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TO: BURLINGTON DEVELOPMENT REVIEW BOARD

RE: BURTON HUB: **Applicability and Violation of the Burlington Noise Ordinance**

Ladies and Gentlemen:

Please consider the following comments submitted on behalf of CRZ Group.

The Burlington Noise Ordinance prohibits **"unreasonable noise"** generally, and, in particular, music and noises from social activity that are **"plainly audible" from "another property or from the street between the hours of 10:00 P.M. and 7:00 A.M."** Burlington Code of Ordinances, Sections 21-13 (b) (1) and (2) (a) and (c). It also expressly prohibits **"permitting or directing the operation of …machinery[1] outdoors between the hours of 9:00 PM and 7:00 AM."** Id., subsection 2 (d). The Noise Ordinance is applicable to the proposed use by reason of CDO sections 5.5.1[2] and conditional use criterion 6.[3],[4]

In his Memo to Justin Worthley dated August 3, 2020, Eddie Duncan, the applicant's noise consultant, suggests without discussion that the application is exempt from the Noise Ordinance. (Duncan Memo, page 8, n.1) That suggestion is not correct, for the reasons explained in the Appendix to this letter.

Notwithstanding his suggestion of non-applicability, Mr. Duncan goes on to argue that the proposed performing arts center *complies* with the Noise Ordinance. In doing so, he strains to introduce "ambiguity" where there is none: Quibbling with Mr. Blomberg's use of the term "detect" as synonymous with the term "plainly audible," Duncan writes: "One can detect a lot of

[1] e.g, rooftop air handling machinery in this case.

[2] "All 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. **All such standards shall be met for all uses … as determined or measured at the property line…"** CDO section 5.5.1. (Emphasis added.)

[3] "[T]he proposed conditional use and any related development shall not result in an undue adverse effect on… (6) Any standards or factors set forth in existing City bylaws and city and state ordinances." CDO section 3.5.6 (a). In our context, any violation of the Noise Ordinance must be understood as "undue." The DRB does not have authority to waive the Noise Ordinance or any other city or state law.

[4] The Noise Ordinance is also relevant to conditional use criterion (3) for its definition of "public nuisance."

sound that is not audible and discernible by a human listener with instrumentation." (Duncan memo of 8/3 at page 8.) (Emphasis added.) Neither the ordinance nor Blomberg implies anything about "instrumentation." To an objective reader, the injection of that idea is an obvious red herring. Under the Noise Ordinance, after 10 PM, musically generated sound and/or noise arising from social activity is a public nuisance if a human being with normal auditory function can easily hear it from the street. There is no other plausible meaning of the term "plainly audible."[5] Id., (Noise Ordinance sections (b) (2) (a) and (c).) Moreover, after 9 PM, all noise generated by machinery is expressly prohibited out of doors. (Noise Ordinance section (b) (2) (d).

Taking the diagrams on pages 16 and 17 of RSG's original Noise Assessment at face value,[6] the diagram on page 16 indicates that the sound level where the property adjoins the north side of Queen City Park Road will be 50 dBA Leq during concerts. The post-concert diagram on page 17 indicates that the sound level will be 55 dBA Leq at the same location. According to the Noise Assessment:

> "… [b]ackground sound levels (Leq) at night (10 PM to 7 AM) are generally in the low 40s between 40 and 45 dBA. During the quietest times at night, sound levels can be in the low 30's dBA." (Noise Assessment at page 8.)

Duncan reaffirms this finding on page 4 of his August 3 Memo. Also, he reports, for the first time, the results of a monitoring exercise he conducted in 2010 for the purpose of demonstrating background noise.[7] Consistent with his general statement about "the quietest times," his graph of

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[5] Duncan strains to introduce "ambiguity" where there is none with the proposition that "[o]ne can detect a lot of sound that is not audible and discernible by a human listener with instrumentation." Duncan memo of 8/3 at page 8. (Emphasis added.) Neither the ordinance nor Blomberg implies anything about "instrumentation." To an objective reader, the injection of that idea is an obvious red herring.

[6] For the sake of the argument only. CRZ Group does not acknowledge the accuracy of the diagrams, which will require more data to determine, as separately requested, nor does it agree that they use the appropriate measure. As previously shown, according to the Vermont Supreme Court in the Lathrop and Russell cases, the true impact cannot be evaluated without analysis of the frequency, intensity, and duration of instantaneous sound. For extended quotations from the Court, *see* the undersigned's letter of July 28, page 3. See also Gregory Tocci letter of August 4, in which RSG's use of the "equivalent sound level" (Leq) for music is implicitly criticized:

> It is my opinion that use of the equivalent sound level is most appropriate for broadband, indistinct sound such as that produced by ventilation equipment, for example, which contains no information. Music and speech are distinct, easily identifiable sounds that contain distracting information. We would recommend that… a design goal for music transient sound be developed to minimize impact… [T]he community should be sufficiently protected if the 1^{st} percentile A-weighted music sound level ($LAF_{01,1\text{-hr}}$) expressed as the 90^{th} percentile A-weighted sound level ($LAF_{90,1\text{-hr}}$), does not exceed the existing residual sound level, by more than 5 dBA.

Tocci Letter, Page 1-2. (Emphasis added.)

