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2024 VT 40

No. 23-AP-315

In re Burton Corporation Conditional Use/Act 250
(Lawrence Smith et al. and City of South Burlington,
Appellants)

Supreme Court

On Appeal from
Superior Court,
Environmental Division

May Term, 2024

Mary Miles Teachout, J. (Ret.)

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PRESENT: Reiber, C.J., Eaton, Carroll and Cohen, JJ., and Mello, Supr. J. (Ret.),
Specially Assigned

¶ 1. **REIBER, C.J.** Appellants, the City of South Burlington and several neighbors of a proposed development,¹ challenge the Environmental Division's order affirming the conditional use and Act 250 permits granted to appellee Burton Corporation by the Burlington Development Review Board (DRB) and the District Commission. Burton seeks the permits in connection with a proposed performing arts center to be constructed on a portion of its Burlington property and

¹ Appellants include fourteen individuals challenging the conditional use permit and ten individuals challenging the Act 250 permit.

managed by concert organizer Higher Ground. Appellants argue that the court erred in permitting the sale and consumption of alcohol within the entire performance space, in determining that the City of Burlington's noise ordinance did not apply as a performance standard, and in concluding that the increased traffic noise will not have an undue adverse impact on the surrounding area. For the reasons detailed below, we reject each of appellants' arguments and affirm the court's order.

I. Background

¶ 2. The following descriptions are taken from the Environmental Division's findings and the record. The subject property is located in a district of Burlington zoned for Enterprise and Light Manufacturing (ELM). Other businesses in the district include a commercial-trucking company, a regional-bus-maintenance facility, a frozen-foods-manufacturing plant, and a commercial-kitchen-equipment manufacturer. The district is surrounded by other uses as follows: to the east, by a ravine containing a railroad track, beyond which is a residential street called Arthur Court; to the south, by Red Rocks Park and the border with the City of South Burlington; and to the north and west by residential streets.

¶ 3. The subject property is an 83,000 square-foot building owned by Burton and located adjacent to Burton's corporate headquarters on Queen City Park Road (formerly Industrial Parkway). The property was previously used for manufacturing by General Electric and General Dynamics before being purchased by Burton in 2007. The property can be accessed by a two-lane road from the north, but only via a one-lane bridge crossing over the ravine to the southeast. The property contains a large parking lot with 426 spaces, which can potentially be expanded up to 500 spaces because of open areas on the subject lot. Burton plans to use the building for a "hub project," with spaces leased for mixed uses, all accessible from a common lobby.

¶ 4. At issue here is Burton's plan to use part of the space as a concert venue. In collaboration with Higher Ground, a concert organizer that operates an existing venue in South Burlington, Burton plans to convert an 11,560 square-foot portion of the building into a

performance space. The space would be accessible only through the shared lobby, where ticketing and security would take place. From the lobby, concertgoers would pass through an adjacent shop before entering the performance space. Accessible from one side of the performance space would be a 2380 square-foot outdoor lounge, surrounded by a stockade fence.

¶ 5. While performing arts centers were not historically permitted in the ELM district, the City of Burlington amended its Comprehensive Development Ordinance (CDO) in 2015 to allow such projects with a conditional use permit. Prior to this case, the DRB had only approved one other performing arts center in this district—Arts Riot in March 2016. In 2019, in order to facilitate “Burton’s interest in repurposing one of their buildings,” the City again amended its CDO to allow performing arts centers on “properties with frontage on Industrial Parkway up to 15,000 square feet in size.” Burlington CDO, Appendix A n.32. Under the current CDO, performing arts centers are permitted to “contain accessory space for preparation and serving food and beverages, including alcohol, provided this accessory space comprises less than 50% of the entire establishment.” Id.

A. Burton’s Conditional Use and Act 250 Permits

¶ 6. Burton first applied for a conditional use permit, and the Burlington DRB approved the permit on September 1, 2020. In evaluating the proposal, the DRB noted that it would only grant approval if it determined that “the proposed conditional use and associated development shall not result in an undue adverse effect on each of” six general standards. Relevant to this appeal, the DRB first concluded that the proposed project would not have an undue adverse effect on “[t]he character of the area.” The DRB noted that the City Council had adopted a zoning amendment to allow “non-traditional commercial uses” in the ELM district, with the intent of prioritizing art production, supporting existing industrial uses, and expanding the allowable area of performing arts centers. Because “[t]he proposed performing arts center is consistent with this intent,” the DRB concluded that the project would not have an undue adverse effect on the surrounding area.

Second, the DRB concluded that while noise impacts are a concern, the proposed mitigation efforts plus additional permit conditions imposed by the DRB were sufficient to avoid any undue adverse effects. Third, the DRB determined that as conditioned, the transportation system could support the proposed use on top of uses already in place. Finally, to ensure that the project would not be too disruptive, the DRB imposed nineteen conditions on its approval, including that Burton conduct noise and traffic assessments within the first six months of operation, that evening use of the venue be limited to 1500 attendees, that doors remain closed during events, that no music or tailgating be permitted outdoors, and that traffic control measures be implemented before and after events in the parking lot and at nearby intersections.

