

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

Sullivan Superior Court
22 Main St.
Newport NH 03773

Telephone: (603) 863-3450
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

**H. Bernard Waugh, Jr.
Gardner Fulton & Waugh PLLC
78 Bank Street
Lebanon NH 03766**

Case Name: **NEWPORT SAND & GRAVEL V TOWN OF GOSHEN & GOSHEN ZONING
BOARD**
Case Number: **220-2010-EQ-00068**

Enclosed please find a copy of the court's order of May 31, 2011 relative to:

Order of Petitioner's Appeal

June 01, 2011

Barbara A. Hogan
Clerk of Court

(548)

C: TIMOTHY E BRITAIN, ESQ

The State of New Hampshire

SULLIVAN COUNTY

SUPERIOR COURT

Newport Sand and Gravel Co., Inc.

V.

Town of Goshen, New Hampshire

Docket No.: 220-2010-EQ-0068

ORDER ON PETITIONER'S APPEAL

Petitioner, Newport Sand & Gravel Co., Inc. ("Petitioner" or "NS&G"), appeals under RSA 677:4 the decision of the Town of Goshen ("Town") Zoning Board of Adjustment ("ZBA") denying NS&G's application for a special exception. On September 29, 2010, the ZBA denied Petitioner's motion for rehearing of its June 22, 2010 decision to deny the application. A bench trial on Petitioner's appeal took place on March 16, 2011. Based upon a review of the underlying record, arguments and pleadings of the parties, and caselaw, the Court finds that the ZBA acted lawfully and reasonably when it denied NS&G's 2009 Application. In addition, the Court finds NS&G is not entitled to a builder's remedy.

FACTUAL BACKGROUND

On November 3, 2000, NS&G filed with the ZBA an application for a special exception "for the excavation of earth materials on . . . Lot 2 of Tax Map 203." Certified Record ("CR") 1 (henceforth, "2000 Application"). On December 6, 2000, after a joint meeting and a joint public hearing with the Town's Planning Board ("PB"), the ZBA voted to deny the 2000 Application. *Id.* On December 22, 2000, Petitioner moved for rehearing, which was held on April 11 and April 26, 2001. *Id.* A site visit was held on May 2, 2001. *Id.* On May 22, 2001, the ZBA voted again to deny the special exception. CR 19. NS&G appealed to this Court. By Order dated February 22, 2003, the Court (Mangones, J.) upheld the denial of the application. CR 21 (henceforth, "2003 Order"). The Court summarized the ZBA's findings, which Petitioner claimed were unlawful or unreasonable.

[The ZBA] [] denied Newport's request for a special exception. The ZBA made the following findings in that decision: 1) the Anderson Pit¹ would be offensive due to noise; 2) the Pit would negatively impact traffic and public safety; 3) there would be no damage to the aquifer; 4) the proposed project would have a negative impact on property values; and 5) the project would negatively affect the community character such that it would be offensive to the public.

2003 Order p. 7; CR 27. The Court then addressed Petitioner's arguments: "that the ZBA's interpretation of the zoning ordinance was overbroad and vague[;]" "that the ZBA's rejection of the evidence presented by the noise level expert was unreasonable[;]" "that that the ZBA's rejection of its property value expert was unreasonable[;]" "that the ZBA's determination that the special exception would be offensive to the public because of its impact on community character was both unreasonable and unlawful[;]" and "that the ZBA applied the incorrect burden of proof in this case." Id. at 8; CR 28.

In the 2003 Order, the Court found the record, which included letters from Goshen residents complaining about the noise from existing gravel operations, supported the ZBA's determination on noise. The ZBA weighed the disparity between residents' accounts and the testimony of NS&G's expert. Id. at 11-12; CR 31-32. The Court found the ZBA's rejection of expert testimony without an opposing expert report did not constitute an error of law. Id. at 13; CR 33. Next, the Court held the ZBA properly discounted the testimony of NS&G's property value expert and that it had sufficient evidence before it to conclude that the proposed project would impact property values. Id. at 14-15; CR 34-35. The Court found lawful and reasonable the ZBA's consideration of whether the proposed project would affect the overall character of the community. Id. at 16; CR 36. "The ZBA could consider that the project was in the 'dead center of the village.' . . . There was concern about the Town's image as a 'gravel pit town.'" Id. at 17; CR 37 (citation omitted). The Court therefore "conclude[d] that the ZBA's reasoning is sufficiently supported and [found] no reason why the ZBA could not correlate 'community character' with the other factors listed in the ordinance, such as noise or traffic." Id. Lastly, the Court found "that the burden of proof applied by the ZBA was both lawful and reasonable." Id. at 19; CR 39.

