

TOWN OF CHESTER
DEVELOPMENT REVIEW BOARD

In re: Julian Material, LLC (Allstone) Conditional Use Application

POST-HEARING PROPOSED FINDINGS AND MEMORANDUM OF LAW SUBMITTED
BY SCOTT KILGUS AND LESLIE THORSEN

INTRODUCTION

The Conditional Use Application of Julian Materials, LLC (“Julian”), must be denied for the following reasons.

Julian Proposed Hydraulic Hammer Noise

◆ Julian failed to prove that its initial proposal (5/31/23) or its revised proposal (12/7/23) will comply with the requirement of Ordinance § 4.9.A that “Noise levels or frequencies which are *not customary* in the district or neighborhood *or which represent a repeated disturbance to others* shall not be permitted.” The “hit-hit-hit-hit-hit” noise of the hydraulic hammer did not occur until Julian commenced using the hydraulic hammer, and the noise is highly disturbing to neighborhood residents Kilgus, Thorsen, LeClair, Greene, MacAllister, Melanson, Goodrich, Kenworthy, and Nowak. The noise is not customary; and the noise is a repeated disturbance—whether it occurs one day a week or every day of the week.

◆ Julian failed to prove that its initial proposal or its revised proposal will comply with the requirement of Ordinance § 4.9.A that “Noise shall *not exceed 70 dB* during the day between 7 a.m. and 8:00 pm.” RSG’s report shows that the hydraulic hammer noise *will exceed* 70 dbA on private property on both sides of Route 103 (Figure 29) and both sides of Dean Brook Road (Figure 32).

◆ Julian intentionally prevented the Board and the parties from obtaining relevant, critical evidence about the noise impacts of operating the hydraulic hammer.

A) Julian’s expert prepared a report that *omitted the noise contour lines* on Figures 29 and 32 that would have shown how far above 70 dbA the hydraulic hammer noise has been and will be;

B) Despite the Board’s order that this information was relevant and necessary, Julian’s owners *refused to testify* about the locations and frequency of the use of the hammer that resulted in the past complaints and the videos of horrendous noise; and

C) after explicitly agreeing to a site visit by the Kilgus/Thorsen’s noise expert during operation of the hydraulic hammer, Julian *refused to allow the noise expert to*

enter onto Julian's property to measure the loudness of the hammer and observe where it was being used—making his visit useless.

Julian Proposed Noise Without the Hydraulic Hammer

◆ Julian failed to prove that, even when the hydraulic hammer is not in use, its initial proposal or its revised proposal will comply with the requirement of Ordinance § 4.9.A that “Noise levels or frequencies which are not customary in the district or neighborhood or which represent a repeated disturbance to others shall not be permitted.” The noise of *rock being loaded onto trucks* is highly disturbing and repetitious did not occur until Julian commenced operation.

◆ Julian failed to prove that, even when the hydraulic hammer is not in use, its initial proposal or its revised proposal will comply with the requirement in Ordinance § 4.9.A that “Noise shall not exceed 70 dB during the day between 7 a.m. and 8:00 pm.” Mr. Duncan’s modeling report (Figures 28, 30, 34, 36, 37, 41, and 42) shows that its operations will add *over 70 dbA* of noise to properties adjacent to the North Quarry and Chandler Road Quarry even when the hydraulic hammer is not being used.

◆ Julian intentionally prevented the Board and the parties from obtaining relevant, critical evidence about the noise impacts of operating the North Quarry and the Chandler Road Quarry, because Julian’s expert prepared a report that *omitted the noise contour lines* on Figures 28, 30, 34, 36, 37, 41 and 42 that would have shown how far above 70 dbA the noise has been and will be at properties near these quarries;

The Julian Initial Proposal Lacked Necessary Data About Visual Impact, Dust, Traffic and Water Pollution; It also Required a Rock Crusher and Included Strip Mining

◆ The Julian initial proposal calls for massive downward excavation of the South Quarry and the North Quarry, with processing at the Chandler Road Quarry. It included *no visual or dust impact analysis* of the massive excavation, and no data on the *traffic impacts of the massive trucking* of quarried rock to the Chandler Road site. Mr Matosky justified the lack of traffic evidence by saying much of the rock would be crushed in a rock crusher at the South Quarry and used on-site for the building—but the existing South Quarry permit does not authorize a rock crusher, and Julian’s initial application did not seek approval of a rock crusher.

◆ The massive downward excavation at the South Quarry and the North Quarry set forth in the initial version constitutes *strip mining*, which is prohibited by § 3.9.

◆ Julian presented no test results or other evidence of the *nature, quantity, or toxicity of the materials* it is discharging into Dean Brook, and asks the Board to rely on mitigation

measures that have *not been approved* of by the State even though the discharges continue.

The Julian Revised Proposal Violates 24 V.S.A. §§ 1204, 1206 and 4464

◆Julian’s revised plans, submitted on Thursday, December 7 before the final hearing on Tuesday, December 11, seek approval of a rock crusher and of new but undisclosed trucking routes for the quarried rock—contrary to the statutory notice which commenced these proceedings, and in violation of the notice and fairness protections of the Vermont Municipal Administrative Procedure Act.

The Julian Initial and Revised Proposal Contain Inadequate Information about Use of the Chandler Quarry Shed for Processing Granite

◆Julian proposes continued use of the shed for processing granite, but provided no information on the cutting tools and processes currently in use, and their dust and water quality emissions.

1. JULIAN PROPOSED HYDRAULIC HAMMER NOISE

The applicant for a conditional use permit bears the burden of proof. This means that Julian must submit evidence that persuades the Board that it has satisfied every one of the relevant criteria; if it fails to persuade the Board about one or more of the criteria, the permit must be denied. *In re Group Five Investments CU Permit*, 2014 VT 14 ¶¶ 5-9. 195 Vt. 625, 93 A.3d 111; P. Salkin, *American Law of Zoning* (Thomson Reuters 2017) § 14.6 (burden of proof is on conditional use applicant). The following proposed Findings of Fact address these facts, and also the “standing” of Mr. Kilgus, Ms. Thorsen and others to address these issues.

1. Scott Kilgus and Leslie Thorsen reside at 296 Blackberry Hill Rd. in Chester. They own this property. Thorsen Affidavit (Exhibit 8)
2. They also co-own with another family, through a trust, the parcel of land that adjoins their residential parcel on its west side. This second parcel, about 20 acres in size, is roughly trapezoidal in shape and runs down the hill to the west, ending at the edge of the field along Route 103, slightly south of the intersection with Route 10. Thorsen Affidavit
3. They have a trail on the 20-acre parcel that goes down near the field. They use the trail for walking, cross-country skiing, and horseback riding. Thorsen Affidavit (Exhibit 8)
4. If one were to stand on Route 103 just south of the Route 10 intersection and look to the east one would see the trees on their 20-acre parcel where it meets the field. From the same location, if one were to look to the west you would look across another field and see the trees on the land owned by Julian Materials on which the South Quarry and North Quarry of Allstone Vermont are located. Thorsen Affidavit (Exhibit 8)

