TOWN OF CHESTER, VERMONT
DEVELOPMENT REVIEW BOARD

IN RE: JULIAN MATERIALS, LLC (ALLSTONE)
CONDITIONAL USE APPLICATION #594

OPPOSITION TO MOTIONS IN LIIMINE

NOW COMES Julian Materials, LLC ("Julian"), by and through its attorneys, Paul Frank + Collins P.C., and hereby submits its opposition to the motions in limine as filed by Attorneys Dumont and Ankuda.

Background

Prior to the December 11 hearing on this application, Julian proposed limited new mitigation offering move the processing currently at Chandler Road to a location outside the Town of Chester and to create an artificial barrier or berm when using a rock hammer. It also proposed limited days and times for the operation of the rock hammer and a stone crusher, neither of which is prohibited under its current permit. This olive branch resulted in a sweeping motion that requests irrelevant information regarding the location of out-of-town processing center, while seeking to remove altogether the rock hammer and crusher, which have been an integral part of project dating back to Julian's initial presentation and before. *See* GG, PowerPoint Presentation; J RSG Report, and HH RSG addendum. The motion is not supported by law, fact, or equity, and therefore should be denied.

A. Neither Title 24 V.S.A. §§ 1204 or 4464(a) prohibit the approval of a crusher or rock hammer.

The matter before the DRB is an application to consolidate theories of quarry operations under a single town conditional use approval. Julian has suggested, in response to neighbor concerns voiced at the 10/23 hearing, certain limited, but effective mitigation, which mainly

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includes moving the processing out of Chester entirely, building bunkers for the rocker hammer, and placing time and day restrictions on hammering and crushing. These proposals should not be controversial, except that improving the mitigation might increase the likelihood the application is approved. In any case, the notice and hearing provisions of Title 24 cited in the motions in limine do not provide a basis for excluding the evidence.

Starting at the beginning, the conditional use process starts with a "plain jane" notice requirement. The provision found at § 4464(a)(1)(C) relates to how notice of zoning hearings is given. The provision briefly describes the required content for notice of a conditional use application:

> (C) Written notification to the applicant and to owners of all properties adjoining the property subject to development, including the owners of properties which would be contiguous to the property subject to development but for the interposition of a highway or other public right-of-way and, in any situation in which a variance is sought regarding setbacks from a State highway, also including written notification to the Secretary of Transportation. The notification shall include a description of the proposed project and shall be accompanied by information that clearly informs the recipient where additional information may be obtained, and that participation in the local proceeding is a prerequisite to the right to take any subsequent appeal.

24 V.S.A. § 4464(a)(1)(C) (emphasis added).

As the DRB can see, the notice is very general and only requires a brief description, which would include the type of use, the location, the name of the applicant, the date of any hearing, and where additional information can be found. The application materials on file for a complete application at the Town office typically fill in the blanks, but even a "complete" application is not written in stone as changes and additional submissions are routine up to and including the last day of hearings. In this case, the material on file with Chester is substantial and has been added to and changed throughout the process by both parties. The application on file includes studies and

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references to a rock hammer and portable crusher, especially with respect to the hammer, which consumed days of hearings, dating back to June 2023.

The recipient of the notice is responsible for following up by reviewing the materials kept at the town and attending the scheduled hearings. The hearings serve the purpose for answering questions like what equipment will be used and what operational parameters will be imposed if the materials are not already in the file. In short, initial application and the related notice do not halt the evolution of conditional use approval. The notice identified in 24 V.S.A. § 4464(a) is simply a notice designed to simply alert interested parties to the application and nothing else. Section 1204 of Title 24 is also preliminary in scope and merely states the general proposition that "an opportunity be given to all parties to respond and present evidence on all issues involved." 24 V.S.A. § 1204(b). The opportunity has been provided, which Mr. Kilgus and Ms. Thorsen have taken full advantage of over four days of hearings and a site visit.

The obvious intent of these statutory provisions is merely to provide a description of the project and to alert all parties and interested persons to their opportunity to be heard. They are not intended to effectively cast an application in stone from the date of the initial submission. To the contrary, a provision that required notice to state every signal aspect of a complicated commercial project would be exceptionally burdensome on the applicant and the Town zoning administrator. The statute instead reads that there is no defect in the notice unless it "was materially misleading," meaning that it was misleading to a degree that parties did not participate because the notice misinformed them as to what was proposed or somehow denied them of their opportunity to respond and present evidence and argument on the issues involved. That is certainly not the case for Mr. Kilgus or Ms. Thorsen, who have participated from the outset with particular focus on the

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rock hammer. There is nothing about the notice given in this case to suggest the notice was in any way misleading on the notion of a rock hammer being part of the operations.