¶ 7. Burton next applied for an Act 250 permit amendment, which the District Commission granted on March 3, 2022. The District Commission analyzed the proposed project under each of the Act 250 criteria and concluded that it would not be detrimental to the public health, safety, or general welfare. See 10 V.S.A. § 6086(a)(1)-(10). Relevant to this appeal, the District Commission concluded that Criterion 1 only restricts noise as “air pollution” if the noise rises “above annoyance and aggravation to cause adverse health effects such as hearing damage.” Because the evidence showed that noise from the project would only rarely and briefly exceed World Health Organization (WHO) guidelines for sleep disturbance and would be of the same character as existing noise in the area, the District Commission concluded that the project complied with Criterion 1. On the aesthetic impacts of the project under Criterion 8, the District Commission concluded that the project would create some adverse noise impacts. However, it determined that these impacts would not be “undue” under its precedents because the project would not violate a clear, written community standard, the sounds would not be out of character for the neighborhood and would not penetrate deeply into Red Rocks Park, and Burton had taken generally available mitigating measures. Finally, under Criterion 9(K), the District Commission concluded that the project would not unreasonably compromise or dilute the public investment in Red Rocks Park

because the evidence showed anticipated noise impacts would be comparable to existing levels and would be localized to the “developed” portion of the Park. To ensure compliance with the Act 250 criteria, the District Commission imposed forty-eight conditions, including that breakout noise not exceed 60 dBA L_{Fmax} ,² that certain features be put in place to minimize breakout sound, that Burton conduct noise and traffic assessments within six months of beginning operation, that nighttime events begin after 6:30 p.m. and end before 2:00 a.m., and that Burton provide shuttle service to UVM and downtown Burlington for larger events.

¶ 8. Appellants timely appealed both decisions, which were later combined to a single case in the Environmental Division.

B. The Environmental Division’s Order

¶ 9. The Environmental Division held a joint five-day hearing on the permit appeals from April 17-21, 2023. On the conditional use permit, appellants argued that Burton had not met its burden to show that the use would comply with Burlington’s ordinances on noise and alcohol sales and that it would not unduly change the character of the area. On the Act 250 permit, appellants argued that Burton had not met its burden of showing compliance with criteria relating

² As explained in the uncontroverted report of Burton’s sound expert, decibels (dB) are a logarithmic scale for measuring sound levels. Decibels range from 0 to 120, with each increase of 20 dB indicating a ten-fold increase in sound pressure. As perceived by the human ear, each increase of 10 dB represents an approximate doubling of apparent loudness. Because sound contains a spectrum of frequency levels and because humans perceive middle frequencies to be louder than lower or higher frequencies, experts often apply frequency weighting to measure sound levels. The measure used here, dBA, is the most commonly used weighting, giving more weight to middle frequencies to better represent the sensitivity of the human ear. The “L” means “level,” and is used in conjunction with a subscript to indicate how the sound is being measured. The subscript “F” means “fast” and implies that sound was measured with a time constant of one-eighth of a second, while the subscript “S” or “slow” would mean that the sound was measured with a time constant of one second. A slow time response is used where the sound level varies slowly, while a fast time response is used when sound levels vary more quickly. The subscript “max” is used to capture the maximum sound level over a specified period of time. The subscript “eq” is used to denote the equivalent sound level over a time period; for example, $L_{eq(1-hour)}$ would measure the hourly average sound level.

to health impacts of nighttime noise, traffic safety, aesthetic impacts on nearby Red Rocks Park, and conformance with public investments.

¶ 10. At the hearing, Burton's sound expert—Edward Duncan, a senior director of acoustics practice at Resource Systems Group—testified as to the contents of his expert report and offered his opinion that the project would comply with the Act 250 criteria and local noise ordinances. In his report, Mr. Duncan measured background sound levels at two locations: (A) the closest residential property line to the west across Queen City Park Road, and (B) the closest residential property line along Maple Avenue in South Burlington. At Monitor A, average background sound levels were 54 dBA L_{eq} during the day and 52 dBA L_{eq} at night. At Monitor B, average background sound levels were 49 dBA L_{eq} during the day and 41 dBA L_{eq} at night. Mr. Duncan then measured projected noise levels at all nearby residential addresses under two models. Under the Concert Model, which measured the sound levels during a hard rock concert while music is playing and the facility is in full use, the highest projected noise level was 42 dBA L_{eq} (1-hour) at the nearest residence. And under the End-of-Concert Model, which measured the sound of 500 vehicles leaving the parking lot at the same time, the highest projected noise level was 44 dBA L_{eq} (1-hour). In both scenarios, the largest contributor of noise at the nearest residence was 41 dBA from rooftop mechanical equipment, followed by sounds from vehicles, music, and the outdoor lounge. Because the projected sound levels were consistent with existing background noise and lower than guidelines from the WHO and the American National Standards Institute (ANSI), Mr. Duncan concluded that the project would not have an undue adverse impact on the surrounding area.

¶ 11. Burton also submitted testimony and an expert report from Jennifer Conley, the Director of Transportation Systems at VHB engineering firm. As relevant to this appeal, Ms. Conley testified that it was reasonable to project a need for 500 parking spaces for a full capacity, 1500-person event. Ms. Conley also testified that with signage and direction from staff people, it was reasonable to anticipate that no spots would be unutilized. With respect to the one-lane bridge,

Ms. Conley’s report showed that existing delays were less than eight seconds, and that the additional project-related traffic would cause no more than one additional second of delay since nearly all traffic would flow in the same direction. Ms. Conley also suggested that traffic at the bridge could be managed by mandated traffic-control officers for larger events.