5. If one were to stand on the western edge of the Kilgus/Thorsen 20-acre parcel, one would look across the fields and Route 103 directly at the Allstone Vermont property. Thorsen Affidavit (Exhibit 8)
6. On sheet C1-100 of the Allstone Vermont plans, the Kilgus/Thorsen house, the clearing around the house, and the 20-acre parcel are shown. Starting at the blue line that shows the boundaries of sheet C-2000, their 20-acre parcel adjoins the blue line, and to the right (east) of that are the residence parcel, the clearing around the house, and the house. The house and clearing are just above the word "Quarry" where the plans state "South Quarry." Thorsen Affidavit (Exhibit 8)
7. Using the scale on sheet 2-000, sheet 2-000 shows that the property line of the 20-acre parcel is about 900 feet from the Allstone Vermont property line. Thorsen Affidavit
8. Sheet 2-000 also shows that Allstone Vermont plans to extract rock up to 100 feet from the property line, which will be about 1000 feet from the property line of the 20-acre parcel and about 2100 feet from the Kilgus/Thorsen house. Thorsen Affidavit (Exhibit 8)
9. The house at 296 Blackberry Hill Rd. is approximately 4,800 feet from the North Quarry. Thorsen Affidavit (Exhibit 8)
10. The house is at approximately 900 feet in elevation. Thorsen Affidavit (Exhibit 8)
11. The existing South Quarry site is at about 850 feet in elevation. Thorsen Affidavit (Exhibit 8)
12. There is no ridge or other obstruction between the South Quarry site and the Kilgus/Thorsen house. There is just the valley in which Route 103 and the Williams River are located, and the trees on the eastern side of the Allstone Vermont property. Thorsen Affidavit (Exhibit 8)
13. Michael and Cheryl LeClair live at 129 Clemons Road, immediately east of the South Quarry and across Route 103. They have lived there for forty years. LeClair Affidavit (Exhibit 10).
14. Karen and Bob MacAllister reside at 355 Clemons Road, also east of the South Quarry. They have lived there for over 20 years. MacAllister Affidavit (Exhibit 5).
15. Stephen Greene resides at 291 Blackberry Hill Road. He has lived there for more than 50 years. Greene Affidavit (Exhibit 15).
16. The noise report prepared by Mr. Duncan for Julian states and shows on pages 20, 53, and 54 that the South Quarry will be expanded to the south, and Plans C1-100 and C-2000 demonstrate this expansion up to 100 feet from the property line nearest the Kilgus/Thorsen property. These plans show that existing trees that may limit noise from the South Quarry will be removed as the quarry extends towards their property. Thorsen Affidavit (Exhibit 8)
17. Until several years ago, the noise Mr. Kilgus and Ms. Thorsen, the LeClairs, the MacAllisters, and Mr. Greene heard from the South Quarry was minimal. They heard occasional blasting, and occasional loading and scraping noises. There was no hammering noise or rock-crushing noise. Thorsen Affidavit (Exhibit 8); LeClair Affidavit (Exhibit 10); MacAllister Affidavit (Exhibit 9); Greene Affidavit (Exhibit 15); also testimony from Thorsen, Kilgus, LeClairs, and MacAllisters.

18. Over the last several years, the noise from the South Quarry has gone from minimal to loud and disturbing. Thorsen Affidavit (Exhibit 8); LeClair Affidavit (Exhibit 10); MacAllister Affidavit (Exhibit 9); Greene Affidavit (Exhibit 15); also testimony from Thorsen, Kilgus, LeClairs, and MacAllisters.
19. The new noise from the South Quarry that they have heard over the last several years includes rapid-fire mechanical hammering noise (hit-hit-hit-hit-hit-hit). This is loud and extremely disturbing. Ms. Thorsen and Mr. Kilgus hear this at the house, inside and outside. One can hear it from anywhere on their residential property or their 20-acre parcel. Sometimes it goes on for hours at a time. Other neighbors have had the same experience or worse. Thorsen Affidavit (Exhibit 8); LeClair Affidavit (Exhibit 10); MacAllister Affidavit (Exhibit 9); Greene Affidavit (Exhibit 15); also testimony from Thorsen, Kilgus, LeClairs, and MacAllisters.
20. The rapid-fire mechanical hammering noise is generated by the hydraulic hammer that is discussed in the Natural Resource Board's Jurisdictional Opinion about Allstone. Thorsen Affidavit
21. The background noise at the Kilgus/Thorsen house, the LeClair house, and the Greene house is the sound of wind, the songs of birds, and the low roll or hum of traffic on VT-103, with occasionally louder truck noises. The louder truck noises are brief, perhaps 30 seconds. Thorsen Affidavit (Exhibit 8)
22. The same is true at the LeClair and Greene residences. LeClair Affidavit (Exhibit 10); Greene Affidavit (Exhibit 15)
23. The loud hammering Ms. Thorsen, Mr. Kilgus, the LeClairs, the MacAllisters and Mr. Greene hear from the South Quarry is very different from the background noise at the Kilgus/Thorsen, LeClair, MacAllister, and Greene residences. It is not covered up or masked by the background noise. It is distinct and disturbing. It has gone on for hours at a time. Thorsen Affidavit (Exhibit 8); LeClair Affidavit (Exhibit 10); MacAllister Affidavit (Exhibit 9); Greene Affidavit (Exhibit 15); also testimony from Thorsen, Kilgus, LeClairs, and MacAllisters.
24. Julian's engineer, Mr. Matosky, testified that he had no basis to challenge Ms. Thorsen's affidavit. Matosky cross-examination 10/23/23.
25. Ms. Thorsen, Mr. Kilgus, the LeClairs and Mr. Greene and other community residents do not notice the background noise from Route 103 most of the time. Except for the noise of large trucks, it is there but out of mind. Thorsen Affidavit (Exhibit 8); LeClair Affidavit (Exhibit 10); Greene Affidavit (Exhibit 15).
26. The loud hammering noise from the South Quarry cannot be placed out of mind. It dominates Ms. Thorsen's life when it happens, as it does the lives of the LeClairs, the MacAllisters, and Mr. Greene. Thorsen Affidavit (Exhibit 8); LeClair Affidavit (Exhibit 10); MacAllister Affidavit (Exhibit 9); Greene Affidavit (Exhibit 15); also testimony from Thorsen, Kilgus, LeClairs, and MacAllisters.
27. When Mr. Adamovich operated the South Quarry, Ms. Thorsen Mr. Kilgus, and their neighbors did not experience the loud hammering noise, nor did they experience it since Mr. Adamovich sold it – until several years ago, after the Julian purchase. Thorsen Affidavit (Exhibit 8); LeClair Affidavit (Exhibit 10); MacAllister Affidavit (Exhibit 9);

Greene Affidavit (Exhibit 15); also testimony from Thorsen, Kilgus, LeClairs, and MacAllisters.

