditional use standards. See 24 V.S.A. § 4414(5); see *supra*, Discussion of Dillon’s Rule. However, because there is no genuine dispute that the Project complies with the lighting and odor performance standards, as discussed below, the Court determines that the issue is **MOOT** and therefore need not be reviewed at trial.

b. Whether the Project Satisfies the General and Specific Performance Standards

As noted above, the Town has adopted several General and Specific Performance Standards pursuant its authority granted in 24 V.S.A. § 4414(5). With regards to whether the

⁸ The Town only disputes that the Project does not satisfy the noise performance standard, and Adjoining Landowner only argues that the Project does not satisfy the fire, explosion, or safety hazard performance standard. Thus, it is likely that this issue is also moot.

Project complies with these standards, it is undisputed that the Project satisfies several of the general and specific performance standards. The Court finds, however, that there remains a genuine dispute of material fact on others, and accordingly **DECLINES** to enter summary judgment for Blue Flame on Question 10 but will rely upon the undisputed material facts to limit the scope of this Question at trial.

The general performance standards required by the Bylaws provide that:

In all districts uses are not permitted which exceed any of the following standards measured at the individual property line:

- a. Emit noise in excess of 70 decibels.
- b. Emit any smoke in excess of Ringelmann Chart No. 2.
- c. Emit any noxious gases which endanger the health, comfort, safety, or welfare of any person, or which have a tendency to cause injury or damage to property, business, or vegetation.
- d. Cause as a result of normal operations a vibration that causes displacement of 0.002 of one inch.
- e. Lighting or signs which create glare, which could impair the vision of a driver of any motor vehicle, or which unnecessarily illuminate beyond the property boundaries.
- f. Cause fire, explosion, or safety hazard.
- g. Cause harmful wastes to be discharged into a sewer system, stream, or other body of water.
- h. Emit any non-agricultural odor which is considered offensive.
- i. Result in the dumping of refuse and waste material for landfill. Loam, rock, stone, gravel, sand, cinders, stumps, and soil may be used for landfill.

Bylaws § 321. Additionally, the Bylaws include the following specific performance standards:

322.1 – Storage of Flammable Liquids. The storage of any flammable liquid in tanks above ground or underground shall conform to the standards set by the Vermont Department of Labor and Industry Fire Prevention Division or the Department of Environmental Conservation Waste Management Division, as applicable.

322.2 – Screened Service Area Requirements. In any district, all areas designated, used or intended to be used as service areas for

any structure or land use, other than one-family and two-family dwelling units, the Planning Commission or Zoning Board of Adjustment, as applicable, may require that the area be screened from view with either a wall, a solid fence, or evergreens to a height of at least five (5) feet above grade level on all sides where the adjacent land is in a residential district or residential use.

322.3 – Grading. No grading, cut, or fill shall be carried out in any district which leaves the slope of the finished grade in excess of one (1) foot vertical to two (2) feet horizontal, where such area could create an erosion problem or other hazard or impact on adjoining roads or property.

Bylaws § 322.1–322.3.

Here, there remains a dispute of material fact, particularly with regards to whether the Project satisfies the general performance standards for noise and safety hazards, and specific performance standard for storage of flammable liquids and screening. Specifically, with regards to noise, while Blue Flame’s noise report shows that the sounds produced by the pumping and backup alarm noises will not exceed 70 dBA at any property boundary line, the report does not consider noise from the trucks starting or accelerating within the Property. Ex. 3. With respect to safety hazards, while Blue Flame’s traffic report concludes that the “project is not creating a safety hazard,” it reaches this conclusion based on current traffic numbers rather than the projected numbers. Ex. 11. With respect to screening, while the Project uses 23 evergreen trees at least five feet above grade level to screen the parking/loading area, there are disputed facts regarding whether this screening is sufficient to have “screened [it] from view” from the adjacent residential uses.