¹ The Anderson Pit is the name of the project which NS&G proposed in 2000 and for which the ZBA denied a special exception.

On January 22, 2009, NS&G filed with the ZBA another application for a special exception “for the purpose of establishing an excavation site on its . . . property located off Route 10 The material found on this property is sand and gravel.” CR 42, 45 (henceforth, “2009 Application”). Again, Petitioner sought to excavate on Lot 2, Tax Map 203; the excavation site “would be accessed via a new gravel road . . . across an abutting property owned by an affiliate of NSG and identified as Tax Map 204, Lot 10.” Pet. Mem. Law Merits p. 2; CR 43.

NSG and its affiliates own and/or operate two other gravel excavation sites on the northerly side of Lear Hill Road: (a) the so-called “Davis Site,” . . . and (b) the so-called “Bridges Site” which is adjacent to the Davis Site but located in the Town of Unity, see R.R. at 76, 212, 218. . . . Excavation at the Bridges Site was completed last year. [CR 895]. NSG has represented that it will not operate the Davis Site and the Project site at the same time.

Id. at 2-3.

The ZBA held meetings on February 10 (CR 217), March 3 (CR 359), April 14 (CR 428), and April 30 (CR 439). Public hearings took place on June 16 (CR 443), July 21 (CR 451), August 20 (CR 545), and September 1, 2009 (CR 546). The first three ZBA meetings were held jointly with the PB because “[t]he ZBA must make a determination of the application for a Special Exception before the PB can act on” an excavation permit application which Petitioner had filed with the PB. CR 574; CR 217.

At the February 10, 2009 meeting, the ZBA explained the purpose of the meetings as follows.

The ZBA will need to determine if this application is substantially different from the prior application. . . . The initial application that was submitted in 2000 was a much larger project than the one being proposed at this time. A 2004² application was filed with respect to a reduced project and the ZBA at that time determined that the 2004 project was materially different from the project proposed in 2000.

CR 217. Petitioner’s representative, Shaun P. Carroll (“Carroll”) provided an overview of the application, noting in part that “[b]oth the [existing] Davis Pit and the [proposed] Anderson Pit would not be running at the same time, so the volume of trucks would not

² The 2004 project is not part of the present litigation. The ZBA described it as follows. “An application similar to the one now before the Board was also submitted in 2004. However, prior to the ZBA reaching a decision in that case, the applicant filed a petition in the Sullivan Co. Superior Court (Docket No. 04-E-0095) alleging, among other things, violations of the Right-to-Know Law. Due to the lack of court resources that case languished without a hearing for nearly two years, and was withdrawn without a decision.” CR 575.

increase.” CR 218. Carroll stated that although “th[e] application is only for a one-phase project[,]” “[i]f the Town is still pleased with the work done at the end of the project, Newport Sand and Gravel Co, Inc. may return for another application to do further excavation. . . . A prior application contemplated four phases.” Id. Carroll said that the 2009 special exception application “coincides with Phase 1 of the 2000 application.” Id.

NS&G presented the testimony of Stephan Pernaw (“Pernaw”), “a professional engineer and registered traffic engineer[,]” that only a small section of Route 10 in Goshen would be affected by the proposed project and that “[t]he projected impact will be no different from that the Town experienced in 2008 in connection with trucks exiting from the Davis pit.” CR 220-221. Petitioner’s expert David Rauseo (“Rauseo”) offered testimony to the ZBA, “[comparing] the market sales of properties near an excavation site [] to market sales of properties not near an excavation site.” Id. Rauseo’s study “determined that there is approximately a range of 0 to 17% (more or less) difference in the price of properties sold near an excavation site [and that] people will not pay more or less money for a property within close proximity of an active gravel pit.” Id. The expert also “determined that the highest possible impact on the valuation of the surrounding properties will not occur until the later part of the project; three to five years out[.]” CR 222.