28. The rapid-fire mechanical hammering noise is not customary in this neighborhood, is uncharacteristic of the sounds in this neighborhood, and represents a repeated disturbance to us and others, because of its noise level, its type, and its frequency and duration of occurrence. Thorsen Affidavit (Exhibit 8); LeClair Affidavit (Exhibit 10); MacAllister Affidavit (Exhibit 9); Greene Affidavit (Exhibit 15); also testimony from Thorsen, Kilgus, LeClairs, and MacAllisters. See also Matosky cross examination 10/23/23, stating he had no evidence that would address whether the noise was customary in the neighborhood or repeatedly disturbed people.
29. The noise levels they heard before, from trucks on Route 103, were never as loud as the hammering noise. The rapid-fire mechanical hammering noise is much louder than the truck noise. It is much louder than any other noise in their neighborhood. Thorsen Affidavit (Exhibit 8); LeClair Affidavit (Exhibit 10); MacAllister Affidavit (Exhibit 9); Greene Affidavit (Exhibit 15); also testimony from Thorsen, Kilgus, LeClairs, and MacAllisters.
30. As to the type of noise, Ms. Thorsen Mr. Kilgus, and other community members have not heard loud mechanical hammering noises or rapid-fire mechanical hammering noise before. The hammering sound (hit-hit-hit-hit-hit-hit-hit) is very different than a truck engine's noise or any other noise in their neighborhood. Thorsen Affidavit (Exhibit 8); LeClair Affidavit (Exhibit 10); MacAllister Affidavit (Exhibit 9); Greene Affidavit (Exhibit 15); also testimony from Thorsen, Kilgus, LeClairs, and MacAllisters.
31. As to frequency and duration of occurrence, they have not heard loud noises this often or for so long a duration before. The rapid-fire mechanical hammering noise (hit-hit-hit-hit-hit-hit-hit) can go on for half an hour, an hour, or hours at a time. In contrast, the only loud noises they heard before were the noise of trucks on Route 103, which noises were limited to roughly 30 seconds at a time, not often, and scattered throughout the day. The frequency and duration of the mechanical hammering are unlike any preexisting noise in their neighborhood. Thorsen Affidavit (Exhibit 8); LeClair Affidavit (Exhibit 10); MacAllister Affidavit (Exhibit 9); Greene Affidavit (Exhibit 15); also testimony from Thorsen, Kilgus, LeClairs, and MacAllisters.
32. No noise of the loudness, type, frequency, and duration of the rapid-fire mechanical hammering noise was part of the South Quarry operation until the past several years, nor was such noise present in the neighborhood from any other source. The South Quarry noise that commenced recently—after the Julians commenced operation—is not customary and it represents a repeated disturbance to us and other neighbors. Thorsen Affidavit (Exhibit 8); LeClair Affidavit (Exhibit 10); MacAllister Affidavit (Exhibit 9); Greene Affidavit (Exhibit 15); also testimony from Thorsen, Kilgus, LeClairs, and MacAllisters.
33. Use of a mechanical or hydraulic hammer that creates rapid-fire mechanical hammering noise is not a “grandfathered” or nonconforming use with respect to Ordinance § 4.9 (Performance Standards, page 80) because use of the equipment that creates noise this loud, of this type, and of this frequency and duration, did not occur until recently. (See

- Ordinance § 3.19.D on page 52.) Thorsen Affidavit (Exhibit 8); LeClair Affidavit (Exhibit 10); MacAllister Affidavit (Exhibit 9); Greene Affidavit (Exhibit 15)
34. When prior owners of these quarries sought the latest zoning permit, they submitted expert noise reports by RSG on the equipment that they proposed to be used. They did not propose to use hydraulic hammers. (Exhibits KK and LL, RSG reports submitted in 2004)
 35. Use of a mechanical or hydraulic hammer that creates rapid-fire mechanical hammering noise this loud, of this type, and of this frequency and duration, even if it did occur before § 4.9 was adopted, ceased for more than two years. (See Ordinance § 3.19.D(1)(b) [on page 52). Thorsen Affidavit (Exhibit 8)
 36. Julian's noise expert, Mr. Duncan, performed computer modeling of noise, Exhibit J. Page 67 of the report shows RSG's modeling of existing noise at the Kilgus/Thorsen residence. RSG did not measure the noise at the Kilgus/Thorsen residence. Thorsen Affidavit (Exhibit 8)
 37. Page 67 reports that Mr. Duncan's model shows that there is less than 50 dbA of noise, from existing hammering, at the Kilgus/Thorsen residence. Thorsen Affidavit (Exhibit 8)
 38. The modeling is wrong. Page 34 of the report states that the noise of 50 decibels is quieter than the noise of a "field with insects" or a car idling at 50 feet. The rapid-fire mechanical hammering noise that Ms. Thorsen and Mr. Kilgus hear is far louder than a field with insects or a car idling 50 feet away. The hammering is so much louder that one could not hear a field with insects or a car idling 50 feet away. Thorsen Affidavit (Exhibit 8)
 39. Pages 52 through 54 show where RSG placed its "rock hammer" during its modeling of future noise from the South Quarry. Of the three scenarios modeled, two did not include a rock hammer. These are scenarios 11 and 13, on pages 52 and 54. Only scenario 12 on page 53 included a rock hammer, and the rock hammer is located at or next to the present excavation site—not to the south where Julian proposes to expand the quarry as shown on plans C1-100 and C-2000, 100 feet from the property line. Thorsen Affidavit (Exhibit 8)
 40. An enforcement action against Julian has been put on hold so that Julian can obtain permits for its altered or expanded operations—the changes that have caused us to hear the hammering. Thorsen Affidavit (Exhibit 8)
 41. The proposed project, if permitted by the Town of Chester, also would increase operations at the South Quarry, and its southeast expansion. These operations would increase the frequency of loud, uncharacteristic, and intrusive noise that they experience of the rapid-fire hammering noise, further disrupting the use and enjoyment of the homes and properties of Mr. Kilgus, Ms. Thorsen, the LeClairs, the MacAllisters, and Mr. Greene. (Exhibit 8); LeClair Affidavit (Exhibit 10); MacAllister Affidavit (Exhibit 9); Greene Affidavit (Exhibit 15); also testimony from Thorsen, Kilgus, LeClairs, and MacAllisters.
 42. Herb Singleton, PE, testified on behalf of Mr. Kilgus and Ms. Thorsen. He is a highly experienced noise expert. He has a Masters Degree in Mechanical Engineering from the Massachusetts Institute of Technology, was a co-founder of his firm, Cross-Spectrum Acoustics, has 25 years of acoustical engineering experience, and serves on the board of

the Institute of Noise Control Engineering. He has testified as an expert witness many times. (Singleton testimony)

43. Mr. Singleton explained that the noise study conducted by Julian's expert, Mr. Duncan, used A-weighted modeling to predict impact on the community, and that this is a common practice. A-weighted modeling weights more heavily the frequencies that the human ear is sensitive to. (Singleton testimony)
44. However, acoustical engineers make adjustments to A-weighting for certain types of noise. In particular, A-weight noise modeling is adjusted to take into account impulsive and highly impulsive noises. The quality of these noises makes them more annoying than other noises in a manner that A-weighting, by itself, does not account for. The hammering of a hydraulic hammer on rock may be impulsive or highly impulsive. Typically, noise control engineers add 5 decibels to 12 decibels to A-weighted noise modeling to take into account the impacts of impulsive and highly impulsive noise such as hydraulic hammers. (Singleton testimony).
45. Mr. Singleton explained that Mr. Duncan's noise modeling used A-weighting, which is common but failed to make adjustments for the impulsive or highly impulsive noise of the hydraulic hammer. Five to 12 decibels should be added to Mr. Duncan's modeling to reliably predict the noise impacts on the community from the use of the hydraulic hammer. (Singleton testimony).
46. Mr. Singleton also explained the concept that noise control engineers refer to as masking. Masking means that one noise, such as an existing background noise, can cover or obscure another noise so that it is not noticed or does not cause annoyance. However, A-weighted modeling may not provide useful information about masking, because A-weighting combines and weights a great many different sounds. (Singleton testimony)
47. The background noise of highway traffic is unlikely to mask the sounds of a hydraulic hammer on rock. (Singleton testimony).
48. Mr. Singleton considered the testimony of Ms. Thorsen, Mr. Kilgus, Mr. LeClair, Mrs. LeClair, and others about how disturbing the noise of the hydraulic hammer is to them, and also the possibility that the hammer does not create noise that is more than 70 dbA at the property line. Mr. Singleton explained that this would not be surprising. Hydraulic hammering rock can be very disturbing even though less than 70 dbA, because of its impulsive or highly impulsive nature. (Singleton testimony)
49. Mr. Duncan was present during Mr. Singleton's testimony and was recalled by Julian as a witness at the hearing held after Mr. Singleton's testimony.
50. Mr. Duncan did not contradict any of Mr. Singleton's testimony.
51. Mr. Duncan's report shows that the hydraulic hammer noise *will* exceed 70 dbA on private property on both sides of Route 103 (Exhibit J, Figure 29) and both sides of Dean Brook Road (Exhibit J, Figure 32).
52. Mr. Duncan's report contains noise contour lines for all decibel levels that his modeling predicted—with one important exception. Wherever the noise modeling predicted noise levels above 70 dbA, the report omits those contour lines. The contour lines stop at 70 dbA, leaving empty space within the areas encompassed by the 70 dbA contour lines.

