

Reconsideration of the DRB's June 18, 2020 decision
Highland Center for the Arts
August 10, 2020

To reconsider the decision by the DRB on June 18, 2020 to deny the Highland Center for the Arts the utilization of amplified sound outside the structure.

The application requires a review under the following sections of the Greensboro Zoning By-Law: 2.5 Rural Lands District, and 5.4 Conditional Uses

Warnings were posted on July 17, 2020 at the Greensboro Town Hall, the Greensboro Post Office, the Greensboro Bend Post Office, and Willey's and Smith's Stores. The warning was sent to the applicant's attorney, Robert Halpert, and the following abutters and neighboring property owners: Mountain View Country Club, Town of Greensboro, Patricia Mercier, the Bishop Family Trust, NEXT 1, LLC, William & Martha Niemi, David Allen, Hardwick Electric Department, Arthur & Julie Brochu, and Brendan & Lindsay Beer on July 17, 2020. It was published in the Hardwick Gazette on Wednesday, July 22, 2020.

Development Review Board members present: BJ Gray, Linda Romans, Nat Smith, Jane Woodruff, Lee Wright, Wayne Young, Janet Travers (alternate) and Mike Metcalf (alternate),

Development Review Board members absent: MacNeil (recused)

Others present: Robert Halpert, attorney for the applicant; and Brett Stanciu, Zoning Administrator; for others see the sign-in sheet.

Correspondence from interested persons:

1. An email letter from Jenny Bayles (in favor)
2. An email letter from Rick Norcross (in favor)
3. An email letter from David Miltenberger (against)

During the course of the hearing the following exhibits were submitted:

- #1 An email letter from Jenny Bayles (in favor)
- #2 An email letter from Rick Norcross (in favor)
- #3 An email letter from David Miltenberger (opposed)

The hearing was conducted by electronic communication (ZOOM).

Summary of Discussion

Ms. Woodruff, chair, began the hearing at 7:08 PM. She noted the hearing was quasi-judicial, explained the procedure for the hearing, and asked the clerk to swear in all those who wished to speak at the hearing. Ms. Woodruff then asked Mr. Halpert to explain why the Highland Center for the Arts would like the Board to reconsider their decision of June 18, 2020 to deny the Highland Center for the Arts' request to delete condition #5 in their 2014 permit which prohibits the use of amplified sound outside their building. Mr. Halpert said the Highland Center for the Arts filed this second request because they weren't happy with the June 18th decision and they wanted to point out what he felt were deficiencies in the Board's decision process. They felt the Board didn't present any factual evidence to substantiate their decision to deny their request. He also acknowledged some deficiencies in the way the HCA presented its case on June 18th since they didn't present factual evidence based on sound level testing to support their request for amplified sound. They decided to remedy that in this second hearing. On July 2 they conducted a sound test with a purchased decibel meter and an app on a phone to test the decibel levels. The levels were tested on the HCA patio, the HCA driveway entrance on Hardwick Street, the HCA side of the Center Road/Hardwick Street intersection, the ballfield, near the Brochu's drive on Center Road, and the Niemi's drive on Center Road. The sound test was conducted, in large part by Mr. Donlon, assisted by Ms. Hall, Ms. Luce and Mr. Halpert. One person from the DRB participated in the test with his own decibel meter which generally agreed with the HCA findings.

They began by testing background noise then added amplified, live music, typical of a rock band. The background sounds they measured averaged between the high 30dB and low 40dB. With the music playing, they reached 83dB on the patio which decreased to 54dB to 59dB at the HCA driveway entrance and 45dB to 47dB at the ballfield and couldn't be heard or measured at Niemi's driveway. (See sound test results and comparative noise levels attached to the HCA application letter.) When tested, amplified recorded music seemed to have a lesser impact than live music.

Ms. Luce, executive director at HCA, added that it has been a challenging summer trying to work out a way to have art events within COVID guidelines. They are trying to support local artists by employing them to perform there, but having no amplification outside makes it difficult for the performers who have to be aggressively loud and audiences who find it difficult to hear, especially voices.

Mr. Halpert summed up by stating the HCA feels the sound level testing they did shows amplification of events there would not have an adverse effect on the character in the area. He cited Rick Norcross' letter (exhibit #2) which said his group had to stay within a certain decibel level at a Burlington musical event. He suggested someone from the DRB, or HCA, could test the decibel level of performances to regulate them. He also stated that they were amenable to having this summer be a test period that would then be expanded into the future, if things went well.

