

VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 9-1-20 Vtec

**Vermont Woodchips Real Estate Holdings LLC
Conditional Use & Site Plan Appeal**

MERITS DECISON

Vermont Woodchips Real Estate Holdings LLC (“Woodchips”) submitted Application # 2019-42 for a conditional use and site plan permit (the “Permit”) from the Town of Londonderry (the “Town”) for its use of property located at 170 Winhall Station Road in South Londonderry, Vermont (the “Property”). The Permit application sought authorization of Woodchips’ ongoing gravel crushing, storing, and trucking operations on the Property (the “Project”). The Town of Londonderry (“Town”) Development Review Board (“DRB”) approved the Permit with conditions on January 14, 2020.

The approval was subject to conditions based on issues raised by neighbors during the public hearing. Of those neighbors, Janice Pelc-Pugliese, Cheyanne Pugliese, and Romano Pugliese (together “the Puglieses”), appealed the final permit approval to this Court on January 28, 2020.

The Court held a merits hearing on the Permit appeal on April 4, 2023.¹ In these proceedings, the Puglieses are self-represented. Interested parties Jennifer Howe and Domenic

¹ The Court notes that while this matter is coordinated with a related matter—an NOV appealed by Vermont Woodchips, Inc.—the Permit was the only matter before the Court at the April 4, 2023 hearing. During pretrial conferences, the parties agreed to the resolution of the Permit appeal first, and depending on the determination of the present appeal, the parties would decide if to proceed with the NOV appeal.

Mangano are also self-represented, though the Court notes that Jennifer Howe is the principal for Woodchips. Attorney Christopher T. Corsones represents Woodchips, and Robert Fisher represents the Town on a limited basis.

Procedural History and On-the-Record Motion to Dismiss

In December 2021, Applicant filed a motion to dismiss the appeal following the Puglieses' failure to appear at the previous two status conferences. The Court denied the motion to dismiss, but did warn the Puglieses that missing any further status conferences or other deadlines would be grounds for sanctions, including possible dismissal of the appeal. Entry Order at 3 (entered Mar. 11, 2022). No subsequent motions were filed.

During the merits hearing, the Applicant renewed his motion to dismiss on the record, predicated on Janice and Romano Pugliese's failure to attend the merits trial. Cheyanne Pugliese informed the Court that Mr. Pugliese was sick and would not be able to attend, but that Ms. Pelc-Pugliese would be joining as soon as she returned from dropping her children off at childcare. The Court deferred issuing a decision until after Woodchips completed its case. Ms. Pelc-Pugliese did join in the remote merits proceedings and offered testimony during the Puglieses case-in-chief. The Court subsequently denied the motion on the record.

Statement of Questions

As the Appellant, the Puglieses set the parameters for the legal issues we must address in this appeal by the filing of their Statement of Questions. V.R.E.C.P. 5(f) (requiring that only legal questions presented by an appellant in a statement of questions may be raised in an appeal). The Puglieses filed their original Statement of Questions on February 4, 2020. Following a status conference in November 2022, the Puglieses agreed to enter an amended Statement of Questions. The Puglieses filed their Amended Statement of Questions on December 20, 2022, and it is that Statement of Questions that set the parameters for this appeal. Those Questions asked whether the Permit was approvable based on several identified possible issues:

1. Noise - Very loud noise throughout the entire day (stone on stone, stone on metal). Constant beeping from back up alarms.
2. Truck Traffic - Increased traffic in a residential area. Trucks spill material on the road.

3. Soil and Water Contamination - The asphalt millings can leach toxic substances.

4. Change in the Natural Landscape - This dramatic change to the topography alters the actives [sic] at the property. Shooting in the direction of our house against stone piles is now common.

5. Negative Effects on Property Values - Creation of an earth materials industrial site next to a residence decrease the property value of the residence.

6. The nature of this earth material business does not fit the general character of the neighborhood (residential neighborhood noted as such on the zoning map). This industrial operation destroys the quiet, pastoral Vermont setting.

Findings of Fact

1. Vermont Woodchips Real Estate Holdings LLC, incorporated in 2009, owns the subject property, which is located at 170 Winhall Station Road in Londonderry, Vermont.

2. Jamaica Cottage Shop (parcel "Jamaica Cottage Shop Inc." on Ex. 11) and Woodchips (parcel "Vermont Woodchips Real Estate Holdings LLC" on Ex. 11) use to be one parcel but that parcel was subdivided by Jamaica Cottage Shop Inc. prior to the Howes purchasing the Property in 2005. Jamaica Cottage Shop Inc. retained the other parcel and continues to operate on that separate parcel. Its operations are not challenged in this appeal.

3. The Property is approximately 7.41-acres and is located in the Rural Residential 1 Zoning District ("R-1 District") as described on the Town of Londonderry Zoning Map incorporated in the Bylaws. The Property has access to Winhall Station Road via a 50-foot right of way across Jamaica Cottage Shop Inc.'s parcel.

4. Scott Howe conveyed the Property to Woodchips in August 2009.

5. Scott and Jennifer Howe owned Vermont Woodchips Real Estate Holdings LLC when the application was first submitted.

6. The Town of Londonderry adopted its current Zoning Bylaws ("Bylaws") in December 2009.

7. Janice Pelc-Pugliese, Cheyanne Pugliese, and Romano Pugliese own and/or occupy property at 1852 Goodalville Road in Londonderry ("Puglieses' Property") which abuts the

Property. More specifically, the northeast corner of the Puglieses' Property meets the southwest corner of the Property. They purchased their property in 1996.

8. This area used to be the industrial hub of South Londonderry. The Property was historically operated as a sawmill, which began operating in 1946 ("Historic Use").

9. The Historic Use of the sawmill operated all day, every day. It employed up to 75 employees. The mill ran a backhoe, debarker, and saws all day, every day, from 7:00 am to 5:00 pm. The Historic Use had trucks coming and going all day, every day. Historically it was then the largest employer in Town.

10. Of the Historic Use's equipment at the Property, the debarker was the loudest. Credible evidence revealed that, when operating, the debarker could be heard up to two miles away, near the center of Town.