- (Exhibit J Figures 29 and 32). Therefore his report does *not* address *how far above 70 dbA* the noise of the hydraulic hammer is or will be. Duncan Testimony 10/23/23.
53. There have been severe noise impacts from hydraulic hammer use that the Julians commenced at the North Quarry two or three years ago. The Melansons and Mr. Goodrich have experienced unprecedented, severe disturbance from the operation of the hammer. Melanson Affidavit (Exhibit 14) and Testimony; Affidavit of Mr. Goodrich (Exhibit 11).
 54. The noise of hydraulic hammer use at the North Quarry was so loud, disruptive and repetitious that the Melansons have moved out of their home. The residence remains empty and unusable, because of the severe noise of the hydraulic hammer. Restricting hydraulic hammer use to two days a week would not change the unlivable conditions at the Melanson home. You cannot have a home that is unlivable two days a week. Melanson Testimony.
 55. The noise of the hydraulic hammer at the Chandler Road Quarry has also been severe. It, too, commenced about three years ago. The noise experienced by neighbors to the east and west sounds like a jackhammer but is louder and at a higher pitch, is difficult to live with, is not like preexisting background noise and cannot be put out of his mind when it is occurring. Kenworthy Affidavit (Exhibit 12), Kenworthy Testimony; Nowak Affidavit (Exhibit 13) and Testimony.
 56. Julian presented no testimony or other evidence about whether the noise of the hydraulic hammer is customary in the neighborhood of the South Quarry, the North Quarry, or the Chandler Road Quarry, in which Mr. Kilgus, Ms. Thorsen, Mr. and Mrs. LeClair, Mr. Greene, the MacAllisters, the Melansons, Mr. Goodrich, Mr. Kenworthy and Mr. Nowak live. See Matosky cross examination 10/23/23. Their testimony that this noise is not customary was not rebutted.
 57. The testimony of these witnesses that the noise of the hydraulic hammer is highly disturbing and repetitious also was unrebutted. Matosky cross-examination 10/23/23.
 58. Julian presented no testimony that, despite Figures 29 and 32 of Exhibit J, there would be no hydraulic hammer noise above 70 dbA outside of the Julian property. Those pages are unrebutted.
 59. Mr. Duncan testified that generally the noise of trucks entering or leaving a project site, as they cross the project site property boundary with the public right-of-way, is not considered when assessing noise impacts. Counsel for Mr. Kilgus and Ms. Thorsen stated his agreement. Mr. Thorsen, Ms. Kilgus, and Mr. Singleton's testimony did not address the noise of trucks entering or leaving the project site at the property line.
 60. In addition to omitting data about how far above 70 dbA the hydraulic hammer noise will be, Julian's owners refused to testify about the locations and frequency of the use of the hammer that resulted in the complaints that many residents testified about and that were captured in the videos that were submitted.
 61. Counsel for Mr. Kilgus and Ms. Thorsen stated at the initial hearing, and repeated in his motion for a subpoena dated September 21, 2023, their need to question one of the owners. The motion for a subpoena on September 21, 2023. It stated in part:

Scott Kilgus and Leslie Thorsen hereby request that the Development Review Board (DRB) utilize the authority granted to it by 24 V.S.A. § 4461(a) to compel the production of persons and documents. That section grants the DRB the power to “compel the attendance of witnesses and the production of material germane to any issue...”The two owners of Julian Materials should be subpoenaed, and the documents listed below.

The **subpoenas to Jason and Andrew Julian** are needed because Mr. Matosky repeatedly stated that he could not answer the Board’s questions about the past activities at the quarries. He has been focused only on future activities and permitting. Julian’s past actions on these sites is highly relevant to whether they qualify for a conditional use permit, and if so on what terms. To cite one obvious example, at the Chandler site they propose to continue the existing use for some period of time. Their past, unlawful use of this site, and the impacts of that use, are highly relevant to whether that use should continue and if so on what terms. To cite another example, the Board needs to know how often the hydraulic hammer has been used, and at what locations—the impacts of which many interested persons have testified about—in order to evaluate how much use of the hydraulic hammer to permit, if any, in the future. (Underlining added)

62. The Board reserved making a ruling on whether it would compel Jason or Andrew to appear and answer questions. The Board ruled, however, that evidence from Julian about past operations was necessary in order for the Board to rule upon what to permit, or what not to permit, in the future. The Board stated: “in the exercise of its authority under 24 V.S.A. § 4461(a),... the DRB notes that its review of the pending Julian application requires that Julian demonstrate its ability to meet the General and Specific Standards and Specific Criteria of Section 4.8(C)... as well as the specific requirements and standards set forth in CUDB § 3.9 (Extraction Operations) and § 49 (Performance Standards.” In order for the Board to rule under these sections, the order stated, the Board must have “a thorough understanding of conditions at the quarries past, present and future, to assess compliance with current standards and the appropriate conditions necessary to reasonably assure compliance in the future.” October 10, 2023 Decision and Order (underlining added).
63. The record of the proceedings shows that, after counsel for Mr. Kilgus and Ms. Thorsen stated he wished to examine the owners, and the Board issued its order, neither Jason nor Andrew appeared at the proceedings. Only their lawyer, Mr. Hall, their engineer, Mr. Matosky (who stated he was not knowledgeable about Julian’s past actions), Mr. Duncan and Julian’s traffic engineer, Mr. Dickinson, testified on Julian’s behalf.
64. Julian presented zero evidence about its past operation of the South Quarry, the North Quarry, or the Chandler Road quarry, including its operation of the hydraulic hammer. Julian’s representative, Mr. Matosky, stated he could only answer questions about future operations. Matosky cross-examination 10/23/23.
65. Therefore, there is no evidence whatsoever about the location of the hydraulic hammer when it caused the noise that has severely disturbed the community—and therefore no

evidence whatsoever from Julian that the location and intensity of hammering tested by Mr. Duncan was an accurate representation of the location and operating conditions at the South Quarry, the North Quarry or the Chandler Road Quarry in the past and in the future.

66. The only evidence about whether what Mr. Duncan measured was representative of past and future operations came from Mr. Goodrich. He testified that the noise of the hammer when Mr. Duncan was present was not at all representative of what they had been living with. It was far less noisy. The Board finds that the noise of the hydraulic hammer when Mr. Duncan was present was not representative of the noise of the hydraulic hammer that has been typical since Julian introduced its use.
67. Julian also decided to restrict Mr. Singleton's access to information. Counsel for Mr. Kilgus and Mrs. Thorsen informed the Board that their expert needed to visit the South Quarry while the hydraulic hammer was operating, and stated he would ask for a Board order to allow this if Julian did not agree. (9/11/23 hearing)
68. Julian then agreed (9/11/23 hearing) and it was clear that the purpose of the visit was to monitor the operation of the hammer (Exhibit 21) – but later, the day before the site visit, Julian's lawyer barred the expert from entering onto the property. He had to stay at the property line. Singleton Testimony and Hall Email (Exhibit 21)
69. The purported reason was to protect the safety of the noise expert. Noise experts routinely work in construction and similar areas and are fully trained and equipped. (Singleton testimony)
70. Julian's lawyer stated that it was irrelevant whether Mr. Singleton's employee was properly equipped. (Exhibit 21). Julian prohibited him from entry.
71. Mr. Duncan's modeling was based upon the measurements that Mr. Duncan made while on the Julian property. The manner in which the hammer is operated, and its location, are critical. (Singleton testimony)
72. It was necessary for Mr. Singleton or his staff to be present and observe just as Mr. Duncan had, but Julian unilaterally precluded this at the last moment.