¶ 12. Finally, the parties stipulated to the admission of deposition testimony from Scott Gustin, the Zoning Manager for the City of Burlington. Mr. Gustin testified that amendments were made to the CDO to allow performing arts spaces to be built in the ELM District and to create “specific standards for food and beverage” service within those facilities. He opined that the City intentionally chose a limit based on the total area of the establishment because “the standard, or general accessory provision, was too restrictive for what they wanted.” Mr. Gustin also explained in his affidavit that the City intended the amendment to mean that “if the space where food and beverages are ‘prepared and served’ does not exceed the 50% limitation, a project does not violate footnote 32 by allowing patrons to consume food and beverages elsewhere in the facility.”

¶ 13. At the close of the hearing, appellants brought a Vermont Rule of Civil Procedure 52(c) motion for judgment as a matter of law, arguing that Burton had failed to provide sufficient evidence of compliance with the plainly audible standard of Burlington’s noise ordinance, that the planned sale of alcohol violated limits on the size of accessory spaces and the amount of sales for accessory uses, and that there was insufficient evidence about the level of noise the venue would generate with the doors open, the level of noise typically generated, and the noise impact from overflow parking.

¶ 14. The court issued a written order in July 2023, imposing several additional conditions,³ but otherwise disposing of all of appellants’ arguments. The court began by outlining

³ The court imposed the following additional conditions, requiring Burton to (1) conduct sound assessments for a full year after opening, rather than six months; (2) install permanent sound monitors at the property line and take immediate steps to correct noises exceeding the maximum permitted; (3) place barriers at adjoining residential streets to prevent parking in the neighborhood

its findings of fact. First, on the topic of noise, the court credited the testimony of Burton’s sound expert and found that the biggest source of noise would be rooftop mechanical equipment rather than music or traffic, that the additional sound produced by music would not raise overall sound levels more than one dBA over existing levels, and that sound levels from all proposed uses would be unlikely to shake nearby buildings or create vibrations. The court found that the permits set conditions on noise that are “reasonable and specify maximum allowable sound levels,” while minimizing risks of vibrations or random noise events that exceed allowable standards. At Red Rocks Park, the court found that daytime uses of the performance space were unlikely to create significant impacts, and that there was no evidence of frequent use of the closest parts of the park during nighttime hours. On traffic, the court again credited the testimony of Burton’s expert witness, finding that the parking lot had sufficient room to accommodate a full-capacity crowd and that with signage and parking attendants, the entire parking lot was likely to be used. However, the court found that absent greater efforts to prevent it, some concert attendees were likely to park on adjacent side streets rather than in the venue’s parking lot.⁴ Finally, on the topic of food and beverage, the court found that the performing arts center would include as many as three bars, running approximately twenty-feet long and ten-feet deep, and that up to 50% of the venue’s gross sales were likely to come from beverage sales.

¶ 15. The court then detailed its legal conclusions, three of which are of importance for purposes of this appeal. First, the court concluded that Burlington’s noise ordinance restricting “plainly audible” nighttime music did not apply as a performance standard for zoning purposes

and provide traffic control staff for larger events; (4) coordinate with the cities of Burlington and South Burlington to prevent parking on adjacent streets, including by funding tow-trucks; and (5) end performances by midnight, except for twelve performances per year that end by 2:00 a.m.

⁴ Based on this finding, the court imposed the additional traffic management requirements mentioned in footnote 3.

because it did not specifically describe a level of operation sufficient to put an applicant on notice of what is required, and because noises in excess of the standard were not automatically likely to adversely affect the use of the surrounding area. The court also concluded in the alternative that even if the “plainly audible” standard was within the City’s authority, Burton had met the standard by showing that noise from rooftop machinery and other background noises would likely mask the noise from the music. Second, the court noted that performing arts centers are permitted to serve alcohol provided the accessory space for “preparation and serving” is less than 50% of the entire establishment; because each bar would occupy only 1.7% of the total space, the court concluded that Burton’s proposal complied with this limit. The court rejected the argument that the 25% sales limit for an “accessory use” applied here because Burton was not applying for an accessory use permit and because the zoning ordinance used the term accessory space instead of use. Third, the court concluded that under the permit conditions, all activities associated with the performance space, including parking, would occur on site, and that noise effects from traffic would not unduly interfere with use of Red Rocks Park or create undue adverse impacts on the surrounding neighborhoods.

¶ 16. Following the July order, appellants brought three postjudgment motions, moving to amend the findings under Civil Rule 52(b), to reopen the case under Civil Rule 59(a), and to amend the judgment under Civil Rule 59(e). The court granted the motion to amend the findings in part, adding a clarifying paragraph to its order, explaining the meaning of the closed-doors requirement. The court also granted the motion to amend the judgment in part, agreeing to expressly incorporate the conditions previously put in place by the Burlington DRB and the District Commission, and requesting the parties prepare an amended judgment with the additions. The parties submitted the proposal in September 2023, and the court adopted it. As to all of appellants’ other claims for post-judgment relief, the court denied the motions.