11. The Historical Use continued even after the Puglieses purchased their property in 1996.

12. At some point around 2001, the Property's Historic Use as a sawmill was discontinued.

13. In 2004, the use of that mill was re-established pursuant Bylaws § 412-C by Jamaica Cottages, which constructed sheds and tiny houses on a parcel of land adjacent to the Property. The Property and the parcel containing Jamaica Cottages was once one parcel but was subsequently subdivided and sold to the Howes after the mill's use was reestablished.

14. The Property was conveyed to Scott Howe in 2005.

15. At the time of conveyance, the Property's sawmill was intact and operational.

16. The Howes began and continued to operate the sawmill in 2005 ("Howe's Use") to process wood products. Though the Howe's Use was smaller than the Historic Use, it was consistent with that type of use. The Howe's Use employed fewer people and had no more than 10 trucks a day coming and going from the Property.

17. The Howes later gradually transitioned to a gravel operation, which is the use at issue in this appeal. This operational transition occurred from 2009 to 2012. During the interim, the Property was being used as both a sawmill and gravel crushing, screening, and storing operation.

18. In 2009, Woodchips obtained an Act 250 permit for the rock crushing and screening operations at the Property. The Act 250 permit was approved and conditioned the use.

19. Now, Woodchips employs 1 to 3 employees relative to the operations at the Property.
20. Woodchips brings in material and stores it on the Property until it has enough to operate the crusher.
21. It runs the crusher a maximum of 10 days per year in two five-day periods. During those days the crusher runs can run from 8:00 am to 4:45 pm.
22. Woodchips also screens asphalt, sand, and topsoil on the Property, which it stores on the Property until it is trucked out to buyers.
23. Woodchips currently has 2 dump trucks and might have as many as 6 trucks a day on the Property from customers picking up or dropping off material at the site.
24. Woodchips never has more than 6 trucks on site in a day.
25. This is significantly less than the historical use of the Property, which included trucks coming and going all day (historically) and as many as 10 trucks a day when the Howes started operating the Sawmill in 2005. Overall, Woodchips current operation is generally a significant reduction in activity from the sawmill.
26. While not a part of the commercial activities at the Property, the Howes do recreationally shoot at their property. When the Howes are doing any target practice on the Property, they institute several safety measures, one of which is using the gravel piles as a backdrop or berm for their target practice. This is not, however, the primary purpose of these features.

Noise:

27. Sound pressure level is expressed in decibels (dB), a logarithmic quantity based on the sound pressure of the sound source of interest and a reference pressure representing the quietest sound we can hear. A logarithmic scale is measured so that successive points are equal in ratio, rather than quantity. For decibels, a tenfold increase in either the noise source strength or number of equivalent sources causes the sound pressure level to increase by 10 dB.
28. Because decibels are logarithmic, sound pressure levels do not combine, or add, as we might expect. For example, combining two sound sources that each independently generate a sound pressure level of 40 dB individually causes a total sound pressure level of 43 dB, rather than 80 dB. Generally, an increase in sound level of 10 dB may be perceived as a doubling of the

sound level. Changes in sound level of less than 3 dB change are difficult to perceive in an environmental setting.

29. Frequency (or pitch) is related to the rate of the small oscillations in air pressure that we perceive as sound, and is expressed in cycles per second, or Hertz (Hz). Human ears can detect a wide range of frequencies but is generally less sensitive at very high and low frequencies. The A-weighting system was designed to correlate with what humans actually hear, which emphasizes mid-range frequencies between about 500 Hz and 10,000 Hz. The A-weighted sound level has been widely adopted by acousticians as the most appropriate descriptor for environmental noise. Sound levels that have been measured using A-weighting typically are expressed as “A-weighted decibels” (dBA).

30. Because environmental noise changes continuously, it is sometimes convenient to describe a particular noise event or source in terms of its maximum sound level (L_{max}). While the maximum sound level is useful in describing one aspect of an event or noise source, it provides no information on the duration of the event or the cumulative exposure to a noise source. A common way to account for the cumulative exposure is to express the energy-average of the actual time-varying sound level over a period of time as a single number, called the “equivalent” sound level (Leq). The Leq is the constant or “equivalent” sound level that would contain the same amount of sound energy as the time-varying sound level over the same period, be it 1 second, 1 minute, 1 hour, or other. A layperson and this Court are aided by thinking of this as the average sound over a period of time. Due to the logarithmic addition of noise sources described above, Leq is influenced strongly by the loudest events that occur during a particular period.

31. The Town contracted with Cross-Spectrum Acoustics (“CSA”) (with this expense charged to Woodchips) to conduct a noise measurement at the Property to determine whether the rock crushing and screening operation complies with the noise standards specified in the Bylaws.

32. CSA conducted a sound level measurement at the project site on the Property on Tuesday, July 28, 2020 from approximately 11:15 AM until 11:40 AM.

33. During the measurement, the crusher was brought in for the sound test. During the measurement period, both the crushing operation and the screening operation were operated and measured. Material screened during the noise testing included concrete, blacktop (asphalt), and gravel (stone).

34. CSA characterized the sound environment as a fairly consistent sound level caused by the continuous operation of the crushing and/or screening machinery. When the excavator loaded material into the input hopper, the sound level would increase intermittently as rocks and/or chunks of asphalt were processed.

35. No back-up alarms were audible during the measurement. It was unclear whether this meant they were not audible at the sound monitor or whether they were not deployed during the test period.

36. Weather conditions throughout the measurement were fair with a temperature of approximately 75 degrees Fahrenheit, light wind, and no measurable precipitation. Noise was monitored at the property line closest to the Puglieses' Property.

37. The $L_{eq,24-min}$ was 55 dBA at the property line. CSA also monitored the 1-second L_{eq} and $L_{F,max}$ over the same period. The $L_{Aeq,1-second}$ varied from 53 to 62 dBA. The $L_{F,max}$ during the period varied from 53 to 65 dBA.

38. Scarlett Pugliese lived at the Puglieses' Property until 2021. While completing high school at home, she described the noise as an ear-piercing loud banging. It would last sometimes for only a few hours and sometimes all day. She wore noise cancelling headphones to prevent issues with schoolwork and limited her outdoor use as a result of the noise. She did not discuss the current use of the Property, but only the use of the Property up to 2021.