Conclusions of Law re; Hydraulic Hammer Noise

Julian has failed to meet its burden of proving compliance with CUDB § 4.9 (Performance Standards) as well as with the General and Specific Standards and Specific Criteria of Section 4.8(C).

Section 4.9 requires that all uses in all districts must show compliance with the standards in paragraph 4.9.A. Julian has not demonstrated that operation of the hydraulic hammer will not cause noise "levels or frequencies" of noise which are "not customary" in the district or neighborhood or which represent a "repeated disturbance" to others, and which will not exceed 70 dbA at the property line. On the contrary, the uncontradicted evidence is that operation of the hammer will cause noise levels that are not customary and which are a repeated disturbance, that the frequency of the noise is not customary and is a repeated disturbance, and that the proposed will cause noise in excess of 70 dbA at the property line. A permit cannot be granted.

Section 4.8.C.1.b requires proof of no undue adverse impact on the character of the area. Here, too, Julian has failed to meet its burden of proof. Section § 4.8.C.1.b. states that a conditional

use permit shall be granted only if the Board determines that the proposed conditional use shall not result in an undue adverse effect on the following standards:

The character of the area affected, as defined by the purpose or purposes of the zoning district within which the project is located

The relevant language is a partial quote from the statute, 24 V.S.A. § 4414(3), which states (emphasis added):

(A) In any district, certain uses may be allowed only by approval of the appropriate municipal panel, if general and specific standards to which each allowed use must conform are prescribed in the appropriate bylaws and if the appropriate municipal panel, under the procedures in subchapter 10 of this chapter, determines that the proposed use will conform to those standards. These general standards shall require that the proposed conditional use shall not result in an undue adverse effect on any of the following:

(i) The capacity of existing or planned community facilities.

(ii) 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 statutory standard for conditional use review is incorporated into each municipal ordinance, regardless of the exact language of the ordinance. That is, the statute sets the minimum standards for conditional use review. *Application of White*, 155 Vt. 612, 618-619, 587 A.2d 928, 931-932 (1990). (“The town may enact ordinances that replicate or embody those criteria, but if they do not, the statutory criteria still govern without further action by the town.”) The “area affected” language in the statute governing conditional use has been interpreted by the Supreme Court as encompassing any area that will be affected by the proposed land use, not just the district in which the proposed use will be located. *In re Miller*, 170 Vt. 74, 70-71, 742 A.2d 1219, 1224 (1999); *In re Gaboriault*, 167 Vt. 583, 585, 704 A.2d 1163, 1165 (1997) (mem.). The statutory meaning of “area affected,” therefore, controls the interpretation of the same concept in the ordinance.

An interpretation of the ordinance or the statute that defined the “area affected” as confined to the zoning district in which the use would be located would be absurd and would eviscerate municipal land use regulation in Vermont, contrary to the purposes of Chapter 117 of Title 24, set forth in 24 V.S.A. § 4302. It would mean that when reviewing a proposed land use that is situated within one district but adjoins or is nearby to another district, the Board can consider only the impacts in the first district. But the statute states a clear legislative intent that zoning boards not engage in such tunnel vision. One explicitly stated purpose of the zoning statute is to protect residential and other areas from “the invasion of through traffic, and from the loss of peace, quiet and privacy.” 24 V.S.A. §4302(a). By definition, “through traffic” means traffic that originated elsewhere. Protection of residential areas against the invasion of through traffic and other impacts would not be possible if the “area affected” were limited to the business district in which a proposed project will be located. Here, the impacts on other districts are both traffic and noise.

Julian’s evidence about noise impacts fails the “Quechee” test. The Quechee test is the standard that must be followed when applying the conditional use ordinance’s “undue adverse

impact” test. *In re Group Five Invs. CU Permit*, 2014 VT 14, ¶¶ 10-15, 195 Vt. 625, 93 A.3d 111 (holding that the Quechee test was properly invoked even for a conditional use ordinance that referred to “adverse impact” rather than “undue adverse impact”). The Quechee test requires evidence of the existing noise environment in order to determine whether the added noise would be adverse or would not “fit;” if the noise would not “fit and therefore would be adverse, then there must be evidence to show that the added noise: a) would not be offensive or shocking to the average person, b) would not violate written community standards, and c) that the applicant did not fail to adopt reasonable mitigation. *Id.*; *In re Champlain Parkway Act 250 Permit*, 2015 VT 105, ¶ 14-15, 200 Vt. 158, 129 A.3d 670. Julian has not passed the Quechee test for four reasons.

The first reason is that Julian and its noise expert did not submit evidence of what the preexisting noise levels and types were. There is no baseline against which to measure the impact of the hydraulic hammer. Mr. Duncan stated that it was a legal question, not an expert witness question, whether he needed to address the noise environment at the Kilgus/Thorsen residence, the LeClair residence, etc., that existed before Julian commenced use of the hydraulic hammer. Legally, if the hydraulic hammer noise violated § 4.9 when it was introduced in 2020 or 2021, its noise cannot serve as the baseline. In other words, the hydraulic hammer is not grandfathered; the ordinance forbidding such loud noise existed before the noise was introduced. CUDB § 3.19.D. Clearly, it was not grandfathered, both because there has been no proof that its use predates § 3.9 and because the evidence is uncontradicted that Julian introduced their use. See, e.g., Exhibits KK and LL. Yet, Mr. Duncan presented no evidence of the noise environment at Blackberry Hill Road, Clemons Road, Route 103, Dean Brook Road, etc. during operation of the quarries before the hydraulic hammer was introduced. Because use of the hydraulic hammer was not grandfathered, this evidence was necessary under the Quechee test in order to establish the baseline; there was no such evidence.

The second reason is that, regardless of the baseline, the noise of the hydraulic hammer would be offensive or shocking to a reasonable person. Julian presented no evidence that contradicted the testimony of Mr. Kilgus, Ms. Thorsen, Mr. and Mrs. LeClair, Mr. Greene, the MacAllisters, the Melansons, Mr. Goodrich, Mr. Kenworthy, and Mr. Nowak about the severe and in some cases unbearable noise of the hydraulic hammer. That noise is unduly adverse.

The third reason is that the noise violates a clear written community standard, the 70 dbA limit.

The fourth reason is that Julian presented no evidence on whether a reasonable mitigation measure would be to quarry rock without use of the hydraulic hammer. Every owner before Julian did so. Why is that not feasible for Julian? It was Julian’s burden to prove that it had considered and adopted all reasonable noise mitigation. If there exists a valid reason why use of the hammer wasn’t necessary for the prior owners but is necessary for Julian, Julian has not shown what that is. This is one of the questions that would have been asked of one of the Julians if they had testified.

A permit should also be denied because Julian intentionally and in bad faith engaged in a pattern of behavior that prevented presentation to the Board of relevant evidence about the noise impacts of the hydraulic hammer. First, Julian’s noise report withheld all data about the decibel levels above 70 dbA that his modeling had predicted; Mr. Duncan’s report did not inform the reader that these contour lines had been withheld, he just withheld that data and did not disclose that it was missing until a Board member asked him. Second, the Julians withheld evidence about the locations and nature of use of the hydraulic hammer at the times the hammer had

disrupted the lives of the witnesses. The Julians refused to testify after the Board ruled that this evidence was relevant and necessary. Third, Julian prevented Mr. Singleton's employee from entering onto the Julian property during the site visit that had been scheduled for Mr. Singleton's office to observe and measure the noise of the hydraulic hammer. This made it impossible for Mr. Singleton to verify the reliability of Mr. Duncan's report.