Ms. Woodruff said she happened to be playing golf at the time of the test and she could hear the music plainly on every hole. She was also playing golf during a couple of the HCA's Sunday brunches, which are not amplified, and could hear the unamplified music and talking when she was on the hole directly across the road from the HCA.

Ms. Woodruff then opened the hearing to questions from the Board which resulted in these facts:

- The sound testing was done at an intentionally loud level. Decibel levels range from the 10dB of a person breathing to an ear-splitting 150dB of a jet plane taking off. 30dB to 60dB is considered quiet, 60dB-90dB is moderately loud, 90dB to 110dB is very loud and 110dB-130dB uncomfortably loud. (See sound test results and comparative noise levels attached to the HCA application letter.)
- Sounds are subjective. Unpleasant sounds seem louder than pleasant ones heard at the same decibel level.
- The sound travels through the microphones, to the mixer, to the master amplifier, and finally through the speakers.
- The sound can only be set with a meter, not with a setting on the amplifier and it varies with each performer.
- The decibel levels presented were a combination of the background sound and the background sound.
- A system of baffles did not seem probable, if possible.
- Sound travels in a straight line, so it is logical that the sound test could be heard on the golf course, which is directly across the street from the HCA and in the direction the speakers were facing, better than at the Niemi's driveway which is behind the speakers, although closer.
- The same sound system and speakers would be used for all performances and the two speakers are considered small.

Ms. Woodruff then opened the hearing to questions or comments from those present which brought out these facts and opinions:

- At the time of the original decision in 2014, we were in a different place and there was a possibility of having inside performances year round.
- The performances are outside now because of the pandemic and amplification would make them more enjoyable because they could be heard more easily. Voices are especially difficult to hear.
- One of the performers said that many of their performances around the world have been

cancelled because of the pandemic and HCA has been the only place they have been able to perform and performing is their living.

- It is very difficult to perform outside with no amplification. Dialog and movements must be changed and broadened and still it is difficult for the audience to hear and understand.
- The Highland Lodge, the Country Club, the July 4th celebration, Sunday music on the lake, and Circus Smirkus in town all have can have amplified sound outside.
- Another person said they could hear the sound test music on every hole of the golf course, especially on the hole which parallels the street and is directly across from the HCA.
- The DRB should not base their decision on the few people who find the music too loud, but for everyone.
- The performances will only be about an hour and a half to two hours long.
- The request to have amplification is not really about the pandemic, there could be performances inside now. (Mr. Halpert reacted by saying yes, performances could be inside, but there could only be about 20 people in the audience.)
- It is not the role of the DRB to supply evidence in a hearing. It is up to the applicant.
- The DRB follows guidelines set up in the Town plan, voted in by the whole Town.
- The burden of policing the sound would be on the Town and that is not possible.
- The HCA's closest neighbor said that so far living close to the HCA has generally been a good experience, but there have been a few instances when she could hear the bass of the music very loudly, even though they were inside. Once, when the doors were left open, it even woke her up. When she called them they apologized and closed the doors so she could not hear the music. When people are eating out on the patio she can hear the sound and wonders what it will be like if there is amplified music.
- This same neighbor wonders now if she would have been so agreeable to the theater in 2014 if she had known there would be outside performances. In 2014 they said there would be no outside performances and the building would be sound-proofed.
- The decision shouldn't be based on the pandemic.
- The existing unamplified sound seems to be audible to the surrounding area.
- The DRB should take all residents of the Town into consideration, not just the people who attend the events.
- It's more important to hear what people say about hearing the music on the golf course and the neighboring properties than looking at the decibel levels.

Mr. Halpert summarized that the HCA came to the hearing in June without presenting enough objective evidence to enable the DRB to make a more informed decision, and the HCA has now presented some objective evidence. The sound test on July 2nd was a worst case scenario, where the sound was intentionally played and amplified loudly. HCA is also part of the community and a neighborhood which is not so quiet all the time. There is always incidental noise made by many things. They would like relief from a condition that prevents them from doing what others in the community can do. If they have an opportunity to do the minimal amplification they need to do, the community will find they are not disturbing them, having an adverse effect on the character of the area, and are not creating undue sound pollution.