39. Janice Pugliese purchased the Puglieses' Property in 1996. She was aware of the mill and the Jamaica Cottage Shops business when she purchased it but had no concerns with the operations and noted that the mill didn't bother her. When the mill was operated, both prior to the Howe's purchase and by the Howes, she was not bothered by the equipment, and would hear the whistle blown in the morning, at noon, and in the evening. It was not until the Howes started the gravel operation that she took issue with the uses on the Property.

40. Janice Pugliese noted that noise emanating from the Property was louder prior to the issuance of the municipal Permit. However, in the last couple years, noise has not disturbed her.

41. Cheyanne Pugliese lives in an accessory dwelling unit on the Puglieses' Property. She also described the noise prior to the issuance of the municipal Permit as an ear-piercing loud banging from the sound of gravel hitting trucks and rocks hitting other rocks. Cheyanne noted that in the last year or two, the noise has not been substantial. She does not have concerns with the current level of noise but expressed concern with it returning to its prior levels. Despite being unconcerned with the current noise levels, she does not feel the DRB's limitations adequately alleviate her concerns.

42. Domenic Mangano, another adjoining landowner that participated in the trial, did not offer any testimony about the use or resulting noise.

Traffic:

43. The Property is located on Winhall Station Road.

44. Winhall Station Road intersects with Route 100 about a quarter mile from the Property.

45. Route 100 in the vicinity of this Project is a busy rural highway, and a main artery for Londonderry.

46. The amount of truck traffic to the Property varies daily. Woodchips may have as few as 2 and up to 6 truck trips per day. Each of these trips represents a truck coming and going from the Property, meaning 6 truck trips to the Property would be 12 passes on the roadway entering the Property.

47. Additionally, Woodchips employees may add as many as 1 to 3 vehicle trips per day.

48. The number of truck loads per day is consistent with, if not less than, prior use of the Property as a sawmill.

49. When the Historic Use operated at the sawmill, it employed up to 75 employees and had regular log trucks throughout the day. When the Howe's Use operated the sawmill, they would operate up to approximately 10 trucks per day, year-round.

50. Today, the gravel operation does not run during the winter months and has intermittent spring, summer, and fall truck-traffic, with no more than 6 round trip truck trips per day.

51. Woodchips has not received any complaints of spills from its trucks either on the Property or on roadways off the Property, nor has it ever been subject to municipal or state enforcement actions for any spills.

52. The trucks have tarps covering the product during transport. These tarps help prevent product from spilling out of the trucks.

Soil and Water:

53. Woodchips has acquired the necessary storm water permit from the State.

54. Woodchips has taken several steps to mitigate any stormwater runoff that may occur on the Property.

55. Woodchips built pools on the Property for excessive rain events, located in the center of the Property. Those pools, for the most part, remain dry except for during heavy rainfall events.

56. Woodchips monitors the peripheral of the Property, and to their knowledge has never experienced a runoff problem on or beyond the perimeter.

57. In all, the uncontested evidence supported that Woodchips has never experienced a runoff problem.

58. To the best of Woodchips knowledge, it has never had an issue with any surface or groundwater pollution, or pollution generally. There was no testimony or other evidence offered to contradict Woodchips' assessments in this regard.

59. It has never received any notice of a potential problem from any regulatory body, and it has never been the subject of an enforcement action.

Change in the Natural Landscape:

60. Because the site was already an industrial mill yard, very few changes to the natural landscape were required.

61. Even so, Woodchips has incorporated berms on the Property to shield its operations from the neighbors and mitigate noise.

62. The berms are 25 to 30 feet tall, built of topsoil that could be removed if necessary.

63. The berms have not increased any runoff, though, as noted above, Woodchips also built up a pond in the center of the yard to collect storm water and prevent runoff.

64. These additions did not require Woodchips to alter other parts of the landscape.
65. Woodchips left a natural buffer surrounding the operations and berms. The natural buffer is 25- to 75-feet wide.
66. Additionally, Woodchips maintains piles of asphalt and rocks for their crushing and screening operations at the Property. These piles are temporary, with products only being stored on site until they are sold and shipped off.
67. The Puglieses cannot see the gravel operations or the berms from their home on the Puglieses' Property. They can see the berms, however, if they are out in their field.

Property Values:

68. Generally, property values have increased in the area. Woodchips is not aware of any evaluations on neighboring property values.

General Character of the Neighborhood:

69. Jamaica Cottage Shop is an industrial operation that constructs small houses and sheds that people then purchase for use on their separate properties. It employs over 50 people. Its operations produce around 5 truck trips (round trips) per day and use machinery that includes loaders and back hoes. The carpentry work includes sawing and building activities. All the construction occurs on-site, with near constant activity. Alarms can be heard periodically.

70. The Jamacia Cottage Shop property is located to the north and east of Woodchips's Property.

71. The Merrit/Bakala property (parcel "Merritt/Bakala" on Ex. 11) abuts the Woodchips Property to the west. It is a residential use with a hayfield and barn, in addition to the home.

72. The property abutting the Property to the south is "a development" though it was not specified what kind.

73. The Dryden Property (parcel "L. Dryden" on Ex. 11) just across Winhall Station Road from the Jamaica Cottage Shop property, north of the Property, houses a small business that does landscaping and caretaker jobs. The business runs equipment on the property, and stores equipment that it uses for loading, log splitting, plowing on this property as well as stockpiling

sand or salt for its winter operations. The business results in traffic in and out. This property is also in the R-1 District.

74. The Smith property (parcel 41 on Ex. 11) is a commercial property with a private contractor operation. It has equipment stored on the property, including dump trucks and excavators. While in the neighborhood around the Property, this property is in the “Service Commercial District.”

75. Brown Enterprises is the largest commercial use in the neighborhood. It is located approximately half a mile from Woodchips (“M3B Ent.” on Ex. 11). It is a large-scale agricultural and equipment business. It sells lawn mowers, cranes, gravel, snowmobiles, ATVs, 4-wheelers, and other equipment, and rents equipment. When equipment is rented, it will deliver equipment to its customers’ homes or job sites. While in the neighborhood around the Property, this property is in the “Service Commercial District.”