A party to a case who intentionally obstructs the ability of the tribunal or of other parties to obtain access to relevant information can be subject to severe sanctions, including dismissal of that party's claims or defenses. *Leon v. IDX Systems Corp.* 464 F.3d 951, 958-961 (9th Cir. 2006). At the least, if Julian's application is not to be dismissed, Julian's behavior deprives its witnesses of any credibility. It cannot satisfy its burden of persuading this Board that its proposed land use satisfies sections 3.9 and 4.8 of the ordinance.

2. JULIAN PROPOSED NOISE WITHOUT THE HYDRAULIC HAMMER

73. Another disturbing and repetitious noise from the South Quarry and the North Quarry that started within the past year so, that the neighborhood did not hear before, is the scraping sound of metal on rock or rock on metal, followed by the sound of rocks tumbling into a truck. This goes on for a half hour, an hour or longer, at a time. Thorsen Affidavit (Exhibit 8) and Testimony; Greene Affidavit (Exhibit 15); Goodrich Affidavit (Exhibit 11).
74. These noises were not frequent or loud until the past year or so. Thorsen Affidavit (Exhibit 8) and Testimony; Greene Affidavit (Exhibit 15); Goodrich Affidavit (Exhibit 11).
75. After hearing these noises recently for about an hour and a half, Ms. Thorsen drove down to Route 10 and then to the South Quarry. At that time, a dump truck filled with large stone emerged from the South Quarry/Allstone site and drove up Route 10 to the Chandler Road quarry turnoff: Thorsen Affidavit (Exhibit 8) and Testimony.
76. These noises are the noise of rock being loaded into trucks—Thorsen Affidavit (Exhibit 8) and Testimony; Greene Affidavit (Exhibit 15).
77. The proposed project would increase operations at the South Quarry and the North Quarry. These operations would increase the frequency of loud, uncharacteristic, and intrusive noise that they experience from the mechanical scraping noise that they did not hear until this past year, further disrupting their use and enjoyment of their homes and property. Thorsen Affidavit (Exhibit 8) and Testimony; Greene Affidavit (Exhibit 15); Goodrich Affidavit (Exhibit 11).
78. Figures 28, 30, 34, 36, 37, 41, and 42 show that operating the North Quarry and the Chandler Road Quarry adds *over 70 dbA* of noise to properties adjacent to these quarries even when the hydraulic hammer is not being used
79. Julian's expert prepared a report that *omitted the noise contour lines* on Figures 28, 30, 34, 36, 37, 41, and 42 that would have shown how far above 70 dbA the noise has been and will be at these quarries. Within the areas encompassed by the 70 dbA purple lines, the contour lines are missing. Duncan Testimony 10/23/23

80. Julian did not submit any evidence that would support a finding that non-hydraulic hammer noise over 70 dbA at properties in the neighborhood of the North Quarry and the Chandler Road Quarry commenced before the 70 dbA limit was imposed. This noise is not grandfathered.

Conclusions of Law re; Noise Without Hydraulic Hammer

Julian has failed to meet its burden of proving compliance with CUDB § 4.9 (Performance Standards) as well as with the General and Specific Standards and Specific Criteria of Section 4.8(C) with regard to the noise of operating the three quarries without the hydraulic hammer.

Section 4.9. Again, the overwhelming weight of the evidence is that operation of the quarries will cause noise levels that are not customary and which are a repeated disturbance, that the frequency of the noise is not customary and is a repeated disturbance, and that the proposed will cause noise in excess of 70 dbA at the property line. A permit cannot be granted.

Section 4.8.C.1.b. Again, Julian's evidence about noise impacts fails the "Quechee" test for four reasons. First, as to the loud, disruptive sounds of rocks on metal, and of loading into trucks, which commenced at the Kilgus/Thorsen, Greene, and Goodrich properties within the past year, Julian's expert did not submit evidence of what the preexisting noise levels and types were before that to establish the baseline. Second, regardless of the baseline, whatever the undisclosed dbA level is of the noise in excess of 70 dbA at the North and Chandler Road Quarries, it is offensive or shocking to the existing neighbors and would be to a reasonable, average person. Third, it violates a clear written community standard, 70 dbA. Fourth, with regard to the missing data about noise over 70 dbA, Julian's behavior deprives its witnesses of any credibility. It cannot satisfy its burden of persuading this Board that its proposed land use satisfies sections 3.9 and 4.8 of the ordinance.

3. THE JULIAN INITIAL PROPOSAL LACKED NECESSARY DATA ABOUT VISUAL IMPACT, DUST, TRAFFIC AND WATER POLLUTION; IT ALSO REQUIRED A ROCK CRUSHER AND INCLUDED STRIP MINING AND RELIES ON EXISTING ZONING VIOLATIONS

81. Ms. Thorsen and Mr. Kilgus also submitted evidence about the character of the area, truck traffic, hours of operation, and air quality, under ordinance sections 3.9.B (extent and magnitude of the proposed operation, project phasing, and finished grades), 3.9.C.4 (strip mining prohibited), 3.9.D.5 (hours of operation), 3.9.D.6 (effects on neighboring properties, including noise and dust), 3.9.D.7 (nuisance), 3.9.D.9 (traffic and road conditions), 3.9.D.9 (rate of extraction and number and frequency of truck trips), 4.8.C.1 (character of the area affected), 4.8.C.2 (traffic), 4.8.C.2 (landscaping, performance standards under § 4.9), 4.9.A (noise levels or frequencies not customary or which represent a repeated disturbance; noise levels not to exceed 70 dB during daytime), 4.9.B (no dust or other air emissions which endanger public health or are a nuisance, offensive or uncharacteristic of the area) and 4.9.C (glare, light, or reflection). Kilgus Affidavit (Exhibits 20 and 22) and Testimony

82. Mr. Kilgus holds a Masters Degree in architecture, with many years of experience. He also has a degree in geography, specializing in the interpretation of aerial imagery for land use planning, which he did for the New York State Department of Environmental Conservation.
83. Julian's initial application proposed to construct a 24,000-square-foot building, with an additional 20,000 square feet added later. 24,000 square feet is larger than a half acre; 44,000 square feet is larger than an acre. Allstone is seeking approval of a building that will eventually be larger than an acre in size. Kilgus Affidavit (Exhibit 20) and Testimony
84. The average house in Vermont and in Chester occupies a footprint of about 1,500 square feet, which is roughly 1/30th of an acre. Kilgus Affidavit (Exhibit 20) and Testimony
85. Allstone has prepared no assessment of the visual impact on the character of the area of a warehouse-type structure that has a 24,000 or 44,000-square-foot footprint.
86. The site is proposed to be 30 feet lower than the current elevation. The RSG report states and shows on pages 20, 53, and 54 that the South Quarry will be expanded to the south, and Plans C1-100 and C-2000 demonstrate this expansion up to 100 feet from the property line nearest the Kilgus/Thorsen property. These plans show that existing trees that may limit visibility of the building from the Kilgus/Thorsen land will be removed as the quarry extends towards their property. Kilgus Affidavit (Exhibit 20) and Testimony
87. Julian has submitted no assessment of the visibility of its proposed half-acre or acre-sized building, with leaves on or leaves off, so it is impossible for the Board to adequately evaluate these impacts. Kilgus Affidavit (Exhibit 20) and Testimony
88. However, based on Mr. Kilgus' Affidavit and testimony, the half-acre and then acre-sized building more likely than not will be partly or completely visible from the Thorsen/Kilgus property and will be out of character for the area. There is no ridge or other obstruction between the South Quarry site and our house. For the entire building not to be visible from the house, the closest edge would have to be sunk much further below the existing grade than 30 feet (and the rear edges would have to be much deeper below existing grade, because the existing grade slopes up as one travels away from Route 103). Kilgus Affidavit (Exhibit 20) and Testimony
89. This will be a huge building that will be totally out of character with the area. The area is largely wooded and has no buildings that have even a sixth of an acre footprint. The change will be substantial and shocking or disturbing to the average person. Kilgus Affidavit (Exhibit 20) and Testimony.
90. Julian proposes to cut the trees that otherwise would provide screening, Julian has failed to use reasonable mitigation measures. Kilgus Affidavit (Exhibit 20) and Testimony
91. Unless the building will have no windows, it is likely that glare or reflected sunlight will be visible at the Kilgus/Thorsen house. If there are many windows, there may be substantial and highly disturbing glare or reflection. This too will be out of character with the area, Kilgus Affidavit (Exhibit 20) and Testimony
92. Julian has submitted no details of the proposed windows in the building, so it is impossible for the Board to assess these impacts. Kilgus Affidavit (Exhibit 20) and Testimony