II. Discussion

¶ 17. On appeal, appellants make three arguments. First, they contend that the court erred in its conclusions about the sale of alcohol because alcohol sales should be considered an accessory use, subject to a cap of 25% of total sales, and because bar spaces should be measured based on where the alcohol is consumed, not just where it is sold. Second, they argue that the court erred in striking down the City of Burlington’s plainly audible noise ordinance because the ordinance is neither unconstitutionally vague nor overbroad. Finally, appellants argue that the court’s legal conclusions with respect to the impact of traffic noise were not supported by its factual findings.

¶ 18. We review the Environmental Division’s factual findings with deference and will not overturn them unless “taking them in the light most favorable to the prevailing party, they are clearly erroneous, meaning that there is no credible evidence to support them.” In re Katzenbach A250 Permit #7R1374-1, 2022 VT 42, ¶ 11, 217 Vt. 155, 287 A.3d 36 (quotation omitted). The Environmental Division’s legal conclusions are reviewed de novo but will be upheld “if they are reasonably supported by the findings.” Id. (quotation omitted). While we accord no deference to the Environmental Division’s interpretations of local zoning ordinances, In re Confluence Behavioral Health, LLC, 2017 VT 112, ¶ 12, 206 Vt. 302, 180 A.3d 867, we continue to defer to “a municipality’s interpretation of its own ordinance if it is reasonable and has been applied consistently.” In re Application of Lathrop Ltd. P’ship I, 2015 VT 49, ¶ 21, 199 Vt. 19, 121 A.3d 630; see also Confluence Behavioral Health, 2017 VT 112, ¶ 12 n.1.

A. Sale of Alcohol

¶ 19. Appellants first argue that the court erred in concluding that the proposed sale of alcohol was permitted under Burlington’s CDO. Appellants point to the CDO’s definition of accessory use, which refers to a “use, building, or structure that . . . [i]s subordinate in area, extent, or purpose to the principal use or building served, and is not to exceed twenty-five percent (25%) of the gross area or sales of the principal use or building served.” Burlington CDO § 13.1.2. They

argue that this definition limits alcohol sales to 25% of total sales, whereas Burton indicated that alcohol sales for the proposed project are expected to reach approximately 50% of total sales. Appellants suggest that the 25% rule is essential to promote public safety and that the court's reading of the zoning ordinance carves out a loophole that allows bars to operate in a district that does not otherwise allow them. In the alternative, appellants argue that even if the sale of alcohol is not an "accessory use," it is still subject to the requirement that accessory spaces not exceed "50% of the entire establishment." Burlington CDO, Appendix A at 6 n.32. They argue that the total area should be measured based on the space where alcohol is consumed, not just where it is served, and they point to the City's decision on the Arts Riot permit as evidence of inconsistent practice in this regard.

¶ 20. Starting with appellants' first argument, we conclude that the CDO's definition of accessory use, and its cap of 25% of gross sales, is inapplicable here. Under the CDO, performing arts centers "may contain accessory space for preparation and serving food and beverages, including alcohol, provided this accessory space comprises less than 50% of the entire establishment." Burlington CDO, Appendix A at 6, n.32 (emphasis added). The ordinance does not use the term "accessory use" anywhere in connection with performing arts centers. The ordinance thus creates a distinction between "accessory space" and the separately defined term "accessory use." Burlington's Zoning Manager, Scott Gustin, explained in a sworn affidavit that the City intentionally used this distinct term "to clarify that food and beverage service at a Performing Arts Center is not an 'accessory use' as defined in CDO § 13.1.2." At his subsequent deposition, Mr. Gustin testified that the City decided on the 50% space limit, rather than a limit based on gross sales, because "the standard, or general accessory provision, was too restrictive for what they wanted." To support this view, Mr. Gustin produced a series of memoranda from the months leading up to the City's adoption of the accessory-space language, which show that the City considered and rejected alternative definitions of the term. The City ultimately settled on the

“50% of the entire establishment” language based on the conclusion that it would allow “flexibility in revenue streams and provide . . . an easily verifiable metric for evaluation and enforcement.” As Mr. Gustin asserted in his affidavit, the City’s interpretation of the ordinance is that “the only limitation on the preparation and serving of food and beverages, including alcohol, applicable to performing arts centers,” is the 50% space limit. Given the distinct language used in the ordinance, the evidence put forth of the City’s intent, and the lack of evidence of inconsistent application, the City’s interpretation of its own ordinance is entitled to deference. See Lathrop Ltd. P’ship I, 2015 VT 49, ¶ 21 (stating that “a municipality’s interpretation of its own ordinance” is entitled to deference “if it is reasonable and has been applied consistently”).