At the second joint meeting between the Town’s ZBA and PB, the ZBA noted, “[t]he project presented in 2000 was a significantly larger project than the project presented in 2004. The project being presented tonight is substantially smaller than the project presented in 2004.” CR 359. NS&G’s noise expert, Robert O’Neal of Epsilon Associates (“Epsilon”) testified about “the impact the sound level will have on the community.” Id. Epsilon measured sound levels at three locations in the Town and drew the following conclusions.

[T]he sound level is 55-dBA from the project and the existing traffic creates 60-dBA. In 2000, the LEQ or “average sound” was 61-dBA by 22 Lear Hill Road, which included the traffic on that day, such as logging and UPS trucks and school busses. The 61-dBA also included noise from the river, which is quite loud. Noise from proposed traffic from the excavation site, is expected to be 55-dBA. The project noise plus the existing noise would create a projected combined noise of 62 to 63-dBA. A change of one to two dBA is hard to hear with the human ear, there needs to be a change of three to five dBA before the difference can be heard.

CR 361. The ZBA also heard more testimony from Rauseo on property values.

At the April 14, 2009 joint meeting with the PB, Epsilon offered further testimony about noise; the PB questioned the figures cited in Epsilon's study based on a number of concerns. CR 429. The noise levels did not change after the Davis Pit was done for the day. Id. The meters underlying the figures in the study were not placed at the same distance from Route 10 at each location, rendering the sounds incomparable. CR 430. The predicted future noise level was not measured based on a fully loaded truck and "what you want is predicted project level plus the truck that just left the pit" considering that "there is a truck every 3 minutes." CR 431. At the same time, Epsilon testified that "if you removed the sound levels from the Davis Pit, the noise levels would be about the same" because other vehicles create comparable sound. Id.

Pernaw provided additional information to the ZBA about the effect of the proposed project on traffic. He explained that the 2010 traffic figures were predicted based on "raw data from January, [which] they know [] is not a peak month, so the numbers were increased to accommodate for traffic. 2% increase per year [sic]. A review of historical data shows that is high[.]" CR 433. The ZBA discussed installing a left- or right-turn lane at the bottom of Lear Hill Road, but Pernaw testified that "because the numbers are so low you will never need a left turn lane" or a right-turn lane. Pernaw also explained that because "both pits will not be running concurrently[,] ... the trips to and from the new excavation site will not create more gravel trucks." CR 434. Pernaw stated that an approach shelf and additional drainage would nevertheless be required for the trucks to turn safely at the intersection. CR 435.

At the April 30, 2009 meeting of the ZBA, the board clarified its purpose. The Board wants to make sure that everyone is clear about the nature of tonight's meeting, this is a special meeting, where the only decision made tonight's is [sic] to decide if this application is significantly different from the previous application filed. This is only one aspect of the application for Newport Sand and Gravel, after this is decided they still must be seek [sic] approval of the project from the Zoning Board of Adjustments and then is approved [sic], they must go before the Planning Board.

CR 439.

The ZBA also expressed concern that NS&G would return with further applications. Carroll clarified that the permit aims to excavate only 22 of the 76 acres belonging to NS&G and that "he is not planning to come back for another phase . . . the rest of the acreage is not part of this application." Id. Carroll assured the ZBA that the

proposed project was materially different from those previously proposed. ZBA member Peta Brennan (“Brennan”) stated that she contacted DES and was told that the 22 acres, which NS&G planned to excavate on its property, was a multiple-phase operation, although Carroll said that the DES was mistaken. Id. Another ZBA member commented “that tonight they are reviewing weather [sic] they applications [sic] are substantially different, they will continue with the application if there is substantial difference.” Id. NS&G’s counsel, Attorney Timothy Britain, then summarized how, in his view, the proposed project was materially different. CR 440-441. The ZBA voted three to one that the proposed project was substantially different and that “Newport Sand and Gravel will start from the beginning[.]” CR 442.³

The ZBA scheduled a public hearing for June 16, 2009 (CR 443), July 21, 2009 (CR 451) and August 20, 2009 (CR 545) where the Chairman of the ZBA said that “the way the Board would proceed with the procedure was that there would be a designated individual to draft a proposed motion/judgment for the Board to use as the operative document to start commencing discussion for their decision at the deliberative session.” Id. Town counsel, Attorney Bernard Waugh, said “he was assisting a Board member with the procedure as discussed[.]” Id.