93. Unless the building will have no interior lighting and no exterior lighting, the building also will be visible from the Kilgus/Thorsen house at night. If there are many interior or exterior lights, there may be substantial and highly disturbing nighttime light visible from the house. Kilgus Affidavit (Exhibit 20) and Testimony
94. Again, Julian has submitted no details of the lighting, so it is impossible the Board to assess this impact. Kilgus Affidavit (Exhibit 20) and Testimony
95. Julian proposes not only a 24,000 to 44,000 square foot building, but also a “process water pond” and a “gravel wetland stormwater treatment area.” Each of these will require additional room for trucks, excavators, and other equipment. The pond, treatment area, and areas for trucks and equipment all will be at the same level as the floor of the building. The extraction planned will be of a ten-acre area. Kilgus Affidavit (Exhibits 20 and 22) and Testimony
96. Julian has submitted no assessment of the visibility of its proposed very large cleared area (the half-acre or acre-sized building, the pond, the treatment area, and the area for trucks and equipment, adding up to ten acres), with leaves on or leaves off, so it is impossible the Board to evaluate these impacts. Kilgus Affidavit (Exhibits 20 and 22) and Testimony
97. It is more likely than not that the very large cleared area will be partly or completely visible from the Kilgus/Thorsen property and will be out of character for the area. This will be a huge cleared area that will be totally out of character with the area. The area is largely wooded. In the midst of the forest, Ms. Kilgus and Mr. Thorsen will see a huge open pit area that looks just like what it is – a strip mine. The change will be substantial and shocking or disturbing to the average person. Kilgus Affidavit (Exhibits 20 and 22) and Testimony
98. Because the existing grade slopes upward as one moves away from Route 103, Allstone will need to excavate much further downward than 30 feet. The back edge of the 24,000-square-foot building will have to be 50 feet below existing grade. At the back edge of the proposed building addition, the site would have to be excavated 80 feet below existing grade. The areas for the pond and treatment area, trucks, and equipment would have to be excavated 90 feet below existing grade. The rear end of the proposed quarry would be 110 feet below existing grade. Kilgus Affidavit (Exhibits 20 and 22) and Testimony
99. The amount of rock and overburden that will be removed by digging downward—strip mining—is not addressed in Julian’s submissions.
100. The front of the quarry is being lowered 30 feet and the back of the quarry is being lowered 110 feet. The site would be lowered an average of 70 feet ($30 + 110 = 140$; $140 \div 2 = 70$). Excavation of this ten-acre site, as Julian plans, would produce 1,127,777 cubic yards of material (one million, one hundred and twenty thousand, seven hundred and seventy-seven cubic yards). These figures are estimates for the whole South Quarry shown on Julian’s plans, most of which would need to be removed to build the first building and associated infrastructure. Kilgus Affidavit (Exhibits 20 and 22) and Testimony
101. All of these 1,127,777 cubic yards will be removed by digging down, that is, by strip mining, which is prohibited by the ordinance. Kilgus Affidavit (Exhibits 20 and 22) and Testimony

102. Until the new building is usable, Julian plans to truck all of its South Quarry rock to the Chandler Quarry, as it is now doing unlawfully (there is no Act 250 permit and there is no zoning permit for cutting rock in the shed). Kilgus Affidavit (Exhibit 20) and Testimony
103. Julian has not submitted any plans or data that address how much of the 1,127,777 cy of material will be trucked to the Chandler Quarry to be processed by the unlawful cutting devices in the storage shed. Kilgus Affidavit (Exhibit 20) and Testimony
104. A typical dump truck holds 15 cy. If one million cubic yards of rock were to be trucked to the Chandler Quarry, that would be 66,666 round-trip truck trips, or 133,333 one-way truck trips. Since Allstone has not submitted any plans or data addressing how much of this material would be trucked to the Chandler Quarry, this is a very rough number. Kilgus Affidavit (Exhibit 20) and Testimony
105. Julian's traffic expert, Mr. Dickinson, did not include any of these truck trips in his traffic study. He assumed that there will be a reduced number of truck trips because of the project. Therefore, there is nothing in the record upon which the Board can assess the traffic impacts of the proposal. Kilgus Affidavit (Exhibit 20) and Testimony
106. It seems likely that this massive amount of digging down, extraction and trucking will take more than 18 months. Kilgus Testimony
107. Mr. Matosky testified again after Mr. Kilgus had submitted his affidavit and had testified, on October 23, 2023. Mr. Matosky testified about new plans for the quarries. He stated that the plan is not to transport all of the rock removed from the South Quarry in order to construct the building there; instead much of it will be crushed on-site.
108. Mr. Matosky testified that there is already a permit to operate a rock crusher at the South Quarry site. When questioned about that, he modified his testimony to state that there is an Act 250 permit to operate a crusher there, not a zoning permit. Matosky cross-examination 10/23/23.
109. The only way to access the Kilgus/Thorsen house is by taking the same route as the route from the South Quarry to the Chandler Quarry. Kilgus Affidavit (Exhibit 20) and Testimony
110. Ms. Thorsen, in addition to driving on these roads, runs along these roads on a regular basis. Kilgus Affidavit (Exhibit 20) and Testimony
111. The same trucking and traffic problem exists with regard to Julian's proposal for the North Quarry. Julian has not supplied any plans or data addressing the amount of material that will be excavated by digging down, that is, by strip mining, and has not supplied any information about the number of truck trips from the North Quarry to the Chandler Quarry, and back, to process this material. It is impossible to know the traffic impacts on the public and on Mr. Kilgus and Ms. Thorsen from this planned use of the North Quarry and the Chandler Quarry. These trucks will use the same roads the public and Mr. Kilgus and Ms. Thorsen use every day. Kilgus Affidavit (Exhibit 20) and Testimony
112. Another impact that Julian has not addressed is dust. Mr. Kilgus and Ms. Thorsen drive by the South Quarry site daily. Ms. Thorsen runs by it. Dust is a well-known problem with quarries. Julian proposes an enormous quarry at the South Quarry site.

- Allstone has submitted no plans for dust control, nor any assessment of the dust that will reach the public roads that they use. Kilgus Affidavit (Exhibit 20) and Testimony
113. Mr. Matosky testified about the discharges that Julian has been making into Dean Brook and about changes to the Chandler Road quarry that he designed and Julian installed without a zoning permit.
114. The Chandler Road site has been emitting a milky white substance into Dean Brook. Nowak Testimony.
115. Julian has applied for permits from the State for the discharge but no permits have been granted. Matosky 10/23/23
116. A drainage swale with a pipe in it was designed by Mr. Matosky and it was installed without a zoning permit. Matosky 10/23/23
117. Two ponds were constructed on the Chandler Road Quarry property. Mr. Matosky did not know when they were constructed and did not know if there are any zoning permits for their construction.
118. Photographs provided by Julian, admitted into the record as Exhibit II, show a milky white substance in Dean Brook and a milky white substance in the ponds.