[7] Duncan's 2017 "background monitoring" exercise, as also reported for the first time in his August 3 Memo, is not material to the issue. It applied to a single property, with the monitoring instrument located directly behind Rhino

the metered sound indicates that, during the operative portion of the night (10 PM to 2 AM), the "Leq" level for two of the three nights shown was in the low 30's. (Duncan 8/3 memo, page 6, figure 3.) **Duncan's finding regarding "the quietest times at night" is the one piece of data that is most pertinent to the comparison that concerns us.**[8] The band will be cutting loose, people will be gathering in the outdoor lounge, and car, truck, and motorcycle engines will be roaring to life at precisely those times that are now the quietest. Thus, during the *relevant* portion of the night, the sound will be plainly audible to the naked ear "from the street" and the sound level differential at the Burton south property line will well exceed the 5 dBA limit necessary for "protection of the community"[9] (50 – 55 dBA versus "low 30's"). (Noise Ordinance, Sections (b) (1) and (b) (2) (a) and (c).

In summary: (1) The Noise Ordinance is applicable to the proposed use. (2) The noise to be generated between 10 PM and 2 AM (a) will endanger the peace of others and the welfare of the community and (b) will be plainly audible at the property line. Under either of the general or specific standards, it will violate the Noise Ordinance. Consequently, the application fails the test of CDO section 5.5.1 and cannot be approved for operation after 10 PM.[10]

Finally, this letter addresses only the Noise Ordinance, without prejudice to all other objections to the application raised or to be raised by CRZ Group.

Respectfully submitted,

ls/Franklin L. Kochman
Franklin L. Kochman, Attorney for CRZ Group

Foods, an all-night factory quite far from the south line of the Burton property. (See "Monitor A" on the diagram at page 5 of Duncan's memo.) There is currently no late night activity along Burton's south line.

[8] One of the purposes of the Noise Ordinance is to "prevent noise which is prolonged or **unsuitable for the time and place**…" Noise Ordinance, section (a).

[9] See footnote 6, above. Tocci's 5 dBA limit for a tolerable differential between existing and proposed conditions would also disqualify the project under CDO section 3.5.6 (a) (3).

[10] The Noise Ordinance bars the operation of the rooftop air handling units after 9 PM. CRZ Group does not consider the one hour difference material to its concerns. However, that machinery must be taken into account, although RSG's combined Leq measure is not sufficient to reflect the impact of the music component, per Toccci. *See* footnote 6, above.

Appendix: Applicability of the Noise Ordinance

Duncan suggests that the application is exempt from the Noise Ordinance by reason of its subsection (c) (5).[11] (Duncan Memo, page 8, n1.) The proposed use is outside the reach of all of the listed exemptions. That is obvious in almost all of the cases. The exemption for "[p]ersons operating an event or activity under authority of an entertainment permit" gives pause but it, too, dissolves on examination. The ordinance governing entertainment permits (the "Entertainment Permit Ordinance") requires a permit for any "live public music or performance on the premises of any bar, cabaret, club, hotel or restaurant that holds a first class and/or third class liquor license…" *See* general ordinances, section 19-18 (a). (Emphasis added.)

The proposed use will be situated in the E-LM zoning district. None of a "bar," "club," "hotel," or "restaurant" is permitted in the E-LM district (see table of uses at the end of the CDO), and the term "cabaret" is not mentioned.

The proposed use is none of those things. Rather, it is a "performing arts center," defined as "[a]n establishment primarily used for performing arts performances which may include permanent seating." (CDO. Article 13.) (Emphasis added.)

Footnote 32 of the CDO table of uses, applicable to performing arts centers, allows "accessory space for preparation and serving of food and beverages, including alcohol…" The applicant's performing arts center may require a liquor license if – and only if -- it exercises its option to serve alcohol, but that will not make it a "bar" under the CDO, in which the term "bar" is defined as "[a]n establishment… primarily devoted to the serving and on-premise consumption of alcoholic beverages…". The performing arts center is not a "club" as defined in the CDO, and it is obviously not a hotel.

Any cabaret-*like* or restaurant-*like* activity of the Performing Arts Center will be subordinate and incidental to its primary use as a performance venue. The entertainment permit ordinance is designed to reach facilities in which the opposite is true; that is, those in which the performance function is incidental to a facility's status as a bar, etc. The City Council easily, and in fewer words, could have described the permissible accessory activity for performing arts centers as a "bar," "cabaret," or "restaurant," but it did not. In carving out the accessory use for performing arts centers, the City Council avoided terms that may have brought the use within the scope of the entertainment permit requirement.

If a performing arts center serves no alcohol, it would not need an entertainment permit and certainly would be subject to the noise ordinance. It makes

[11] "(5) Events and activities conducted by or permitted by the city. Persons operating an event or activity under authority of an entertainment permit, parade/street event permit, solid waste license, or parks special use permit shall comply with all conditions of such permits or licenses with respect to noise control issues." (Emphasis added.)

little sense to construe the Noise Ordinance as applicable only to performing arts centers that do not serve alcohol.

Finally, the required conditions of an entertainment permit put in doubt whether holders of such permits are intended to be truly exempt from the Noise Ordinance after all:

> It shall be a standard condition of each [entertainment] permit that the applicant shall comply with all city ordinances and regulations…

Burlington General Ordinances section 19-18 (c).

The potential circular effect of this language on the Noise Ordinance has an Alice in Wonderland aspect: on the one hand, one is exempt; on the other hand, one must comply.[12] This anomaly indicates that the true intention of the portion of the Noise Ordinance dealing with entertainment permits is to leave the full extent of noise restrictions for such permits to the discretion of the City Council on a case-by-case basis – but with the standards of the Noise Ordinance as a mandatory minimum. This interpretation best reconciles the interplay of the two ordinances.

Exemptions should be construed narrowly against their operation. The Noise Ordinance must be interpreted to apply to performing arts centers regardless of their permissible accessory uses, either directly or because the standard condition imposed by the Entertainment Permit Ordinance makes it so.

[12] Compare the quoted language from the Entertainment Permit Ordinance with the language of Noise Ordinance subsection (c) (5) at footnote 11, above.