



July 8, 2020

BY EMAIL

Brett Stanciu, Interim Zoning Administrator
Town of Greensboro
P.O. Box 119
Greensboro, VT 05841

Re: HCA Request for Reconsideration and Reopening of Hearing on Amendment of Conditional Use Permit Condition #5

Dear Brett:

Please treat this letter as HCA's request that the Development Review Board reconsider the decision dated June 21, 2020, denying HCA's request for relief from Condition #5 of our conditional use permit. We request that the DRB reopen the hearing to allow for corrective amendment of the written decision and for the DRB to consider additional relevant evidence.

Our grounds for this request include the following:

1. The DRB's June 21 decision correctly determined that our request to eliminate Condition #5 should be examined under the relevant general and specific standards set forth in the Greensboro Zoning Bylaws. The DRB referenced the general standard of "the character of the area," and the specific standard that outdoor amplification "will not affect the noise or air pollution in the area." However, the sole factual evidence on sound impacts from the amplified music came from two HCA representatives; none of this testimony supports an adverse impact under either the general or specific standards. No evidence whatsoever was presented during the hearing that factually relates to an adverse impact under either of these standards. In its decision, the DRB noted only that these two standards were "areas of concern" and, as might be anticipated without any factual supporting evidence, did not cite any evidence or information to support these vague "concerns." The only factual information/evidence about anticipated sound impacts at the hearing was provided by myself and HCA's executive director, Keisha Luce. This evidence does not support any "concerns" under the criteria; indeed, the information HCA provided supports a contrary conclusion: that there would be no adverse impact under the two relevant standards. No other evidence was presented on the issue. As a result, the DRB's decision is erroneous, as there is no factual support for an adverse finding under either of the two noted standards and, based on the actual evidence presented, the request should have been approved.

The two letters in opposition to HCA's request, submitted by Patricia Ann Sullivan and Christine Armstrong, do not include any factual information and cannot support any

adverse findings regarding the general and specific standards that apply to this proceeding. Ms. Sullivan's letter references "concerns" about amplified sound without offering any facts or evidence that HCA's events would actually create an adverse impact under the relevant criteria. Ms. Armstrong's letter points to the same general, unsupported concerns, and the primary focus of her letter is to urge HCA to proceed with online content and indoor dining instead of outdoor events due to her fear of increased risk of exposure to Covid-19. Whether or not this is a valid concern, it is not relevant to the criteria before the DRB. Ms. Armstrong's additional reference to a community survey, which apparently identified a "quiet rural environment" and an "unlit night sky" as priorities, does not constitute relevant evidence in this matter. First, Ms. Armstrong offered no factual evidence that HCA's planned activities would negatively impact either of these priorities (indeed, both the Armstrong and Sullivan letters pre-date the hearing, prior to the authors' awareness of HCA's modified proposal for amplified outdoor sound and before hearing any evidence at the hearing. Second, a community survey, while extremely helpful, on a limited basis, to gauge the priorities of those responding to the survey, has no bearing on DRB decision-making, which must be based solely on the criteria from the Zoning Bylaws. The DRB has properly focused on the general and specific conditional use criteria in the Bylaws. Even if it was somehow appropriate for the DRB to treat the content of letters as formal evidence-- on a par with live testimony under oath--there is no information within these letters that constitutes factual, relevant testimony concerning either HCA's specific activities or the particular sound impacts of those activities. The letters merely state opinions and "concerns" which, without more, have no independent factual significance.

2. Due to the absence of evidence supporting the DRB's denial, the DRB's decision contains no findings of fact, nor a statement of any conclusions the Board determined from the evidence. As such, the decision fails to comply with the Vermont zoning statutes. 24 V.S.A. Sec. 4464(b) requires that "[d]ecisions shall be issued in writing and **shall include a statement of the factual bases** on which the appropriate municipal panel has made its conclusions and a statement of the conclusions." The "Findings of Fact" section of the decision does not include any findings, only a recitation of the applicable standards from the Bylaws. Broad, unsupported statements of "areas of concern" are not findings, are not based on the evidence presented and cannot justify the denial of HCA's request for relief.