With regard to the right to be heard, the application materials themselves are quite extensive, which included noise reports from RSG from June and October of 2023. *See* Exhibits J, HH. Both reports refer to hammering and crushing as part of the proposal. The latter report is even specifically directed at measuring and mitigating hammering and crushing at the South Quarry. Exhibit HH. These reports were part of the proceeding on October 11, during which the reports were entered into evidence without objection. Both reports also refer to possible mitigation, including, but not limited to, using portable barriers, preventing of simultaneous drilling and hammering (or crushing), and strict time limitations of either activity.

After the reports were admitted and Mr. Duncan was thoroughly questioned, Mr. Kilgus and Ms. Thorsen were permitted to, and in fact did, retain an expert to review and critique all of Mr. Duncan's opinions, including those related to the hammer and the crusher. The expert then appeared and testified before the DRB on October 23, 2023, after having gone to the South Quarry and taking measurements related to the equipment, which included the hammer. As for the rock crusher, not only is it part of the October RSG report provided to all the parties, it is also a permitted activity under the Act 250 permit, which is part of the record, and that states that permit specifically authorizes the permittee to develop a stone quarry with "use of a portable rock crusher for four weeks a year." Exhibit P-1 LUP 2S0775-1 (Altered) June 21 2005 at 1.

In addition, Slide 5 to Julian's initial PowerPoint presentation, Exhibit GG, states that the operating parameters include, "South Quarry: ~11-acre limits of disturbance, portable processing shelter, portable rock crusher 4 weeks per year (<150 tons per hour capacity)." Julian has indicated it would stay within the operating parameters of its Act 250 permit. The current zoning

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approval, in contrast, does not impose conditions limiting the use of any type of equipment (or time of day), likely due to the fact it was not a concern of the town in 2003.

In addition to the forgoing, nearly all the opposition filings from the outset of the case, including Attorney Dumont's clients, are directed at hammering. *See* Exhibits 1-15. It was the single biggest topic even before the first hearing was scheduled in this matter. From the outset of the hearing process, the hammer was the focus of the testimony, the site visit, and the neighbors' expert witness investigation, in which he spent most of his focus on the hammer. No party can suggest that it was somehow misled regarding the rock hammer and deprived of a right to respond to its use. The same goes for the crusher, which is front and center in the first presentation to the DRB.

The factual allegation that the use of a hammer or a crusher are part of some kind of late disclosure are unfounded. There is nothing new or surprising about the use of a crusher or a rock hammer. The only "new" changes proposed on December 7, 2023, are that Julian volunteered to use an additional mitigation measure of building a partial structure around the hammer when it is being used, and limited the time and days on which hammering can occur. Mr. Kilgus and Ms. Thorsen were properly noticed, so they could and did take more than full advantage of their opportunity to attend the hearings and be heard. Accordingly, they have no arguments to make under either 24 V.S.A. §§ 1202 or 4464.

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B. Julian is not required to provide traffic information regarding the route its trucks take to a location outside of Chester.

Julian plans to move its process to a location outside of Chester. To the extent the traffic in question is out of the community, the DRB has no jurisdiction and thus no interest in the downstream location. Moreover, to the extent traffic is considered within the town, the legal standard under the bylaw is whether the project will result in undue adverse conditions with respect to traffic safety and congestions on roadworks in the vicinity of the project. There is no provision to suggest that an applicant provide anything additional. Thus, the only impacts of concern are its point of ingress and egress, adjacent intersections, and the local highway network.[1]

In that regard, Julian has produced two traffic reports, dated July 6 and December 7, 2023, respectively, which meet the standard. *See* Exhibits FF and SS. The reports are nearly identical in content and scope, and the conclusions made remain uncontested by any qualified witness. The conclusion is reached in both reports that the proposed improvements improve further traffic congestion and safety conditions by: (1) moving processing out of Chester; and (2) improving site distances and access on VT Route 103. Conversely, there is no evidence that the project will produce a significant negative change in traffic from existing conditions.

Based on the forgoing, there is no provision in the bylaw or any hint of evidence provided by Mr. Kilgus and Ms. Thorsen that requires Julian to identify its intended process location as it is outside the vicinity and outside of Chester itself. The only germane fact is the project as altered

[1] Costco presents an excellent example of Julian's point. It was asked to review and provide mitigation an intersection immediately adjacent to its point of ingress and egress onto US7/Route 2. *See* In re Costco Wholesale, Act 250 LUP #42088-19C and F. It was not asked to identify or assess traffic or travel paths to or from the warehouse outside of the adjacent intersection in the immediate vicinity of its store, which would be unheard of. In this case, the traffic from the quarry is nominal. These arguments are "throw-spaghetti-at-the-wall" arguments.