76. The Trevmor Group LLC owns property that houses a storage facility located approximately half a mile from the Property. It has 2 or 3 buildings with multiple storage units in each. Again, while in the neighborhood, this property is in the “Service Commercial District.”

Conclusions of Law

The ultimate issue before the Court is whether the Project as proposed complies with the Town’s Bylaws. Thus, the ultimate determination relies on interpreting the Bylaws. In interpreting zoning ordinances, the Court applies the ordinary 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). 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). 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 VT 13, ¶ 22. With these provisions of interpretation in mind, the Court turns to evaluating our factual determinations and the applicable zoning provisions.

The purpose of the R-1 District is to provide for moderate density residential development and compatible land uses while preventing commercial strip development along major highways and maintaining the rural character of the community. Bylaws § 201(A)(2). Proscribed uses for this District are specified in Table 2-1 of Article 2. Bylaws § 203(B). Permitted uses and conditional uses are both subject to Site Plan Review under § 504 and additional performance and specific standards set forth in Article III and/or Article IV. Conditional uses are additionally subject to Conditional Use review described in § 503. “Any use not permitted by these regulations, unless specifically exempted under Section 603, shall be deemed to be prohibited.” Bylaws § 203(D).

This specific use—processing of gravel, asphalt, and top soil—is not listed in the Table 2-1 of Article 2. However, in considering a conditional use application, the Bylaws allow the DRB (and this Court on appeal) to “allow for a use not specifically listed within a district only upon finding that, in addition to meeting the other specific and general standards set forth in this bylaw, the proposed use is of the same general character as those uses listed for that district and defined under Article VII; and such use will not adversely affect other uses within the district or adjoining land uses.” Bylaws § 203(D).

The Project here includes receiving crude rock and crushing it into gravel, screening the gravel, and storing it onsite until it is trucked off the Property for sale and use. The rock is not extracted on site, but rather trucked onto the Property. The Court finds the use is not specifically listed within the district, but is most similar to “Excavation/Quarry,” which is a permissible conditional use in the R-1 District. Bylaws, Art. 2, Table 2-1.² “Excavation/Quarry” is defined as

² The Court concludes that “Recourse Industry” is the second most similar use contemplated by the Town Bylaws. The Bylaws define “Resource Industry” as “[a]n activity involved in the primary processing of agricultural or forestry products, including saw mills, but excluding those activities identified in the definition of Agricultural Use or Farm.” Bylaws § 701. The Project involves the primary processing of stone to gravel, however it is not the processing of a “agricultural product” but rather a quarry product. As such, the Court concludes that “Quarrying/Extraction” is a better fit. Regardless, both uses are conditional.

“[t]he activity and location of extraction of soil, sand, rock or other earth materials usually involving heavy equipment and posing the potential to cause high levels of noise and dust.” Bylaws § 701. The Court finds that, here, the Project operates heavy equipment in the processing of rock, soil, and blacktop, and that use poses the potential to cause high levels of noise and dust. As such, the Court concludes that this use is the closest analog, and pursuant Bylaws § 203(D), applies the review standards required for permitting an Excavation/Quarry project in the R-1 District.

“The removal of soil, sand, rock, stone, or gravel . . . may be permitted in [the R-1 District] subject to Site Plan Review in accordance with Section 504 and Conditional Use Review in accordance with Section 503 and, findings that the proposed activity meets the [specific] standards [for excavation and quarrying] in addition to any other applicable standards contained in this Bylaw, including but not limited to performance standards under Section 414.” Bylaws § 308(A) (“Excavation and Quarrying). Therefore, the Court addresses each of the Puglieses’ Questions on appeal under the appropriate conditional use and site plan review criteria, and performance and specific standards that apply to an Excavation/Quarrying operation. See Bylaws, §§ 308, 414, 503, 504.

I. Noise

First, the Puglieses challenge the Project under the noise criteria. They assert that the proposed use will produce very loud noises throughout the entire day (stone on stone, stone on metal), and constant beeping from back up alarms.

In addition to the general standards set forth under conditional use review, conditional uses must also “conform[] to all Specific Standards set forth in Article III and all General Standards set forth in Article IV of this bylaw.” Bylaws §§ 503(D), (E)(2). It is in Article IV that the Bylaws provide the most specific noise standard, and thus the standard this Court applies. See In re Application of Lathrop Ltd. P'ship I, 2015 VT 49, ¶ 31, 199 Vt. 19 (citing 6 E. McQuillin, The Law of Municipal Corporations § 20:63 (3d ed. rev. 2007) (“When general and specific provisions are

The Next closest analog is “Industry.” Industry is defined as “[a]n activity primarily concerned with enclosed manufacturing, processing, or warehousing of goods.” Id. This Project is not enclosed, but otherwise fits into this use. Industry is not a use not specifically listed in the district, but “light industry” is a prohibited use in the district.

employed in ordinances, where there are two provisions, one general and the other specific and relating to only one subject, the specific provision ordinarily must prevail and be treated as an exception to the general provision.”)).

The Performance Standard established for noise requires that “[n]o use, under normal conditions, shall cause, create or result in . . . noise in excess of seventy (70) decibels at the property line, or represents a significant increase in noise levels in the vicinity of the use so as to be incompatible with the surrounding area” Bylaws § 414(D)(1).

CSA’s sound level testing monitored sounds from both the crushing and the screening operations, tested on materials often crushed and screened on the Property. CSA characterized the sound environment as a fairly consistent sound level caused by the continuous operation of the crushing/screening machinery but noted that when the excavator loaded material into the input hopper, the sound level would increase intermittently as rocks and/or chunks of asphalt were processed. No back-up alarms were audible during the test measurements.

The sound at the property line between the Puglieses’ Property and the Property was recorded at 55 dBA $L_{eq,24-min}$. The $L_{eq,1-second}$ varied from 53 to 62 dBA. The maximum sounds recorded during the test period ranged from 53 to 65 dBA $L_{F,max}$. All these sound levels are well below the Performance Standards’ 70 dB limit. The operations producing these noise levels are limited to daytime use, Monday through Friday, between the hours of 8:00 am and 4:45 pm. Therefore, the Project cannot reasonably result in sleep disturbances. The Court concludes that the sounds and noises produced from the Project do not exceed 70 dB at the property line, and as such, the Project complies with the applicable noise Performance Standard.