¶ 21. Turning to appellants’ other argument, we conclude that under the plain language of the CDO, the proposed accessory spaces comprise less than 50% of the entire establishment and are therefore permissible. In interpreting a municipal zoning ordinance, we apply the general principles of statutory construction, starting with the plain language of the ordinance unless it is ambiguous. Id. ¶ 22. Unless the express language leads to an “irrational result,” we are “bound by the plain meaning of the words in the ordinance.” In re JSCL, LLC CU Permit, 2021 VT 22, ¶ 16, 214 Vt. 359, 253 A.3d 429 (quotation omitted). The CDO states that performing arts centers “may contain accessory space for preparation and serving food and beverages, including alcohol, provided this accessory space comprises less than 50% of the entire establishment.” Burlington CDO, Appendix A at 6, n.32 (emphasis added). While “preparation and serving” are not defined, “where no definition of a word is given in an ordinance, it must be given its commonly accepted use.” City of Rutland v. Keiffer, 124 Vt. 357, 360, 205 A.2d 400, 402 (1964). By their plain meaning, “preparation and serving” refer only to the acts of making and distributing food and beverages, not to subsequent consumption. Burton’s proposal does not involve any table service, so alcohol will only be prepared and served in the immediate vicinity of the three proposed bars. As the Environmental Division found, each of these bars will occupy approximately 1.7% of the

total space. Because the accessory spaces will comprise “less than 50% of the entire establishment,” they are permitted under the CDO.

¶ 22. Appellants argue that the term “accessory space” should be understood to refer to the entire room containing a bar counter, rather than merely the area immediately surrounding the bar. They argue that the word “accessory” necessarily means something distinct from the principal, and cite to our decision in Regan v. Pomerleau, 2014 VT 99, 197 Vt. 449, 107 A.3d 327, to suggest that we have previously defined “accessory spaces to mean spaces that are separate and distinct from a principal unit or space.” Under appellants’ reading of the ordinance, 100% of the proposed venue would be an accessory space since Burton plans to have bar counters in each room. But regardless of how we have defined “accessory” in other contexts, the term “accessory space” has been defined here by the City to refer only to the space for “preparation and serving” of food and beverages. Alcohol here will only be prepared and served in the area immediately surrounding the bar counters. Our decision in Regan, relating to permits for an “accessory dwelling unit,” 2014 VT 99, ¶ 20, is inapposite because it interprets entirely distinct provisions of law, separately defined in the CDO.

¶ 23. Appellants also point out that in its prior decision on the Arts Riot conditional use permit, the City referred to the “related space for preparation and consumption of food and drink.” (emphasis added). They argue that the City’s practice has thus been to interpret “accessory space” as encompassing areas of consumption and that its current interpretation is inconsistent with this practice. As discussed previously, the City’s interpretation of the ordinance—that it applies only to areas for preparation and serving of food and beverages, but not the consumption thereof—would be entitled to deference if it “is reasonable and has been applied consistently.” Lathrop Ltd. P’ship I, 2015 VT 49, ¶ 21. Conversely, if it has not been applied consistently, then the City’s interpretation would be entitled to no deference. We need not decide whether the record reflects

actual inconsistency⁵ because even absent any deference to the City’s interpretation, the plain language of the statute is clear. Because the ordinance unambiguously refers to areas for “preparation and serving,” we conclude that it applies only to those areas and not to surrounding areas where consumption is permitted.

B. Noise Ordinance

¶ 24. Appellants next argue that the court erred in striking down the City’s noise ordinance. They assert that the City was empowered under 24 V.S.A. § 4414(5) to pass performance standards for limiting noise, and that the City acted in accordance with this authority in passing the ordinance. They further contend that striking down the noise ordinance for zoning purposes while leaving it in place for enforcement purposes is error and disregards the public safety purposes of zoning laws. Finally, they argue that the noise ordinance is neither unconstitutionally vague nor overbroad.

¶ 25. Section 4414(5) of Title 24 empowers municipalities to adopt “[p]erformance standards,” which must “specifically describe the levels of operation that are acceptable and not likely to affect adversely the use of the surrounding area by the emission of such dangerous or objectionable elements as noise.” Performance standards are intended to serve as either an “alternative or supplement to the listing of specific uses permitted” within a given zoning district. Id.; see also 1 P. Salkin, Am. Law of Zoning § 9:47 (5th ed. 2024) (explaining that performance

⁵ While the record shows inconsistency in language, it is less clear whether there was actual inconsistency in application. The record reflects that Arts Riot contained a space for food preparation, a café area, and a performance space, and that the City treated both the food preparation and café areas as accessory spaces. However, the record does not reveal whether Arts Riot included table service throughout the cafe space or whether consumption of food and beverages was permitted in the performance space. At the hearing, Mr. Gustin, who personally prepared the Arts Riot decision, testified that the reference to consumption had “misse[d] the mark” and that it should have read “preparation and serving” as required by the ordinance. The City ultimately approved the Arts Riot permit without modification despite the reference to “consumption.”

standards “can be imposed in addition to the orthodox inclusion and exclusion of uses” and typically impose limits on “permitted levels of smoke, dust, noise, glare, [or] radiation” that are “stated in quantities and qualities capable of measurement”).

¶ 26. Pursuant to this authority, the City enacted CDO § 5.5.1, which states that “[a]ll applications for a zoning permit shall be required to demonstrate compliance with the applicable nuisance regulations and performance standards pursuant to the requirements of the Burlington Code of Ordinances.” At issue here is a portion of Burlington’s noise control ordinance, which prohibits operating

any musical instrument . . . for the production or reproduction of sound in such a manner as to be plainly audible through walls between units within the same building, from another property or from the street between the hours of 10:00 p.m. and 7:00 a.m. or in such a manner as to unreasonably disturb the peace, quiet or comfort of the public.