"The findings must indicate to the parties, and to this Court, if an appeal is taken, what was decided and how the decision was reached." *State of Vermont v. Huston*, Vt. Supreme Court, 2020 VT 46, No. 2019-361. With particular regard to zoning boards, the Vermont Supreme Court noted:

"This Court has often explained that findings are required in order that the board will adequately communicate " 'how the result was arrived at,' " not only for the

parties, but also for the reviewing court. Findings serve to: (1) facilitate judicial review; (2) prevent judicial usurpation of administrative functions; (3) assure more careful administrative consideration; (4) help parties plan their cases for rehearings and judicial review; and (5) keep administrative agencies within their jurisdiction.”

City of Rutland v. McDonalds Corp., 146 Vt. 324 (1985).

Even in a “de novo” appeal situation, in which the Environmental Court conducts a new hearing, findings of fact and adherence to the statutory requirements for hearings remains vital: “[i]f a procedural defect is so inherently unfair that it calls the whole process into disrepute, the remedy is for the Court to remand the application to the municipal body to conduct a fair proceeding..” *In re: Walsh d/b/a Deerwood Estate Conditional Use Application*, Docket No. 122-6-09 Vtec, December 9, 2009.

3. Following HCA’s review of the DRB’s decision and our determination that the decision did not cite to any factual evidence regarding sound impacts, HCA’s representatives determined that the above-noted deficiencies in the DRB’s written decision may have stemmed, in part, from HCA not taking a more scientific or detailed approach for presenting evidence on anticipated sound impacts. HCA moved to correct this deficiency on Thursday, July 2, when we conducted extensive sound testing to present more detailed information to the DRB that was not available at the initial hearing.

The attached spreadsheet reports the result of this testing, and establishes that sound levels from the loudest of our events—amplified live music, utilizing a drum kit, electric bass, guitar and amplified vocals—remain on the “quiet” scale at various locations in the immediate vicinity of HCA. To put our results into context, we have attached a chart of sound measurement levels for various sound sources and an explanation of the decibel scale. Our testing was conducted using two separate decibel-measuring devices and we tested for potential sound impacts from our amplified music at several locations within and outside the HCA property. We tested for two parameters at each site: background sound levels without any music playing, and the added sound from amplified music at each location. We also employed two separate sound-measurement devices to ensure accuracy: so-called Unit 1 is a hand-held, self-contained unit; Unit 2 was an app downloaded to a smartphone, presumably providing less accurate but still helpful readings. At the source (HCA’s patio), the average live music level averaged close to 80db, compared to a background (no music) noise level of 46db. Background noise levels (no amplified sounds) at all testing locations remained consistent throughout the testing, ranging from an average of 44 to 48db at both the HCA driveway intersection with Hardwick Street and the Hardwick Street/Center Road intersection (without passing cars). Background noise was quietest at the intersection of the Niemi driveway/Center Road at 39db. At the HCA boundary (tree line opposite Brochu), an average reading of



50.5db was clearly affected by the operation of a riding lawnmower. We managed to obtain an average reading of 49db at this location with the live music playing and minimal noise from the mower. Measurements with live music playing at each of the other areas, unaffected by any substantial additional outside noise, were as follows: Averages of 51.5 and 56.5db (Unit 1 vs. Unit 2) at HCA driveway/Hardwick Street; average of 56db at Hardwick Street/Center Road intersection; and an average of 40db at the Niemi driveway intersection with Center Road (at this location, the live music could not be heard by either of two sets of human ears). At the bleachers area of the ballfield, Unit 1 averaged 45db and Unit 2 averaged 47db with live music—virtually the same sound levels as measured outdoors on the HCA patio, with human activity and without any sound amplification(46db).