Additionally, the Court received evidence about the Historic Use, the Howe’s Use of the sawmill more recently, and current gravel uses on the Property and in the area such that it cannot conclude the sounds from the Project would represent a significant increase in noise levels in the vicinity of the Property. Historically and recently, the Property was used as a sawmill, which credible evidence demonstrated was very loud, though the Court received no quantitative evidence of those historic or recent sound levels. Additionally, there are other industry or commercial uses in the vicinity that produce noise from equipment, tools, and trucks. Jamaica

Cottage Shop is an industrial operation that constructs small sheds and houses. It employs over 50 people and its operations produce around 5 truck trips per day (10 trips in and out). The operations include the use of loaders and back hoes, carpentry tools which includes sawing and building. All the construction occurs on-site, with near constant activity. Alarms can be heard periodically. The Dryden Property just across Winhall Station Road from Jamaica Cottage Shop is a caretaker business that does jobs that require it to run equipment that it uses for loading, log splitting, and plowing. The business results in regular traffic in and out of that facility. As such, the Court cannot conclude that the sounds from the proposed Project are a “significant increase” in neighborhood sound levels.

While each of the Puglieses that testified described the sounds as ear-piercing and very loud, the uncontested quantitative evidence supports our conclusion that the sounds produced on the Property from its use as the site of a gravel processing operation do not exceed the Bylaws’ limitations. Further, it appears to the Court that many of the Puglieses’ complaints have been alleviated by the conditions in the Permit, as the sounds that the Puglieses complained about were focused on the use prior to the municipal Permit’s issuance. Scarlett Pugliese only testified that the sounds prior to the issuance of the Permit disturbed her, as she has been in grad school since the Permit was issued and therefore did not complain about noises caused by the current use of the Property. Janice Pugliese testified that noise emanating from the Property was more significant prior to the issuance of the municipal Permit, but noted that, for a while now, the activity has not been disturbing. Finally, Cheyanne Pugliese testified that in the last year or two, the noise has not been as intrusive, and she was not concerned by the current level of noise. Instead, her concerns were based upon a fear of noises returning to its prior levels. Despite a lack of concern with the current noise levels, Cheyanne does not feel the DRB’s limitations adequately alleviate her concerns. She failed to provide any understanding of the discrepancy between these two opinions.

In so finding that the Project does not produce sounds in excess of 70 dBA at the Property line or sounds that represent a significant increase in neighborhood noise levels, the Court declines to impose conditions beyond those already imposed by the DRB relative to noise and

adopts those conditions herein. See Bylaws § 308(D)(5)–(6), (8) (authorizing the Court to impose certain conditions on Excavation/Quarrying uses). The DRB already significantly limited the operations on the Property, including limiting the “[c]rushing and hammering . . . to 2 (two) five-day periods, per year, to take place only Monday to Friday, between the hours of 8:00 am and 4:45 pm” and requiring that all abutting property owners receive notice of those five-day periods “one week prior to a crushing and hammering event by 1st class mail and email.” Additionally, screening operations are limited to “only Monday to Friday from 8:00 am to 4:45pm.” Finally, the Permit specifically requires Woodchips to comply with all Performance Standards, which includes keeping sounds below 70 dB at the Property line. As noted, the Puglieses affirmed that the noise has not been a disturbance to them since the Permit conditions were imposed, but their concern before the Court is a hypothetical reversion to pre-Permit noise levels . In the event that noise does become a disturbance in the future to the point where the noise is in violation of the Bylaws or the Permit, the Town would be able to bring an enforcement action against Woodchips for violating the Permit or Bylaws if it were to be demonstrated that the sound levels regularly exceed 70 dB at the property line from the gravel screening and crushing operations.

II. Truck Traffic

Second, the Puglieses challenge the Project under relevant traffic criteria. They assert that the Project causes increased traffic in a residential area and that material from the trucks spills onto the road.

As part of conditional use review, the Bylaws require that a proposed project must not adversely affect traffic on roads in the vicinity. Bylaws § 503(D)(3). Additionally, § 308(C)(2) requires that the applicant demonstrate that the activity will not have an undue adverse effect on public facilities and services.³ Thus, the Court considers “the projected impact of traffic resulting from the proposed development on the capacity, safety, efficiency and use of affected public roads, bridges, and intersections” and whether it will unduly and adversely affect the

³ While also related to safety of traffic access, the Court does not consider the Project under § 504(D)(1) because nothing about the site plan’s vehicular access and intersections with roads are changing. Section 504(D)(1) of the Bylaws requires site plans to demonstrate that vehicle access and intersections “meet all applicable Town and State design standards.” The Project does not alter the vehicle access points or intersections with the roads or add any curb cuts, and the site plan review for the sawmill use is no different than the site plan review for the Project.

roads. Bylaws §§ 308(C)(2), 503(D)(3). While not required, this determination generally depends on accepted transportation standards for evaluating traffic impacts. Id.

Here, the Property is located on Winhall Station Road, which intersects with Route 100 about a quarter mile down from the Property. Route 100 is a busy road, and a main artery in the Town and region.

Woodchips truck traffic varies from day to day. Woodchips may have as few as 2 round trip truck trips per day or as many as 6 truck trips per day (i.e., up to 12 passes on the roadway entering the Property). Additionally, Woodchips employs 1 to 3 employees, which may add as many as 1 to 3 roundtrip vehicle trips per day. These operations are limited to Monday to Friday from 8:00 am to 4:45 pm, thus Woodchips is not creating nighttime or after-hours traffic.