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will not produce any undue adverse impact on traffic congestions or safety in the vicinity of the project.

C. The DRB clearly has jurisdiction to hear evidence of proposed mitigation while holding evidentiary hearings on a conditional use application.

The very nature of the conditional use process is that any of the involved parties, whether it be the applicant, other interested parties, or the DRB, can provide evidence that volunteers or suggests conditions that change the project under review. That is actually the very point of the process. As the parties participate in the review of a project, there is the opportunity to implement communal changes to better mitigate the impact of the development. In that regard, the Vermont Supreme Court has made it clear that the reviewing body avoid the "procedural ping-pong match" occasioned by requiring every revision be restarted, renoticed, and reheard. *See In re Wright & Boester Conditional Use Application,* 2021 VT 80 at ¶ 22.

Instead, the Court allows a DRB to make changes and revisions that are not "truly substantial changes to the form or type of permit request." *In re Sisters & Brothers Inv. Grp.*, 2009 VT 58, ¶ 21. *See also, In re Chaves Act 250 Permit Reconsideration,* 2014 VT 5, ¶¶ 6, 14, 19-20 (concluded the proposed changes to the application included scrapping plans for a new entrance to the quarry in favor of an existing access road, changing the loading area to mitigate noise, adding noise-mitigation berms, limiting the number of truck trips per day, establishing a blasting plan, and limiting the days and weeks when drilling, blasting, and crushing could take place did not require remand of a de novo appeal).

This is shown in the structure of the process. Under Title 24, the purpose of the conditional use hearing is to take evidence regarding the application, after which a decision is issued by the DRB or Board of Adjustment. 24 V.S.A. § 4464(b). During the hearings, the DRB is tasked with gathering information, and taking testimony, or causing to be produced any

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evidence it deems necessary to rule on the application. 24 V.S.A. § 4461(a). Inherent in a conditional use proceeding is the concept that the "panel may attach additional reasonable conditions and safeguards as it deems necessary to implement the purposes of this chapter and the pertinent bylaws and the municipal plan then in effect." 24 V.S.A. § 4464(b)(2). Typically, the evidence from which the controversial conditions are derived, mainly comes from the hearing process, either from the application, the neighbors, or the DRB itself, and almost always involves a change in the project as originally proposed.

This necessarily means that the DRB decidedly has jurisdiction to review any evidence presented in good faith at any hearing and fashion within its decisions any reasonable change, condition, or safeguard it deems necessary to satisfy the bylaw. This is doubly the case when the applicant is offering additional conditions to further mitigate the impacts of the project.

D. The DRB should consider all evidence and any suggested condition that will mitigate the impacts of a conditional use.

A typical conditional use proceeding is usually held in one or two hearings, in which the DRB hears from all the parties and, if it approves the application, imposes conditions that are part of the application or arise at the hearing. Very often this involves conditions volunteered by the applicant in response to concerns stated by either the DRB or other interested parties, much as what has occurred here. Often, the full concerns of interested parties are not heard prior to the initial hearings.

At the hearings on October 10 and 23, Julian heard concerns from neighbors concerning processing and hammering at Chandler, hammering at South Quarry, and the length of time and impacts of moving processing to South Quarry. These concerns are very closely related to the original intent of the application, which was to reduce impacts by moving processing out of Chester and improving noise overall using a building at South Quarry for processing that would

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have involved lowering the site to improve conditions. After hearing the concerns, Julian has proposed very simple solutions. It would (1) move the processing out of Chester altogether to a more industrial-type venue; and (2) create artificial bunkers to further enhance noise mitigation associated the hammer; and place restrictions of the time and days for hammering and crushing. Both suggestions certainly help alleviate impacts upon and concerns of neighbors and greatly speed-up reducing operations at Chester. Frankly, it is helpful for everyone, so Julian is at a loss as to why this is controversial.

When considering its decision, the DRB should be conscious that mitigation of the project, if effective, helps the entire community, not just those participating in the proceeding, who may oppose positive solutions simply for tactical reasons, as seems to be the case here. There are no restrictions under 24 V.S.A. §§ 1204 or 4464 that prevent hammers, crushers, or any other aspect of the project from being considered with this application. To contrary, it would reversable error were theses aspect of the project omitted from the DRB's review.

CONCLUSION

For the forgoing reasons, the motions in limine filed by Attorneys Dumont and Ankuda should be denied.

DATED this 2nd day of January, 2024.

JULIAN MATERIALS, LLC

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