For comparison purposes, a passing passenger car at the Hardwick Street/Center Road intersection, measured from the shoulder of Center Road, registered 72db and 74db on Units 1 and 2, respectively. A small RV fluctuated between 81 and 82db on Unit 1 at the same location.

We intended to continue testing at additional sites further away from HCA's property, but with no audible amplified sound detected at the Niemi driveway and with negligible increases at the ball field, it was clear that there would be no difference between background noise levels and HCA-generated amplified sound at any areas near or along Caspian Lake or toward the village.

HCA submits this new information as the most relevant evidence to evaluate actual sound impacts and potential effects on the "character of the area" and the specific standard of noise pollution in the area. These impacts are negligible and cannot be said to create undue noise pollution nor an adverse effect on the character of the area.

Legal Authority for the DRB to reconsider the decision and re-open the hearing:

Both the Vermont Supreme Court and the Vermont Environmental Court have recognized a municipal zoning board's authority to re-open a hearing for additional evidence and reconsider the initial decision, even after the issuance of the board's written decision, so long as the decision has not yet become final (appeal period has not expired).

In *Nash v. Warren Zoning Board of Adjustment*, 153 Vt. 108 (1989), the Vermont Supreme Court affirmed a decision in which the ZBA [now DRB] initially voted to orally grant a permit at the end of a hearing, only to later reopen the matter following further site investigation by one ZBA member after the hearing was closed and the vote to approve the permit had occurred. The Vermont Supreme Court affirmed the subsequent denial of the permit based on the after-acquired information which was presented at the reopened hearing. The Court noted that there is "substantial authority" for the practice of

“a municipal zoning authority to reopen proceedings and reconsider a decision where new evidence is submitted.”

Later cases from the Environmental Court authorized reopening hearings during the appeal period even after the written decision was issued and circulated to the parties. The Court stated as follows in *In re: Walsh d/b/a Deerwood Estate Conditional Use Application*, *supra*:

As explained at length in *In re Appeal of Dunn*, No. 2-1-98 Vtec (Vt. Env'tl. Ct. Mar. 8, 1999): “...a DRB may vote to reconsider its decision as long as the time has not expired for an appeal to be taken from the decision, that is, if there has not been reliance on the previous decision. A DRB may warn a hearing to take additional evidence and an additional vote, by following the procedures for reconsideration outlined in Appeal of Dunn.

In the *Dunn* case, the Environmental Court expanded a DRB’s authority to reopen and reconsider a decision in situations like the present matter, when an initial decision has been rendered and has been reduced to writing, so long as the appeal period has not expired, such that the decision is still not final:

[a]ny quasi-judicial board, whether municipal or administrative, should be allowed a limited time to reopen a decision and to take new evidence, if only for reasons of judicial and litigant economy in the reviewing court. That is, it is far more efficient for such a board to have the opportunity to correct its own decisions than to have the reviewing court necessarily make the correction. Further, even in a de novo proceeding, the reviewing court may find it necessary to remand the matter to the board for it to consider an issue in the first instance. In *re Maple Tree Place*, 156 Vt. 494, 499 (1991). **It is much better practice to avoid unnecessary remands [footnote omitted] by allowing a board, which realizes that it has acted on incomplete or inadequate information, or is informed of previously-unavailable evidence, to reopen the initial proceeding if such a procedure may result in a sounder decision**, so long as the reopening works no prejudice on the parties and they have adequate notice of the reopened hearing.

In re: Dunn, No. 2-1-98 (March 8, 1999); *see also In re: Comi*, 2005 WL 6056121 (2005), in which the Environmental Court ruled as follows:

“All of the criteria established in *Dunn* to allow the DRB to reopen its [earlier] decision were met in the present case. Once the DRB had brought to its attention the possibility that the measurements it had relied on may have been inaccurate or incomplete, the DRB was entitled to decide whether it wished to take additional evidence. Prior to the expiration of the time for appeal of the original



decision...the DRB voted to reopen and hold a properly-warned hearing on the reopened decision...Further, the DRB allowed the applicant and all other interested parties to present any additional evidence and argument at the [subsequent] hearing on the reopened decision. Under these conditions, there was no prejudice either to parties favoring the original decision, nor to parties intending to appeal the original decision.”