While the Court did not receive evidence of any transportation standards for the roads in the area, we can conclude that the Project will not have an unduly adverse impact on safety, capacity, efficiency, or use of the roads, bridges, or intersections in the area, because this number of trips is consistent with, if not less than, the prior permitted use of the Property as a sawmill. When the Howes operated it as a sawmill starting in 2005, they would operate up to about 10 trucks (i.e., 20 in-and-out) per day. Thus, the current use produces less traffic than the Historic Use and the more recent Howe's Use of the sawmill because it represents a 4-truck reduction in daily use. Additionally, the sawmill operation ran year-round, whereas, the gravel operation is limited to spring through fall. As such, the Court concludes that the proposed use will not adversely affect traffic on roads in the vicinity.

Further, the uncontested evidence demonstrates that Woodchips has never had issues related to spillage on road from its trucks. Woodchips has not received any complaints of spills from its trucks, nor has it ever been subject to enforcement for any truck spills. Further, the trucks have tarps covering the product during transit to limit spillage or risk thereof. As such, the Court concludes that the Project will not adversely affect traffic or safety on roads in the vicinity, nor with the use unduly harm or destroy the roads from spills.

III. Soil and Water Contamination

Third, the Puglieses challenge the Project under water contamination and health and safety criteria. They assert that the Project poses a threat to water, health, and safety because the asphalt millings can leach toxic substances.

The Project must “not cause any hazard to public health or safety, or otherwise have an undue adverse effect on . . . [s]urface and groundwater . . .” Bylaws § 308(C)(3). Additionally, “[t]he proposed development shall not result in any direct or indirect discharge of waste, contaminants, storm water, or in-ground disposal of wastewater in a manner that would adversely impact existing or planned, public or private, water supplies or facilities (including roads, erosion, etc).” Bylaws § 503(E)(3).

The uncontested evidence demonstrated that Woodchips has never had a runoff problem. Despite never having any issues with runoff, however, Woodchips has taken several steps to mitigate any stormwater runoff that may occur on or from the Property. Woodchips built up pools on the Property for excessive rain events, located in the center of the Property. Those pools, for the most part, remain dry except for during heavy rainfall events. Woodchips monitors the peripheral of the Property, and to their knowledge has never experienced a runoff problem on the perimeter. Woodchips has also acquired the necessary storm water permit from the State. The Pugliese did not present any evidence to contravene or undermine Woodchips assessment of runoff. In all, the uncontested evidence supported that Woodchips has never experienced a runoff problem and its continued use is not likely to cause one in the future.

It was also uncontested that Woodchips has never had an issue with any surface or groundwater pollution, or pollution generally. It has never received any notice of a potential problem from any regulatory body, and it has never been the subject of an environmental enforcement action. The Court heard no evidence of any dust, pollution, waste, or leaching impacting surrounding properties.

Finally, to the extent that discharges or pollution may occur, the Permit conditions the use by mitigating potential harms from discharges and pollution. The Permit requires that Woodchips comply with the Vermont Solid Waste Management Program Policy on Management

of Asphalt, Brick and Concrete.⁴ This management policy contemplates disposal, transport, storage, processing, and testing of these materials to protect human health and the environment and mitigate problems from noise, dust, odor, and unsightliness. The Court concludes that this condition is reasonable and adopts it herein.

As such, the Court concludes that the proposed use of the Property will not cause any hazard to public health or safety, and that it does not otherwise unduly adversely affect surface or groundwater, or otherwise result in any discharges.

IV. Change in the Natural Landscape

Fourth, the Puglieses challenge the Project based on its changes in the natural landscape. They assert that the change in the landscape topography to accommodate the Project has altered the private recreational activities at the Property, in that now the landowners frequently operate firearms, shooting against the stone piles and berms on the Property.

The Project must “not cause any hazard to public health or safety, or otherwise have an undue adverse effect on . . . [t]he scenic or natural beauty of the area, other aesthetic values, historic sites or rare or irreplaceable natural resources or areas.” Bylaws § 308(C)(4).

The Puglieses appear to raise this question to challenge the private recreational shooting activities occurring on the Property. Am. Statement of Questions (filed Dec. 20, 2022) (“This dramatic change to the topography alters the actives [sic] at the property. Shooting in the direction of our house against stone piles is now common.”). The Howes occasionally use the Property for personal, recreational target practice. When the Howes are doing any target practice activities on the Property, they institute several safety measures. One of the safety measures they incorporate is using the gravel piles as a backdrop or berm for their target practice. Shooting activities are not part of Woodchips commercial operations, but rather a personal recreational use. Thus, the activities are not within the scope of the commercial use presently before the Court.

⁴ Available online at: <https://dec.vermont.gov/sites/dec/files/wmp/SolidWaste/Documents/ABC-policy-Final.pdf>.

To the extent that the Puglieses challenge the creation of stone piles because they are being used as an earthen backstop or berm for target shooting, the “primary purpose of zoning is to manage municipal and regional growth and development in an organized fashion, not to regulate the incidental recreational activities of private property owners.” In re Laberge Moto-Cross Track, 2011 VT 1, ¶ 15, 189 Vt. 578 (quoting In re Scheiber, 168 Vt. 534, 539 (1998)). The Supreme Court has concluded that “certain recreational activities, such as target shooting of the kind in question, are de minimis uses of private property which are neither regulated nor contemplated by the zoning regulations.” Scheiber, 168 Vt. at 539.

Here, the Court is considering the activities on the Property that are subject to the conditional use application, namely the change in use to “Use Not Provided For” for the stockpiling, crushing, screening, and sale of extracted earth materials. Here, any target practice done on the Property is clearly an incidental recreational activity on the Property. As such, these activities are not before the Court. Rather, the Court reviews the changes to the topography solely for the purpose of determining whether Woodchips has demonstrated that their Project will not have an undue adverse effect on the scenic or natural beauty of the area, or other aesthetic values.

Woodchips has altered the landscape by incorporating berms onto the Property. The berms were incorporated to shield its operations from neighbors and mitigate noise from its business operations. Woodchips also built up a pond in the center of the yard to collect water and prevent runoff. These additions did not require Woodchips to alter other parts of the landscape, because the site was already an industrial mill yard. Woodchips left a 25- to 75-foot-wide natural buffer surrounding the operations and berms. While not a “change to the landscape,” Woodchips maintains piles of asphalt and rocks on the Property for their crushing and screening operations. These piles are temporary, with products only being stored until they are sold and shipped off.