At the September 1, 2009 public hearing, Attorney Waugh circulated a drafted decision of the ZBA on NS&G’s special exception application. He explained that the document was a “preliminary draft prepared for discussion purposes only.” CR 546. He further clarified

[T]his draft was created on the basis of an earlier draft that was given to him by one Board member and so the language that we are reading here is partly that Board members [sic] language and partly Attorney Waugh’s language, and another Board member voluntarily sent him comments as well. . . . Attorney Waugh said that if it goes one way and not the other way, if the majority of the Board decides that they want it to go the other way he can write a decision the other way. Attorney Waugh took the direction that he was given . . . Attorney Waugh stated that if the document is read over and . . . if the Board does not agree with paragraph X or Y for example, then Attorney Waugh could edit the draft. Attorney Waugh’s recommendation was that if the Board just does not like the way that the document goes, then he recommends the Board not take a final vote tonight, but to have somebody who wants it to go the other way prepare an alternative draft.

³ Only four members voted on April 30, 2009; the fifth had resigned.

Id. The ZBA reviewed the submitted document page by page. The Chairman of the ZBA suggested that the document address more fully the deficiencies in Rauseo's report. CR 547-548. At least two ZBA members confirmed that they had arrived at their conclusions and decided on how to vote on the application before town counsel distributed the drafted decision. CR 548.

One ZBA member inquired who would draft a dissenting opinion if the need arose. Town counsel replied, "if enough of the Board were in doubt that you would like to see it in a different way, then it would make sense" to draft a different opinion and "that certainly is a possibility." CR 549. Attorney Waugh said that a ZBA member could draft the decision and he would "fill it in" with legal matters, much like the draft decision circulated to the ZBA.

The minutes reflect that the ZBA was not sure how to proceed upon finding that the 2009 Application was materially different from the 2000 Application. The parties' counsel disagreed whether the ZBA may rely on information dating back to the 2000 Application and the 2003 Order. Id. The ZBA went into executive session "to receive legal advice." Id. The ZBA reiterated that it was considering two separate questions: the first, whether "this is a significantly different application than the previous application" and the second, whether "a special exception could be granted[.]" Id. The ZBA discussed noise levels being offensive even if they fell within the decibel levels permissible under the Ordinance. CR 551. The ZBA also grappled with whether to re-analyze the 2000 Epsilon report which was addressed when it denied the 2000 Application in 2001. Although one member used the term *res judicata*, the ZBA proceeded to analyze whether the data from 2001 was still valid in 2009 or whether sound levels had changed. Id.

One ZBA member expressed confusion on how to vote because "she doesn't know what to believe[.]" CR 552. Another member told her that although she may use her own personal experience, she may not rely solely on it. He said she must listen to the expert testimony and determine what areas make her skeptical. One such area "was how [a] truck [which] produces 69 dBA at 50 feet could somehow be modeled to produce 55 dBA at 22 Lear Hill Road, which was approximately 50 feet from the end of the haul road." Id. Town counsel referred the ZBA to the 2003 Order which states that ZBA members may use their personal experience to determine what testimony is most

credible. *Id.* Three ZBA members voted to deny the application; two abstained. CR 591. The decision was issued on September 17, 2009. CR 574.

On September 30, 2009, NS&G moved for rehearing. CR 633. On October 21, 2009, the ZBA voted to grant the motion for rehearing, but not with a different board. CR 672-673. The ZBA re-heard the matter, including testimony from NS&G's experts, on May 11, 2010 (CR 677), June 8, 2010 (CR 689), and June 22, 2010 (CR 1032). On June 22, the ZBA voted, 3-2, to deny the application. On July 21, 2010, NS&G moved for rehearing of the June 22, 2010 decision. CR 1119. The ZBA met on August 10, 2010. At the meeting, one ZBA member accused another of having seen the draft decision before it was circulated to the ZBA and "stated that the decision was written by only two people and all should have been involved in writing the decision." CR 1162, 1163. The accused member denied having seen the draft and said that he simply submitted some comments to town counsel. CR 1162. *Id.* The ZBA met again on September 29, 2010 and voted unanimously to deny the motion to rehear the June 22, 2010 decision. The present appeal followed.