Finally, though not challenged by the Town or Adjoining Landowner, the undisputed material facts do not demonstrate that Blue Flame has satisfied the specific performance standards for storage of flammable liquids. The Bylaws require that the storage tank “conform to the standards set by the Vermont Department of Labor and Industry Fire Prevention Division^[9] or the Vermont Department of Environmental Conservation Waste Management Division, as

⁹ There is no Fire Prevention Division within the Vermont Department of Labor. The Vermont Department of Public Safety (DPS), however, does have a Division of Fire Safety. It is undisputed that Blue Flame received a permit from DPS’s Division of Fire Safety. Ex. 10.

applicable.” Bylaws § 322.1. While it is undisputed that Blue Flame received a permit from the Division of Fire Safety of DPS, Vermont’s Department of Environmental Conservation Waste Management and Prevention Division’s Underground Storage Tank Rules “apply to persons who own or operate, install, remove, repair, or test underground storage tank systems.” Underground Storage Tank Rules § 8-102, 16-3 Vt. Code R. § 203 (WL) (2020) [hereinafter “VUST Rules”].¹⁰ Blue Flame, however, has not demonstrated that the Project conforms with the VUST Rules. Furthermore, a cursory review of the VUST Rules raises some concerns for the Project getting permitted under these rules as proposed. It is undisputed that the tank is within 1,000-feet of the Flood Brook School’s well, which Blue Flame acknowledges is a Non-Transient, Non-Community (NTNC) Source Protection Area (SPA). See *Eugair Aff.* at ¶ 47. The VUST Rules prohibit siting any category one underground storage tank system within such NTNC SPAs. VUST Rules § 8-402(a)(1). Accordingly, the Court **DECLINES** to enter summary judgment to Blue Flame on Question 10.

It is undisputed, however that the Project satisfies the general and specific performance standards in the Bylaws with respect to smoke, noxious gases, vibrations, lighting, discharges of waste, odor, dumping of refuse, storage of flammable liquids, and grading.¹¹ See *supra*, Undisputed Material Facts ¶¶ 5–29; see Town’s Opp. at 13 (acknowledging that Blue Flame’s project would meet some performance standards, and disputing only noise and screening); see Adjoining Landowner’s Resp. at 4 (challenging only noise, vibrations, and odor, though insufficiently to raise a genuine dispute in light of the V.R.C.P. 56 requirements); see also Adjoining Landowner’s Suppl. Opp. at 3 (challenging the safety hazards performance standard in light of the traffic study’s perceived inadequacies).

Specifically, the undisputed material facts demonstrate that the Project will not emit smoke other than what is customary for heating the existing building with propane and exhaust

¹⁰ Available on WestLaw and at <https://dec.vermont.gov/sites/dec/files/wmp/UST/UST-Rules.pdf>.

¹¹ Adjoining Landowner, in his original opposition, argues that the Project does not satisfy the performance standards for vibrations and odor. In so opposing, however, Adjoining Landowner failed to produce “a paragraph-by-paragraph response, with specific citations to particular parts of materials in the record that the responding party asserts demonstrate a dispute” or point to deficiencies in the record showing that Blue Flame failed to meet its burden, and the exhibits filed in support of his general opposition fail to raise a genuine dispute on these standards.

from vehicles visiting the site. The parties do not dispute that this type of smoke does not exceed the density set by Chart No. 2. As such, the Project satisfies the performance standards for smoke. Bylaw § 321(b).

There is no genuine dispute regarding the noxious gas performance standard. The undisputed material facts demonstrate that propane is nontoxic and not considered a noxious gas. The only time any propane gas is released is during product transfer between tank and truck, which will be limited to 0.09 cc of liquid propane when disconnecting. This amount dissipates immediately within a few feet of the source and will not cause propane or propane odor to be detectable at the property line because nearest line is at least 189 feet from where propane would be transferred. The propane storage facility has been designed to minimize the potential for inadvertent propane releases from storage containers during transfer operations. As such, the Project satisfies the performance standards for noxious gases and odor. Bylaw § 321I, (h).

Regarding vibrations, the undisputed material facts demonstrate that the only potential source of vibration from the Project will be from the vehicular traffic from office staff, weekly deliveries, and Blue Flame's delivery and service trucks. The nearest residential property line is approximately 189-feet, north/uphill, from the proposed tank loading area. Route 11 is closer at approximately 135-feet downhill from the proposed tank loading area, but regularly experiences such vehicular traffic. The Project does not involve blasting, drilling, or construction activity that may cause vibration. The slow-moving vehicles that will be coming into and going from the site will not cause vibration displacement at the property line. As such, the Project satisfies the performance standards relative to vibrations. Bylaw § 321(d).

The undisputed material facts demonstrate that the Project proposes no additional exterior lighting other than what is already on the existing building. The Project will have a sign, but the sign will not be illuminated, will be installed on the existing signpost at the property, and will otherwise be constructed to comply with the Bylaw § 365-Sign Standards. As such, the Project satisfies the performance standards for lighting. Bylaws § 321I.