The Puglieses cannot see the gravel operations or berms from their home, but they can see the berms from the edge of their field. That view is limited by the wooded buffer, and the impact to their property is further limited by the fact that it is not viewable from areas of frequent

activity on the Pugliese property. As such, the Court cannot conclude from the credible evidence presented that the Project has an undue adverse effect on the natural beauty or other aesthetic values, as raised under this Question. The Court does not find it necessary to impose any additional conditions on this issue with respect to the slopes created from the use, the alleged “nuisances or safety hazards” from the shooting or any aesthetic changes to the Property. Bylaws § 308(D)(2), (8).

V. Negative Effects on Property Values

Fifth, the Puglieses challenge the Project under the assertion that it will have an undue adverse effect on neighboring properties. Specifically, they assert that the creation of an earth materials industrial site next to a residence decreases the property value of their residence.

The Court is limited in its consideration of matters relative to property values. The Puglieses point to no specific provision of the Bylaws that they rely on in raising this issue. At best, the Court has identified Bylaws § 308(C)(1), which requires that a quarry/excavation operation project “will not cause any hazard to public health or safety, or otherwise have an undue adverse effect on . . . [n]eighboring properties and uses” Bylaws § 308(C)(3).

The impacts upon property value, however, are not an issue pertinent to such conditional review standards. Bylaws § 503(D)–(E); Bylaws § 308(C)–(D); see Poultney Properties LLC Change of Use & SP App., No. 98-7-17 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. June 23, 2021) (Walsh, J.) (citing Margaret Pratt Assisted Living Site Plan, Conditional Use and Act 250 Approvals, No. 100-8-15 Vtec, slip op. at 22 (Vt. Super. Ct. Envtl. Div. June 21, 2016) (Durkin, J)). Indeed, such a consideration is too subjective to be applied to a town’s development regulations.

A claim of undue adverse effect “based solely upon diminution in property value invites speculation, as ‘[p]roperty values are affected by many factors; a decrease in market value does not mean there is a nuisance, any more than an increase means there is not.’” See Myrick v. Peck Elec. Co., 2017 VT 4, ¶ 13 (quoting Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 277 (Tex. 2004) (applying nuisance law)). Further, while the Supreme Court in Peck was considering whether a use of property constituted a nuisance, it identified another concern applicable with applying such limits to zoning: “such a rule of law would be one-sided: a plaintiff alleging

diminished property value because of activities on a neighbor's land—such as construction of an oddly-shaped house—would have a claim for damages, but a neighbor whose activities resulted in an increase in the property owner's value—such as construction of a palatial estate—would have no claim for contribution for the activity that increased property value.” *Id.* Allowing a zoning appellant to restrict development on their neighbor's land any time a neighbor's activity may have a negative impact on their property value would likely lead to neighborly discord and could impede all development through subjective application.⁵

Finally, even if the Court were to accept that a diminution in property values could restrict development, there was no credible evidence presented that the Project has or would negatively impact the Puglieses' property value. As such, the Court concludes that the Puglieses' alleged diminution in property values are not grounds to deny or further condition the Project.

VI. General Character of the Neighborhood

Finally, the Puglieses challenge the Project by asserting that it adversely affects the character of the neighborhood. Specifically, they assert that the nature of this earth material business does not fit the general character of the neighborhood (residential neighborhood noted as such on the zoning map). Further, they argue that the Project destroys the neighborhood's quiet, pastoral Vermont setting.

A project must not have an undue adverse effect on “[t]he scenic or natural beauty of the area, other aesthetic values, historic sites or rare or irreplaceable natural resources or areas.” Bylaws § 308(C)(4). Further, conditional use approval may be granted only upon their determination that the project will not adversely affect the character of the neighborhood.

⁵ At best, in granting conditional approval, the DRB is required to find that the proposed project will not have an undue adverse effect on neighboring properties. Bylaws § 308(C)(1). However, the Puglieses' Question does not ask whether the Project will have an undue adverse effect on their property by any specific means other than impacts to their property value in this Question. The Court declines to read the question more broadly. V.R.E.C.P. 5(f) (“The appellant may not raise any question on the appeal not presented in the statement [of questions] as filed . . .”); see *In re Joyce*, 2018 VT 90, ¶ 16, 208 Vt. 226 (“The corollary of this rule is the same as that in the environmental context—the statement of questions gives notice of the scope of the issues, the court's consideration is limited to issues within that scope, and the other party's advocacy is tailored to issues within that scope.”). To the extent that the Puglieses have raised issues with noise, water, soil, landscaping, traffic, and character of the neighborhood, the Court considered those factors, in light of any undue adverse effect those factors may have on neighboring properties.

Bylaws § 503(D)(2). In considering the character of the neighborhood, considerations include “the location, scale and intensity of the proposed development relative to the use and character of adjoining properties and other properties likely to be affected by the proposed use;” as well as the project’s “compatibility with the purpose and character of the affected district as defined by this Zoning Bylaw, the Town Plan, and the testimony of affected property owners[,] other interested persons and Town residents.” Id.; see also 24 V.S.A. § 4414(3)(A)(ii) (“[T]he proposed conditional use shall not result in an undue adverse effect on . . . the character of the area affected, as defined by the purpose or purposes of the zoning district within which the project is located, and specifically stated policies and standards of the municipal plan.”). The Bylaws do not define “neighborhood” or otherwise restrict the consideration to only those uses in the same zoning district.

The purpose of the R-1 District is to provide for moderate density residential development and compatible land uses while preventing commercial strip development along major highways and maintaining the rural character of the community. Bylaws § 201(A)(2). Proscribed uses for each District are specified in Table 2-1 of Article 2 and includes Quarrying and Excavation as a permissible conditional use in the District, among other commercial uses. Bylaws § 203(C); Table 2-1 (permitting “Resource Industry,” “Garden, Farm Supply,” “Excavation/Quarry,” “Country Inn,” “Cottage Industry,” “Forestry,” “Public Facilities/Service,” “Cultural Facility,” “Kennel,” and other commercial uses in the district).