In re: Comi, supra.

As the decision in this proceeding is not yet final, HCA is requesting the DRB to reopen this proceeding for the dual purposes of correcting the deficiencies noted in its original decision and to schedule another hearing to allow the applicant and all interested parties to present and comment on the additional evidence and information set forth herein. There is no question that the DRB possesses the legal authority to reopen this matter, which will allow for a final decision that is fair and based on full consideration of all available, relevant evidence.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Rob Halpert", is written over a faint, larger version of the same signature.

Rob Halpert, Board Chair
HCA

Enclosures

HCA Decibel Reading Test - Thursday, July 2, 2020 at approx 4:30 PM

Location	Unit 1 Reading	Unit 2 Reading
Canned Music at Source		
Mid-way point on Patio Base Reading	78	NA
Mid-way on Patio with Canned Music	46	NA
	65	NA
Canned Music Top of the Hill - Lawn		
	55	NA
Live Music		
Mid-way point on Patio	Max 83/Min 76	NA
Driveway to HCA Entrance Background	Max 44.3/Min 43.7	Max 49/Min 39
Driveway to HCA Entrance Live Music	Max 54.0/Min 49.0	Max 59/Min 54
Intersection by Ballfield Background	Max 49.3/Min 47.2	Avg 50
Intersection by Ballfield Live Music	NA	Max 59/Min 53
Passing RV	81-82	
Passing Car		74
Treeline near Brochus Background	Max 52/Min 49	NA
Live Music	Avg 49	Avg 54
Lawn Mower moving around property		Idling 44 - near road 89 - further back on property 63
Niemi Driveway Background	Avg 39	NA
Live Music	Avg 40	Avg 46
Ballfield Live Music	Avg 45	Avg 47

Note: Range was difficult to obtain as homeowner across the road started lawnmower during test

Note: Had to call Ted on the radio to ask if they were playing

Note: We were joined by Nat Smith, member of local DRB, who had his own meter - not certain what he had for a reading

Note: Source one was an actual meter, while source two was an app on a phone

INFORMATION AND CHART re: Decibel Scale

<https://www.usbr.gov/uc/envdocs/ea/navajo/appdx-E.pdf>

Navajo Reservoir RMP/FEA * * * * June 2008 APPENDIX E NOISE

The relationship of noise to the human environment is complex and highly technical. The following information is a simplified summary of noise, some of its descriptors, and some human response to varying levels of noise. Elements of this summary were used in the EA to describe the affected environment and the environmental consequences related to noise. Noise is generally defined as unwanted sound that disrupts normal activities or that diminishes the quality of the environment. It is usually caused by human activity that adds to the natural acoustic setting of a locale. Various descriptors are used to describe sound and noise levels. These include the A-weighted decibel scale (dBA); sound level equivalents (Leq), day-night average sound levels (Ldn), and percentile levels. The most common measurement of sound and environmental noise is the A-weighted decibel scale (dBA). This is a logarithmic scale that ranges from 0 dBA to about 140 dBA and approximates the range of human hearing. The threshold of human hearing is about 0dBA; less than 30 dBA is very quiet; **30 -60 dBA is quiet**; 60-90 dBA is moderately loud; 90-110 dBA is very loud; and 110-130 is uncomfortably loud. **A 10-decibel increase in sound levels is perceived as a doubling of the loudness.** However, due to the logarithmic nature of the decibel scale, the sound levels for different noise sources cannot be added directly for a combined sound level. For example, two adjacent sound sources with the same sound level have a composite noise level only 3 decibels greater than either source; two adjacent sound sources with sound levels that differ by 10 decibels have a composite noise level only 0.4 decibels greater than the louder source.