It is undisputed that the storage and transfer of propane will not result in any discharges into sewers or bodies of water. The Project will use the existing building and its septic system for

the administrative offices. Therefore, the Project satisfies the performance standards governing harmful waste discharges. Bylaws § 321(g).

The parties do not dispute that the Project will not result in the dumping of refuse and waste material for landfill beyond normal trash and recycling permitted with a use as a business office or retail establishment. Thus, while the parties do not concede that the use is a business office or retail establishment, it is not disputed that the Project—regardless of use classification—satisfies the performance standard for dumping of waste material and refuse. Bylaws § 321(i).

Finally, the undisputed material facts demonstrate that there is no grading in excess one foot vertical to two feet horizontal. Thus, the Project complies with the grading specific performance standard.

Accordingly, while the Court **DECLINES** to enter summary judgment on the entirety of Question 10, the Court concludes that it is appropriate to **LIMIT** the scope of review on Question 10 to only whether the Project complies with the noise, safety hazard, screening, and storage of flammable liquids performance standards, based on the conclusions above.

IV. Commercial District Development Requirements (Question 11)

To prevent commercial strip development and encourage orderly growth, the Town adopted several standards with which all development in the Commercial District must conform. Bylaws § 420. Those standards include limits related to ingress and egress on Route 11, setbacks, landscaping requirements, parking requirements, and appropriate screening of any storage areas. Bylaws §§ 421–425. There is no dispute that the Project satisfies requirements for: (1) the ingress from and egress to Route 11, (2) the building setbacks, and (3) landscaping requirements. The Project will be accessed by a single driveway, which connects to Valley View Drive approximately 55-feet from where it meets Route 11. This serves as the single access point to the Project, which complies with Bylaws § 421. The existing building, which will house the Project, has an existing 40-foot front yard setback, and the parking/loading area is located in the rear of the building, satisfying Bylaws § 422, which require a front yard setback of at least 40 feet. Further, there is a landscaped area between Route 11 and the building that is greater than 30-feet in depth. The Project mostly utilizes existing landscaping but will add some evergreens and

hedges along Route 11 “to create a visually pleasing area along Route 11” thereby satisfying the landscaping requirements of the commercial district development requirements. Bylaws § 423(b).

There is, however, a genuine dispute regarding whether the Project satisfies the parking area and screening requirements. Specifically, from the undisputed material facts, it is not clear whether the Project’s parking/loading area meets the tree requirements set forth in Bylaws § 424(b), if applicable to this parking/loading area. Further, as noted above, there is a genuine dispute regarding whether Blue Flame’s screening proposal is adequate. Bylaws § 425. Accordingly, the Court **DECLINES** to enter summary judgment to Blue Flame on Question 11, but otherwise **LIMITS** the scope of review to whether the Project complies with Bylaws §§ 424–425 of the Commercial District Development Requirements.

V. Site Plan Approval Requirements (Question 12)

Pursuant the delegation in 24 V.S.A. § 4414(3)(B) and § 4416, the Town has adopted specific site plan review criteria. Bylaws § 153.2. Those site plan review criteria require that the Planning Commission consider:

- a. Maximum safety of vehicular circulation between the site and the road network;
- b. Adequacy of circulation for vehicles and pedestrians, parking and loading facilities, with particular attention to safety.
- c. Adequacy of landscaping, screening, exterior lighting, and setbacks in regard to achieving maximum compatibility and protection of adjacent property.
- d. Protection of the utilization of renewable energy resources.
- e. The size, location, and design of any signs.
- f. Other matters specified in these Bylaws.

Bylaws § 153.2(a)–(f). The only “[o]ther matter[] specified in the Bylaws” addressed on appeal or raised by any party is the wetlands state requirements. See Bylaws § 316.

The undisputed material facts demonstrate that Blue Flame is entitled to summary judgment on some elements of site plan review, but not others. Accordingly, the Court must **DECLINE** to enter summary judgment on the entirety of Question 12. However, the Court again

will engage with the undisputed material facts for purposes of limiting the scope of the Court's review for trial.