The hearing ended at 9:09 pm. The Board went into deliberative session at 9:10 pm. At 10:22 pm the session was recessed until 7:30 am Tuesday, August 11th. The Board came back into public session to announce their decision at 8:35 am on Tuesday, August 11, 2020.

Findings of Fact:

Based on the application and the credible testimony, the Development Review Board makes the following findings:

2.5 Rural Lands District

All conditions of bylaw 2.5 were met and approved in the DRB's 2014 decision, including one sign of no more than 6 square feet in area. The following conditions were added to the 2014 approval, of which the Highland Center for the Arts wants relief from condition #5:

1. All the Hazendale Farmstand buildings will be removed on the GAAR site.
2. All necessary state and federal permits must be in place before the construction of the facility. In addition, all state and federal requirements, such as ADA accessibility requirements, must be met.
3. The performing arts complex and café will not provide housing on site nor serve as a wedding venue.
4. The proposed café will not exceed 50 seats on the interior.
5. Performances and events conducted on the site will not utilize amplified sound outside of the structure.
6. Evergreens will be planted along the existing line of deciduous trees, and to fill in the area that has no tree line, to provide sight and sound protection for neighboring landowners. An evergreen privacy hedge will be installed on the boundary line between the GAAR parcel and the Niemi parcel.
7. The parking design (and the round-about) must be acceptable to the Greensboro Fire Chief for the purpose of fighting fires. In addition, the water volume must be sufficient for fire protection.
8. The total water demand of the site should not create undue adverse effect on the town water supply or specifically the local fire department's water demand to maintain its intended purpose
9. Every effort will be made to incorporate natural exterior materials and a design to allow the structure to blend into the Rural Lands District.
10. The building will be no higher than 35 feet.
11. The area of any sign will be 6 square feet or less.

5.4 Conditional Uses

B) General standards

The proposed conditional use will not have an adverse effect on:

1. *the capacity of existing or planned community facilities.* The use of amplified sound would not adversely affect the capacity of existing or planned communities.
2. *the character of the area.* The use of amplified sound would adversely affect the character of the area.

One of the neighbors credibly testified that she could hear the music from inside the HCA several times. Once, when the doors were left open, it was so loud, that it woke her up. Although the HCA apologized when she called and solved the problem, this is not indicative of the character of a rural community.

3. *traffic in the vicinity.* The use of amplified sound would not adversely affect traffic in the area.
4. *by-laws and ordinances presently in effect.* The use of amplified sound would not adversely affect the bylaws and ordinances presently in effect.
5. *the utilization of renewable energy resources.* The use of amplified sound would not adversely affect the utilization of renewable energy resources.

C) Specific Standards:

1. *The lot must meet the minimum size required for the district unless other standards are given for conditional use lot size in the district.* The lot meets the minimum size for the rural district.
2. *Setbacks will be the same as for other permitted uses unless other standards are given for conditional use setbacks in the district.* All setbacks are met.
3. *Fencing/ landscaping may be required for commercial and industrial uses to provide*

screening if the Board deems it necessary to protect the character of the area. No landscaping or fencing is required.

4. *Exterior signs shall not be internally lit and must be compatible in size, materials and workmanship to the area in which they are located.* Not applicable for this request.

5. *The proposed structure is compatible with other structures in the area.* Not applicable for this request

6. *The proposed structure adheres to the uses allowed in the relevant district.* Not applicable for this request

7. *The proposed structure will not affect the noise or air pollution in the area.* The use of amplified sound will adversely affect the noise pollution in the area. A neighbor credibly testified how she has heard loud music from inside the building several times from the HCA when the doors were left open. One time she was even awakened by the loud music. She can also hear the talking from the patio at meal times. Two other people spoke of hearing the music on all holes of the golf course during the sound test and at Sunday brunch time along the 7th hole which runs parallel to HCA. This latter music was not amplified and was more in keeping with the quiet nature of the rural lands district.

Decision and Conditions

Based upon these findings, the Development Review Board voted unanimously (7 – 0) to deny the request to remove condition #5 in the 2014 decision. (Janet Travers, alternate, voted in MacNeil's place. Mike Metcalf, alternate, did not vote.)