Burlington Code of Ordinances § 21-13(b)(2)(a) (emphasis added).

¶ 27. The environmental court assumed that the noise control ordinance qualified as a “nuisance regulation” or “performance standard” under § 5.5.1, and therefore that the CDO required adherence to this standard. However, the court determined that the noise control ordinance exceeded the City’s delegation of authority under 24 V.S.A. § 4414(5) because it did not “specifically describe the levels of operation that are acceptable and not likely to affect adversely the use of the surrounding area.” The court first concluded that “plainly audible” music could include “sound that could be heard at some level at the property line, but not adversely affect the use of the surrounding area.” The court also noted that the “plainly audible” standard is subjective and variable, and therefore fails to “specifically describe the levels of operation that are

acceptable.” Based on these conclusions, the court determined that “Burlington’s noise control ordinance does not apply to the proposed use as a performance standard.”⁶

¶ 28. If we assume that the City intended to incorporate § 21-13(b)(2)(a) as a performance standard,⁷ we agree with the Environmental Division that the “plainly audible” standard exceeded the authority delegated to the City in 24 V.S.A. § 4414(5). Section 4414(5) empowers municipalities to enact performance standards that “specifically describe the levels of operation that are acceptable and not likely to affect adversely the use of the surrounding area.” But as the Environmental Division concluded, a blanket prohibition on plainly audible noise “may encompass sound that is ‘acceptable and not likely to affect adversely the use of the surrounding area.’ ” *Id.* Whereas a noise that is plainly audible from the street might adversely affect the use of a purely residential neighborhood, it would not adversely affect an area where existing noise levels are already high.

¶ 29. The latter half of § 21-13(b)(2)(a), prohibiting the playing of nighttime music “in such a manner as to unreasonably disturb the peace, quiet or comfort of the public,” better states

⁶ Contrary to appellants’ arguments, the court did not hold that the ordinance was unconstitutionally vague or overbroad. While it cited to case law from other states evaluating whether “ ‘plainly audible’ noise ordinances are unconstitutionally vague,” the court’s conclusion was that if applied as a performance standard, the ordinance would exceed the City’s authority under 24 V.S.A. § 4414(5).

⁷ While we need not decide the issue, there is reason to think that the noise control ordinance does not qualify as a performance standard. Section 5.5.1 requires zoning permittees to “demonstrate compliance with the applicable nuisance regulations and performance standards pursuant to the requirements of the Burlington Code of Ordinances.” But nowhere in either the CDO or the Code of Ordinances is the noise control ordinance referred to as a performance standard. Nor does it clearly qualify as a nuisance regulation; unlike § 21-13(b)(1), which prohibits any “loud or unreasonable noise” and states that such noises are “considered to be a noise disturbance and a public nuisance,” violations of § 21-13(b)(2)(a) are only considered to be a “noise disturbance,” not a nuisance. A blanket prohibition on plainly audible noise also does not state an ordinary nuisance standard because it fails to take into account the reasonableness of the noise for the character of the area. See D. Dobbs et al., *The Law of Torts* § 401 (2d ed. 2024) (“Noise, odors, or sights that are consistent in nature and extent with the neighborhood’s legitimate use patterns are seldom if ever a nuisance.”).

an acceptable level of noise that is not likely to adversely affect the surrounding area. But we cannot conclude that the proposed development will violate this standard. The ordinance applies only to nighttime noises from “[t]he operation . . . of any musical instrument.” *Id.* The uncontroverted testimony here is that during a hard-rock concert, with the required mitigation efforts, noise levels from music are expected to be only 32 dBA at the nearest residence. The sound of rooftop mechanical equipment, measured at 41 dBA, is expected to far exceed the sound from musical instruments. Moreover, existing nighttime background noise levels, measured at 52 dBA L_{eq} in one location and 41 dBA L_{eq} at another, are likely to be louder than sounds from music. The sound levels—from music alone and from the project as a whole—are projected to be lower than WHO’s guidelines for protecting against sleep disturbance (45 dBA over an eight-hour period), ANSI’s guidance for compatibility with urban/suburban residential areas (55 dBA), and the City of South Burlington’s noise standards (45 dBA over a one-hour period at points adjoining residential properties). Given this evidence, we cannot conclude that the noise from musical instruments will unreasonably disturb the peace, quiet, or comfort of the public.

¶ 30. Finally, even if we were to conclude that the “plainly audible” noise ordinance does apply, appellants failed to challenge the court’s alternative holding that the plainly audible standard was met here. In a footnote, the court concluded that “even if the ‘plainly audible’ standard was within the scope of the City’s authority to adopt performance standards, the Applicant demonstrated that the project as proposed would not violate the noise ordinance.” The court pointed to evidence that noise levels from music were projected to be less than those from other sources—32 dBA from music, compared to 34 dBA from vehicles and 41 dBA from rooftop mechanical equipment—and concluded that “noise from the HVAC and background noises will likely mask the noise from the music.” Since Burlington’s noise control ordinance applies only to noise from “any musical instrument,” the fact that music will be drowned out by other noises means that the music will not be “plainly audible.” In their principal brief, appellants failed to

raise any challenge to this aspect of the court’s holding. Appellants did briefly discuss the issue in their reply brief, asserting that the rooftop mechanical equipment has different “spectral characteristics” than either music or traffic noise, and arguing that the evidence does not support a conclusion that the rooftop mechanical equipment will mask the other sounds. Appellants failed to put forth expert testimony on this issue. Regardless, because “issues not raised in an appellant’s original brief may not be raised for the first time in a reply brief,” Maynard v. Travelers Ins. Co., 149 Vt. 158, 160, 540 A.2d 1032, 1033 (1987), we decline to consider this argument. Thus, even assuming that the court erred in concluding that the noise ordinance did not apply as a performance standard, appellants’ challenge must fail.⁸