The Court finds that it is undisputed that the project satisfies the site plan requirements for: (1) protection of the utilization of renewable energy resources, (2) the size, location, and design of any signs, and (3) other matters specified in these Bylaws, specifically notification to Vermont Department of Water Resources. The parties do not dispute that Blue Flame is committed to protecting utilization of renewable resources and is prepared to transition to renewable propane if it become available and serves to compliment renewable energies through standby power. The Project is planned in a manner such that Blue Flame will be able to store propane produced from renewable sources. As such, the Project complies with Bylaws § 153.2(d). The parties do not dispute that the sign complies with the sign standards enumerated in Bylaws § 365. We therefore conclude the Project complies with Bylaws § 153.2(e). Finally, it is not genuinely disputed that there are no wetlands in the Property and, therefore, we conclude the Project complies with Bylaws § 153.2(f).

There remains a dispute of material fact, however, regarding vehicular circulation between the site and the road network and within the parking and loading facilities and with regards to the landscaping requirements contemplated in § 330 of the Bylaws. Specifically, as discussed above, the parties dispute the adequacy of Blue Flame's traffic study as it pertains to the increased number of larger trucks utilizing the Valley View Drive intersection with Route 11 as well as whether the landscaping adequately screens the parking/loading area. Bylaws § 153.2; see Bylaws § 332(c) (landscaping requirements incorporated into the site plan requirements). Regarding the vehicular circulation within the loading facilities, the Court does not find Blue Flame's exhibits to sufficiently support its assertion that the parking/loading area is designed to allow for the safe circulation of the trucks. See Ex. 1 at 7 (Drawing A: Turning Movements) (showing that tractor trailers must cross parking spaces to turn around within the parking area). Further, for the reasons set forth above, we cannot conclude at present that the Project complies with applicable screening and landscaping requirements.

Thus, while the Court must **DECLINE** to enter summary judgment on the entirety of Question 12, the Court **LIMITS** the scope of review on Question 11 to whether the Project satisfies the site plan criteria governing (1) the safety of vehicular circulation between the site and the road network; (2) the adequacy of circulation for vehicles and pedestrians, parking and loading facilities, with particular attention to safety; and (3) the adequacy of landscaping and screening to achieving maximum compatibility and protection of adjacent property.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Blue Flame summary judgment in part, and **DENIES** it in part. The Court **GRANTS** summary judgment to Blue Flame on Questions 4, and 7. In so holding, the Court **CONCLUDES**:

1. The Project is not “bulk fuel storage” as defined in the Bylaws.
2. The appropriate analysis for reviewing whether the Project complies with the conditional use standards is whether the Project causes an “undue adverse effect” on any conditional use criteria, by which the Court will apply the substantial and material adverse effect test described in Miller and Walker.

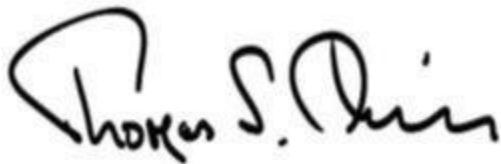
The Court **DENIES** Blue Flame summary judgment on Questions 1–3, 5, 6, and 8–12. However, the Court’s review of the undisputed material facts demonstrate that Blue Flame is entitled to partial summary judgment on Questions 10–12, which would limit the scope of the Court’s review under these Questions. The Court accordingly **LIMITS** the scope of review to whether the Project complies with the following specific provisions in the Bylaws:

Question 10: The Court limits the scope of review to only whether the Project complies with the general performance standards governing noise and safety hazards, Bylaws § 321(a), (f), and the specific performance standards governing screening and storage of flammable liquids, Bylaws §§ 322.1–322.2.

Question 11: The Court limits the scope of review to whether the Project complies with Bylaws § 424 and § 425 of the Commercial District Development Requirements, which govern the parking area and screening requirements.

Question 12: The Court limits the scope of review to whether the Project satisfies the site plan criteria governing (1) the safety of vehicular circulation between the site and the road network; (2) the adequacy of circulation for vehicles and pedestrians, parking and loading facilities, with particular attention to safety; and (3) the adequacy of landscaping and screening to achieving maximum compatibility and protection of adjacent property. Bylaws § 153.2(a)–(c).

Electronically signed at Burlington, Vermont on Tuesday, March 21, 2023, pursuant to V.R.E.F. 9(d).

A handwritten signature in black ink, appearing to read "Thomas S. Durkin". The signature is stylized with a large, looped initial 'T' and a cursive 'D'.

Thomas S. Durkin, Superior Judge
Superior Court, Environmental Division