One of the neighbors credibly testified that she was able to hear the music several times from inside the HCA. Once, when the doors were left open, the sound woke her up. Although the HCA apologized when she called and solved the problem, this is not indicative of, nor in keeping with the character of a rural community, especially since it has happened more than once.

A witness credibly testified that while walking on the golf course, she heard the music during the HCA sound test on each hole on the golf course, especially on the 7th hole that skirts along Hardwick Street, which runs in front of the HCA. She further credibly testified that during two instances when HCA offered unamplified entertainment at Sunday brunch, she heard it from the 7th hole of the golf course, but that it was far less loud than the amplified sound test and was more in keeping with the quiet nature of the rural lands district. However, these instances speak to the problem of noise generated at the facility.

The Board then considered its own compromise proposal as follows:

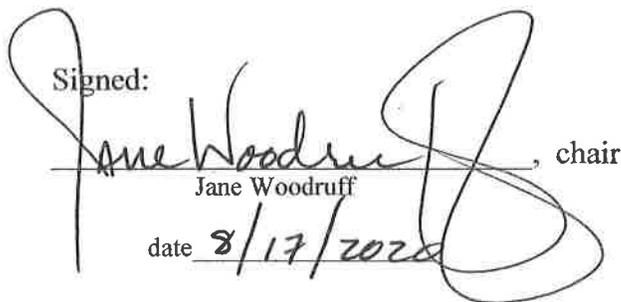
In recognition of the coronavirus pandemic restrictions on indoor gatherings, as dictated by the Governor of Vermont, the DRB grants the Highland Center for the Arts the opportunity to host outdoor sound-amplified events between now and October 15, 2020 with the firm expectation that these events will take place as presented to the DRB at the June 18th hearing, namely, that they will each be at most an hour and a half in length, ending by 8:30pm at the latest, and that they will have minimal sound amplification. The DRB sees this short-term reprieve of Condition #5 as just that, short term; this reprieve should not be interpreted as the beginning of outdoor, amplified sound concerts at the HCA.

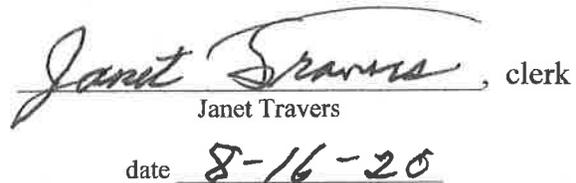
A vote was taken on this proposal and it passed by a vote of 5-2. BJ Gray, Nat Smith, Lee Wright, Wayne Young and Janet Travers (alternate, voting in MacNeil's place) voted for it. Linda Romans and Jane Woodruff voted against it. (Mike Metcalf, alternate, did not vote.)

Those who approved the proposal felt the need to compromise because of the restrictions placed on the Highland Center, and other businesses, by the pandemic and recognized that it is difficult to hear, especially speech, during a performance without amplification. They also wanted to support the community and performers that asked for some relief from the COVID restrictions. They noted the zoning bylaws and Town plan are not clear on the issue of noise; there was credible testimony from interested persons that differed widely on the issue and the Town voted several years ago not to implement a sound ordinance. They know that many other venues in town have the opportunity to use amplified sound outside. For these reasons, they voted for the compromise proposal so the Highland Center could have the opportunity to have amplified outdoor sound for a limited amount of time.

Ms. Romans and Ms. Woodruff voted no for the following reasons:

While we are sympathetic with the constraints that the COVID-19 pandemic has placed on entertainment venues, performers of all types, and the population as a whole, the duty of the Development Review Board is to apply the Greensboro Zoning Bylaw consistently and equally to each application that comes before it. If we were to do otherwise, the Board's decisions would become arbitrary and capricious. Nowhere in Section 5.4 Conditional Uses, is there a provision to grant temporary relief due to a natural disaster. For that reason, we cannot in good conscience vote for the temporary relief when the Board denied the original request to delete Condition #5, as that action would adversely affect the character of the area and would add to the noise pollution.

Signed:  , chair
Jane Woodruff
date 8/17/2020

 , clerk
Janet Travers
date 8-16-20

NOTICE:

This decision may be appealed to the Vermont Environmental Court by an interested person who participated in the proceeding (in person or in writing) before the Development Review Board. Such appeal must be made within 30 days of the date of this decision, pursuant to 24 V.S.A. #4471 and Rule 5(b) of the Vermont Rules for Environmental Court Proceedings.