First, and most basically, the Project is not along a major highway, but rather, set back from Winhall Station Road. Where the Project’s access point intersects with Winhall Station Road is about a quarter mile off of Route 100, which is the closest “major highway.” In addition to being offset from the highway, the Project is buffered by a wooded area. Accordingly, the Court finds the Project does not encourage commercial strip development along major highways.

Second, as discussed above, the land use is compatible with the area and the purpose of the district in which it is located. While this specific use—processing of gravel, asphalt, and top soil—is not listed in the Table 2-1 of Article 2, the Court concluded that it is a permissible “use not provided for” as it is most similar to “Excavation/Quarry,” which is a permissible conditional

use in the R-1 District. Bylaws, Art. 2, Table 2-1; Bylaws § 203(D). Within the R-1 District, the proposed use is surrounded by similar commercial or industrial uses, which aids the Court in characterizing the neighborhood.

The proposed use is consistent with existing the existing development in the neighborhood. While some of the abutting properties are residential in nature, others are industrial or commercial. Immediately abutting Woodchips is the Jamaica Cottage Shop, an industrial operation in the R-1 District. Jamaica Cottage Shop constructs small sheds and houses. It employs over 50 people. The operations produce around 10 truck trips per day. The operations include the use of loaders and back hoes. The carpentry work includes sawing and building. All the construction occurs on-site, with near constant activity. Alarms can be heard periodically. Other abutters are rural farming operations and/or residential operations.

Beyond the immediately abutting properties, there are several other commercial uses in the neighborhood. The Dryden Property just across Winhall Station Road from Jamaica Cottage Shop houses a small caretaker business. It runs equipment on its property, and stores equipment that it uses for loading, log splitting, plowing, and stockpiling sand or salt. The business results in traffic in and out of the property. This property is also in the R-1 District.

The Smith Property (parcel 41 on Ex. 11), the Brown Enterprises Property (“M3B Ent.” on Ex. 11), and the Trevmor Group Property are commercial properties in the neighborhood, though not in the same district. Smith houses a private contractor operation. It has equipment stored on the property, including dump trucks, excavators. Brown Enterprises is the largest commercial use in the neighborhood, located approximately half a mile from Woodchips. It is a large-scale agricultural and equipment business that sells lawn mowers, cranes, gravel, snowmobiles, ATVs, 4-wheelers, etc., and rents equipment. When rented, it will deliver equipment, creating truck traffic. The Trevmor Group LLC property houses a storage facility. It has 2 or 3 buildings with multiple storage units in each. The Court notes, however, that while these commercial uses are in the neighborhood, these commercial uses are located in the “Service Commercial District.”

As such, the character of the neighborhood is not characterized solely by single-family residences and farms on quiet rural residential streets, but includes several rural, commercial,

and industrial uses. Many of those uses involve the on-site use and operation of heavy-duty equipment in some capacity. Here, the Project's activities and uses are consistent with a rural character of the district, the permissible uses in the district, and the character of the neighborhood. As the Project fits well within that character, the Court concludes it will not unduly adversely affect the character of the neighborhood, especially given that its operations are restricted to Monday through Friday, 8:00 am to 4:45 pm, leaving after work hours and weekends undisturbed by its operations.

The Court concludes that the Project is compatible with other neighboring land uses, as discussed above, is adequately buffered and screened to prevent commercial strip development along major highways, and overall maintains the rural character of the community. The Court finds that the conditions imposed by the DRB adequately mitigate the concerns presented, especially in light of the Puglieses' testimony that in the last year or two, the noise has not been a disturbance and that the current level of noise has been acceptable. We therefore incorporate those DRB conditions here.

As such, the Court concludes that the Project will not unduly adversely affect the character of the neighborhood.

Conclusion and Order

Thus, for the forgoing reasons, the Court concludes that the Project as proposed by Woodchips and conditioned by the DRB has satisfied the conditional use, performance, and other specific standards necessary for approval. Specifically, the Court concludes that (1) the sound levels produced from the project will not exceed 70 dBA at the property line nor represent a significant increase in sound levels in the vicinity; (2) the use will not increase traffic on the roads in the area or result in product spilling that unduly harms safety or the quality of the roads; (3) the use will not result in soil or water contamination and is adequately mitigated to prevent those hazards; (4) the project will adequately buffer the use such that its landscape changes will not had an undue adverse effect on the natural beauty or other aesthetic values; and (5) the proposed use fits well within that neighborhood and zoning district, and will not unduly adversely affect the character of the neighborhood. To the extent that the Puglieses have raised concerns

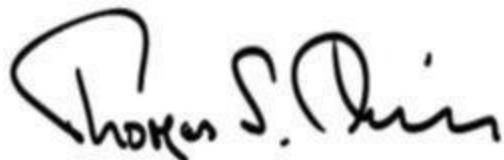
with regards to the Project's impact on their property value, or that the use has resulted in an increase of other private recreational activities outside the scope of the Project before the Court, the Court concludes those are beyond the consideration of this Court and the considerations contained in the Bylaws.

Thus, the Court approves the Permit as issued by the DRB. The DRB issued the permit with the following conditions, which the Court adopts herein:

1. Crushing and hammering will be limited to 2 (two) five-day periods, per year, to take place only Monday to Friday, between the hours of 8:00 am and 4:45 pm.
2. All abutting property owners, as well as the Londonderry Zoning Administrator and Town Administrator, must be notified one week prior to a crushing and hammering event by 1st class mail and email.
3. Screening of material to take place only Monday to Friday from 8:00 am to 4:45 pm.
4. The Applicant must comply with all performance standards, including applicable decibel levels at the property line as measured by an acoustics expert hired by the town of Londonderry and paid for by the Applicant.
5. The Applicant must comply with the Vermont Solid Waste Management program policy on Management of Asphalt, Brick and concrete, which is available online at: <https://dec.vermont.gov/sites/dec/files/wmp/SolidWaste/Documents/ABC-policy-Final.pdf>.
6. This permit is limited to a five-year period from the date noted immediately below, at which time the applicant must reapply for an extension.

This completes the current proceedings concerning this appeal. A judgment Order accompanies this Merits Decision.

Electronically signed at Brattleboro, Vermont on Friday, July 21, 2023, pursuant to V.R.E.F. 9(d).



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