C. Traffic Noise

¶ 31. Finally, appellants argue that the court’s findings could not support its conclusions with respect to traffic noise. They point out that the court acknowledged the possibility of a “backup of traffic” at the one-lane bridge “as cars wait to go across the bridge alternatively with oncoming vehicles,” and that the court found that Burton “did not specifically model noise occurring on neighborhood streets.” But despite these findings, the court affirmed the permits, concluding that “it is reasonable to infer that vehicle noise” at locations other than the Burton lot would be comparable to noise at the lot. Appellants argue that the additional conditions imposed to prevent off-site parking do nothing to address the additional traffic noise that will result from the backups. Taking this noise into account, they argue that the project will violate Act 250 criteria 1, 8, and 9(K), as well as the conditional use requirement of no “undue adverse effect” on “[t]he character of the area affected.” 24 V.S.A. § 4414(3)(A)(iii); Burlington CDO § 3.5.6(a)(2).

⁸ Burton offers a third basis for affirming the decision based on the City’s consistent practice of applying CDO § 3.5.6, and not § 5.5.1, to noise issues with conditional use applications. Given our conclusions on the other points, we need not reach this argument.

¶ 32. On the conditional use permit, appellants point to CDO § 3.5.6(a)(2), which provides that a permit will only be granted if there is no “undue adverse effect” on “[t]he character of the area affected.” They argue that under our decision in In re Ferrera & Fenn Gravel Pit, the “area affected” by a development project includes adjacent residential neighborhoods, 2013 VT 97, ¶ 12, 195 Vt. 138, 87 A.3d 483 (quotation marks omitted), and they contend that the court did not consider the impacts outside of the ELM district.

¶ 33. While appellants are correct that the “area affected” can include adjacent residential areas, we find no error in the court’s conclusion that there would be no undue adverse effect here. As we have previously explained, the “adverse effect test must be applied reasonably to prohibit only substantial and material adverse effects.” In re Miller, 170 Vt. 64, 69, 742 A.2d 1219, 1223 (1999);⁹ see also In re Times & Seasons, LLC, 2008 VT 7, ¶ 8, 183 Vt. 336, 950 A.2d 1189 (holding in context of Act 250 Criterion 8 that adverse impact is only considered undue if (1) the project violates clear, written community standard; (2) it offends sensibilities of average person; or (3) the applicant has failed to take generally available mitigating steps that reasonable person would take). Furthermore, under 24 V.S.A. § 4414(3), the “character of the area affected” is to be defined based on “the purpose or purposes of the zoning districts within which the project is located, and specifically stated policies and standards of the municipal plan.” Unlike Ferrera & Fenn Gravel Pit, where the conditional use permit was sought within a Forest Conservation District

⁹ Miller applied a previous statute, 24 V.S.A. § 4407(2)(B), which required that conditional uses “not adversely affect . . . [t]he character of the area affected.” The current statute, enacted in 2003, see 2003, No. 115 (Adj. Sess.), § 95, requires a showing of no “undue adverse effect.” 24 V.S.A. § 4414(3) (emphasis added). In In re Grp. Five Invs. CU Permit, we affirmed a court’s use of case law interpreting the phrase “undue adverse effect” when applying the “substantial and material adverse effect” language from Miller because “there was little difference between ‘undue’ and ‘substantial and material’ adverse effects.” 2014 VT 14, ¶¶ 12-14, 195 Vt. 625, 93 A.3d 111, overruled on other grounds by Confluence Behavioral Health, LLC, 2017 VT 113, ¶ 17, 206 Vt. 302, 180 A.3d 867. We conclude that the converse is also true here and apply the test from Miller to the revised statute.

that allowed some industrial uses as conditional uses, 2013 VT 97, ¶ 3, the ELM district at issue here is specifically zoned to permit industrial uses and their associated noises.¹⁰ As established in the CDO, the ELM district “is the traditional commercial/industrial center of Burlington, and is intended primarily to accommodate enterprises engaged in” the production of “goods, merchandise, equipment, or art.” Burlington CDO § 4.4.3(a)(1). The City’s municipal plan further explains that businesses in the ELM district “need to be able to spread out, make some noise, and be accessible by heavy trucks.” The evidence here shows that existing background noise levels are comparable to those projected both during and after the loudest concerts. In both scenarios, the loudest noises are projected to come from heavy machinery and vehicles—the same types of noises that the Environmental Division found are already most prevalent in the ELM district and the surrounding area. Appellants also failed to provide rebuttal testimony from a sound expert, and the rebuttal testimony from their traffic expert contained no discussion of impacts from traffic noise.