Conclusions of Law re: Strip Mining, Visual Impact, Traffic, Water Quality, Dust and Ongoing Zoning Violations

Julian had the burden of demonstrating no undue visual, dust and traffic impact, and that it does not propose strip mining, under ordinance sections 3.9.B (extent and magnitude of the proposed operation, project phasing, and finished grades), 3.9.C.4 (strip mining prohibited), 3.9.C.6 (raw materials shall not pollute the waters of ponds or streams), 3.9.D.5 (hours of operation), 3.9.D.6 (effects on neighboring properties, including noise and dust), 3.9.D.7 (nuisance), 3.9.D.9 (traffic and road conditions), 3.9.D.9 (rate of extraction and number and frequency of truck trips), 3.9.D.11 (effect on water quality), 4.8.C.1 (character of the area affected), 4.8.C.2 (traffic), 4.8.C.2 (landscaping, performance standards under § 4.9), 4.9.A (noise levels or frequencies not customary or which represent a repeated disturbance; noise levels not to exceed 70 dB during daytime), 4.9.B (no dust or other air emissions which endanger public health or are a nuisance, offensive or uncharacteristic of the area) and 4.9.C (glare, light, or reflection). It has not satisfied its burden of proof.

Strip Mining. The ordinance prohibits strip mining. According to Merriam-Webster.com, a strip mine is “a mine that is worked from the earth’s surface by stripping of overburden.” Julian proposes to work downward from the earth’s surface at the South Quarry and the North Quarry in order to create the space for the large building in the South Quarry and the contractor’s yard at the North Quarry. This cannot be permitted.

Visual Impact. Mr. Kilgus presented unrebutted testimony about adverse visual impact, night and day. Much of the huge building will be visible and, in the context of Chester’s otherwise largely forested setting, would be shocking or offensive. Julian also has not considered or proposed maintaining a forested visual buffer around the buildings.. The permit must be denied.

Water Quality and Ongoing Zoning Violations. Julian provided photographs of

discharges into Dean Brook, in Exhibit II, but offered no witness who was knowledgeable about the contents and quantity of the discharges. Mr. Nowak made clear these emanate from the Chandler Road Quarry. Mr. Matosky believes that the State will issue permits for these discharges in the future. Under his supervision, a drainage swale has already been constructed to handle some or all of them. These discharges, the drainage swale, and the ponds are not permitted now under any zoning permit or state water quality permit. Under the CUDB any construction, reconstruction, or enlargement of any excavation, any change in use in the use of land, and any extension of the use of land, required a zoning permit. See the Definition of “Development” in § 8.2 and § 4.1, prohibiting any development without a permit.

Julian, in other words, is seeking a conditional use permit for quarrying and rock processing at the Chandler Road site in a manner that discharges into Dean Brook—but Julian has submitted no evidence whatsoever about the nature or quantity of the substance it has been discharging into Dean Brook and may continue to discharge. This is astounding. This Board must determine that the standards of the ordinance have been met. It is no substitute for this proof that the State may, someday, issue a permit under its own, separate, permitting rules.

Even if state approval could substitute for proof that the ordinance has been satisfied, that approval has not been obtained. This Board cannot grant conditional use approval on the basis of a state permit that may or may not be granted in the future.

Julian also has not sought a zoning permit for the discharge infrastructure it has already constructed. The missing permit cannot be granted in this case, because Julian has not identified what it is that will be discharged, and in what quantities, through the swale and pipe that Julian has already constructed.

Traffic. Mr. Dickinson’s traffic study did not include the trucking of rock quarried from the South Quarry in order to dig down deep enough for the planned building and the surrounding ponds and infrastructure. Mr. Matosky testified that Mr. Kilgus’ projections are incorrect because rock will be crushed on-site at the South Quarry, but the site has no rock crusher and has no zoning permit to install a rock crusher. The permit must be denied.

Dust. Julian provided no evidence about the health and visual impacts of dust from its excavation and the trucking of quarried rock, as required by § 4.9.B (no dust or other air emissions which endanger public health or are a nuisance, offensive or uncharacteristic of the area) and by §4.8.C.1.b (undue impact on the character of the area). The permit must be denied

4. THE JULIAN REVISED PROPOSAL VIOLATES 24 V.S.A. §§ 1204, 1206 AND 4464

On October 23, 2023, Mr. Kilgus testified about the lack of evidence pertaining to the visual impacts of the building, the massive amounts of rock that will have to be removed, that the digging downward for the building will be strip mining, and that a massive amount of rock will have to be transported to the South Quarry. Mr. Matosky then testified that Mr. Kilgus’ testimony about the trucking impacts was wrong because much of the rock will be crushed on site. On being cross-examined, he acknowledged that the South Quarry has no rock crusher, and that no zoning permit authorizes use of a rock crusher at the South Quarry.

On December 7, two business days before the scheduled final hearing, Julian submitted revised plans. The revised plans no longer seek approval for the large building. They seek approval for use of a rock crusher at the South Quarry, and they state that quarried rock will no

longer be trucked to Chandler Road Quarry to be processed but will be trucked to undisclosed locations outside of Chester.

Counsel for the neighbors have already asked the Board to exclude these last-minute changed plans and evidence. Counsel relies upon that briefing here.

5. THE JULIAN INITIAL AND REVISED PROPOSAL CONTAIN INADEQUATE INFORMATION ABOUT USE OF THE CHANDLER QUARRY SHED FOR PROCESSING GRANITE

Julian proposes continued use of the shed for processing granite for a limited period of time, initially 18 months and in the revised proposal until June 1, 2024. Julian has provided no information about the equipment being used inside the shed, its dust emissions, or its discharges to Dean Brook. Mr. Matosky's May 31, 2023 letter (Exhibit D) refers only to "the existing splitting, cutting and processing operations from this site" but does not reveal what any of those are. In his oral testimony, Mr. Matosky referred to some of the equipment as a "guillotine" and a "wet saw." Mr. Matosky was unable to explain the purpose of the large holding tank in Exhibit II except to speculate that it might part of the wet-sawing operation. The record does not address what machines are in use, or how many there are, or how often they are used, or what dust they create, or whether the dust will be filtered out of the air, or what waste from the processes is being disposed of in Dean Brook, or what happens to the water used by the wet saw after it has been used. The only useful information provided about the splitting, cutting and processing operation came from Mr. Duncan's report, which measured the processing noise outside the building of the *unidentified* equipment being used inside the building.

A conditional use permit cannot lawfully be issued for processing granite into a finished product without these details. Under 24 V.S.A. § 4414 and CUBD §§ 4.8 and 4.9.B.A, a conditional use permit is not supposed to be the zoning equivalent of a blank check—particularly for processing of quarried rock into a finished product without any information whatsoever about air quality and water quality emissions and particularly where the record is undisputed that whatever is going on at the site is resulting in discharges into Dean Brook. Since Julian has provided no specification of the equipment, processes, dust emissions and water quality discharges presently used in and generated inside the shed, there is no basis upon which a permit can be issued for their continuation for any period of time.

Issuance of a permit based on the vacant existing record also would allow Julian to substitute other equipment or add equipment, regardless of new or additional noise impacts, new or additional dust or new or additional discharges to Dean Brook.

6. INTERESTED PERSONS

The Board finds that Ms. Thorsen and Mr. Kilgus (represented by Attorney Dumont), and Michael LeClair, Cheryl LeClair, Karen MacAllister, Bob MacAllister, Michael Kenworthy, Barry Goodrich, Cayala Goodrich, Steven Schnider, James M. Wells, Kay Wells, Renee Melanson, Priscilla Melanson, John Nowak and Stephen Greene (all of whom signed the Petition and are represented by Attorney Ankuda) are interested persons pursuant to 24 V.S.A. § 4465 and Ordinance § 712.

Dated at Bristol, Vermont, this 2nd day of January, 2024.

SCOTT KILGUS and LESLIE THORSEN

BY:

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