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<https://www.iacacoustics.com/blog-full/comparative-examples-of-noise-levels.html>

Comparative Examples of Noise Levels

Noise Source	Decibel Level	Decibel Effect
Jet take-off (at 25 meters) Recommended product: Outdoor Noise Barriers	150	Eardrum rupture
Aircraft carrier deck	140	
Military jet aircraft take-off from aircraft carrier with afterburner at 50 ft (130 dB).	130	
Thunderclap, chain saw. Oxygen torch (121 dB).	120	Painful. 32 times as loud as 70 dB.

Steel mill, auto horn at 1 meter. Turbo-fan aircraft at takeoff power at 200 ft (118 dB). Riveting machine (110 dB); live rock music (108 - 114 dB).	110	Average human pain threshold. 16 times as loud as 70 dB.
Jet take-off (at 305 meters), use of outboard motor, power lawn mower, motorcycle, farm tractor, jackhammer, garbage truck. Boeing 707 or DC-8 aircraft at one nautical mile (6080 ft) before landing (106 dB); jet flyover at 1000 feet (103 dB); Bell J-2A helicopter at 100 ft (100 dB).	100	8 times as loud as 70 dB. Serious damage possible in 8 hr exposure.
Boeing 737 or DC-9 aircraft at one nautical mile (6080 ft) before landing (97 dB); power mower (96 dB); motorcycle at 25 ft (90 dB). Newspaper press (97 dB).	90	4 times as loud as 70 dB. Likely damage in 8 hour exposure.
Garbage disposal, dishwasher, average factory, freight train (at 15 meters). Car wash at 20 ft (89 dB); propeller plane flyover at 1000 ft (88 dB); diesel truck 40 mph at 50 ft (84 dB); diesel train at 45 mph at 100 ft (83 dB). Food blender (88 dB); milling machine (85 dB); garbage disposal (80 dB).	80	2 times as loud as 70 dB. Possible damage in 8 hour exposure.
Passenger car at 65 mph at 25 ft (77 dB); freeway at 50 ft from pavement edge 10 a.m. (76 dB). Living room music (76 dB); radio or TV-audio, vacuum cleaner (70 dB).	70	Arbitrary base of comparison. Upper 70s are annoyingly loud to some people.
Conversation in restaurant, office, background music, Air conditioning unit at 100 feet.	60	Half as loud as 70 dB. Fairly quiet.
Quiet suburb, conversation at home. Large electrical transformers at 100 feet.	50	One-fourth as loud as 70 dB.
Library, bird calls (44 dB); lowest limit of urban ambient sound	40	One-eighth as loud as 70 dB.
Quiet rural area.	30	One-sixteenth as loud as 70 dB. Very Quiet.
Whisper, rustling leaves	20	
Breathing	10	Barely audible



What is a decibel?

It is important to understand exactly what a decibel is. A [decibel](#) is a unit of intensity of sound, abbreviated dB. The decibel scale is incredibly large, because ears are [so sensitive to sound](#)—people with normal hearing can hear anything from a light touch on skin to the roar of a plane's engine. The decibel scale is logarithmic, meaning it increases by the power of 10 each time. The smallest audible sound is 0 dB. A sound that is 10 times more powerful is 10dB, a sound that is 1,000 times more powerful is 30 dB, and so on (it helps to count the zeroes in the scale to keep track!)

- 10 dB: Normal breathing
- 20 dB: Whispering from five feet away
- 30 dB: Whispering nearby
- 40 dB: Quiet library sounds
- 50 dB: Refrigerator
- 60 dB: Electric toothbrush
- 70 dB: Washing machine
- 80 dB: Alarm clock
- 90 dB: Subway train
- 100 dB: Factory machinery
- 110 dB: Car horn
- 120 dB: Ambulance siren