¶ 34. From this evidence of the existing character of the area and the project’s likely effects, the Environmental Division concluded that the project would not have an undue adverse effect on the character of the area affected. “Although reviewed de novo, the Environmental Division’s legal conclusions will be upheld if they are reasonably supported by the findings.” See Katzenbach A250 Permit, 2022 VT 42, ¶ 11 (quotation omitted). The court found that “a certain amount of noise is inherent in the uses for which the district is designed, and the district and nearby residential streets are also surrounded by other features of a city that generate ambient noise.” The court also found that the projected noises “are consistent with the sounds already occurring in the

¹⁰ Our conclusion in Ferrera & Fenn Gravel Pit was also limited by the fact that the DRB denied the applicant’s conditional use permit and by our standard of review, which required us to defer to the DRB’s findings of fact and to apply independent analysis of legal conclusions only when outside the DRB’s area of expertise. 2013 VT 97, ¶ 6.

neighborhood.” However, “to ensure that the general character of the area is maintained,” the court imposed additional conditions, including the installation of permanent sound monitors at the property line. With all the conditions, the court concluded that “[w]hile the Higher Ground use is likely to generate sounds and traffic, the effects have not been shown to unduly change the character of the area.” This conclusion was “reasonably supported by the findings” and we consequently reject appellants’ argument. *Id.* ¶ 11 (quotation omitted).

¶ 35. Finally, on the Act 250 permit, appellants argue that the court’s factual findings about traffic noise cannot possibly support its legal conclusion that the impacts of the project will not be harmful under criteria 1 and 9(K) or unduly adverse under Criterion 8. Appellants reiterate their argument that the court failed to adequately address the noise from traffic, and they assert that “[t]he court’s decision was conclusory and constituted clear error.” We conclude there was no error and affirm the court’s conclusions on each of the challenged criteria.

¶ 36. Criterion 1 requires the District Commission to find that the development “[w]ill not result in undue water or air pollution.” 10 V.S.A. § 6086(a)(1). The court, following the District Commission’s lead, concluded that noise was only considered an air pollutant under Criterion 1 “if it exceeded a maximum L_{eq} of 70 dBA for 24 hours a day, 365 days a year over a lifetime.” Appellants do not challenge this conclusion, and the evidence here shows that noise levels will not reach this threshold, let alone constantly remain at it.

¶ 37. Criterion 8, for which the burden of proof is placed on “any party opposing the applicant,” *id.* § 6088(b), requires a finding that the project “[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas.” *Id.* § 6086(a)(8). The court applied the Quechee test, a two-part test used to evaluate whether a project will have an undue adverse effect on the aesthetics of an area. Under the test, “a determination must first be made as to whether a project will have an adverse impact on aesthetics and the scenic and natural beauty of an area.” In re Halnon, 174 Vt. 514, 515, 811

A.2d 161, 163 (2002) (mem.). If an adverse impact is found, the court turns to the second prong to determine whether the impact will be undue. An adverse impact is considered to be undue if any of the following questions is answered in the affirmative:

1) Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area? 2) Does the project offend the sensibilities of the average person? 3) Have the applicants failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings?

Id. The court determined that appellants had not met their burden to show that “nighttime noise resulting from the performance use would be unduly adverse.” The court concluded that

[w]hile there may occasionally be sounds that exceed the required standards, as a result of the immediate use of mitigation measures . . . and information that will be obtained from the required permanent sound monitor, incidents of disruptive noise are likely to be rare and remediated, resulting in occasional noise events that occur no more frequently than unplanned noise events from other sources that occur in a city environment.

Appellants raise no specific argument on appeal with respect to Criterion 8. Given that the burden of proof for Criterion 8 is on appellants, we conclude there was no error.

¶ 38. Finally, Criterion 9(K) requires a finding that the development “will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands.” 10 V.S.A. § 6086(9)(K). Appellants argue that the court’s factual findings about increased traffic cannot support its legal conclusion that “the proposed land use will not compromise the public investment in Red Rocks Park.” But as the court found, Burton’s expert provided evidence that “noise in Red Rocks Park from the proposed use will be minimal.” The additional conditions imposed by the court to prevent offsite parking will also further diminish any noise effects within the park. We cannot conclude that the court’s factual findings do not reasonably support its conclusion. See Katzenbach A250 Permit, 2022 VT 42, ¶ 11.

III. Conclusion

¶ 39. For the reasons discussed above, we reject appellants’ challenges to Burton’s conditional use and Act 250 permits for the proposed Higher Ground project. First, under the plain language of Burlington’s CDO, we conclude that the term “accessory space” is distinct from “accessory use” and that the accompanying 50% space limit applies solely to areas for “preparation and serving” of food and beverages. Second, we conclude that the “plainly audible” language in Burlington’s noise control ordinance cannot apply as a performance standard because it does not “specifically describe the levels of operation that are acceptable and not likely to affect adversely the use of the surrounding area.” 24 V.S.A. § 4414(5). Finally, we determine that the Environmental Division’s conclusions about the project’s traffic impacts were adequately supported by its findings under the applicable conditional use and Act 250 standards. Accordingly, we affirm the Environmental Division’s order.

Affirmed.

FOR THE COURT:

Chief Justice