Standard of Review

Any person aggrieved by a zoning board decision may appeal to the superior court. "The petition shall set forth that such decision or order is illegal or unreasonable, in whole or in part, and shall specify the grounds upon which the decision or order is claimed to be illegal or unreasonable." RSA 677:4; see also *Derry v. Diorio*, 113 N.H. 375, 377-378 (1973) (decided under prior law). The burden is on the appealing party to show by a balance of probabilities that the ZBA's decision was unlawful or unreasonable.

In an appeal to the court, the burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment . . . to show that the order or decision is unlawful or unreasonable. All findings of the zoning board of adjustment . . . upon all questions of fact properly before the court shall be prima facie lawful and reasonable. The order or decision appealed from shall not be set aside or vacated, except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it, that said order or decision is unreasonable.

RSA 677:6; Peabody v. Town of Windham, 142 N.H. 488, 492 (1997). 15 P. Loughlin, New Hampshire Practice: Land Use, Planning and Zoning § 25.10 at 448 (2010). "[T]he review by the superior court is not to determine whether it agrees with the zoning board

of adjustment's findings, but to determine whether there is evidence upon which they could have been reasonably based." Hussey v. Town of Barrington, 135 N.H. 227, 231 (1992); Lone Pine Hunters' Club, Inc. v. Town of Hollis, 149 N.H. 668, 670 (2003).

Discussion

This dispute is two-fold. Petitioner disputes both the procedure which the ZBA followed in deciding to deny the 2009 Application, i.e. considering the 2000 Application and the 2003 Order, as well as the substance of the decision itself.

Procedure of Decision

The crux of NS&G's argument is that

The ZBA was precluded from relying on the 2001 ZBA decision or the 2003 court decision associated therewith as a basis for denying any part of NSG's 2009 application. The Town, however, completely relied on this argument to deny NSG the special exception as to the three criteria of concern to the ZBA—noise, property values, and character of the area. This was unlawful and must be overruled. . . . NSG is entitled to have the ZBA consider the new application on the basis of the special exception criteria outlined in the current Town of Goshen Zoning Ordinance . . . without regard to any prior applications or prior renditions of the ordinance. . . . [U]pon a determination of material difference, the ZBA is supposed to apply the unique facts of an application to the ordinance currently in force.

Pet. Reply Town's Trial Memo pp. 12-13. NS&G asks the Court to overturn the ZBA's decision and issue a special exception or remand the matter to a newly constituted ZBA with instructions to issue the exception.

[T]he text of the initial draft decision and the red-lined decision, demonstrate that the ZBA members who deliberated on September 1, 2009 and again on June 22, 2010, had thoroughly pre-judged the issues before deliberations started, did not meaningfully deliberate, irretrievably tainted the quasi-judicial process, and had otherwise abandoned its quasi-judicial role in favor of an advocacy role[.]

Id. at p. 14.

The Town responds that only some issues are governed by res judicata and collateral estoppel, for example NS&G's "claim that it is illegal to consider truck traffic on public highways – those pure issues of law were specifically decided in the Town's favor in 2003." Town's Supp. Memo p. 2. According to the Town, the dispute is over how the ZBA should reach the merits of the 2009 Application, while conceding that the Board should have reached the merits in the first place. The Town states that NS&G's position

would be inconsistent with finality because with each application, the ZBA would “be required to ‘start over’ again, and again, and again.” *Id.* at 3. The Town argues that the ZBA’s purpose in 2009 was to determine whether the differences in the subsequent application were sufficient to overcome the reasons why the ZBA denied the earlier application. *Id.* at 6.

When a party re-files an application with a land use board which was previously denied, the board must make a preliminary inquiry whether the second application is materially different from the one previously ruled on. This preliminary inquiry serves the purpose of preventing redundancy and waste: it shares its policy goals with the doctrines of *res judicata* and *collateral estoppel*.

When a material change of circumstances affecting the merits of the application has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition. If it were otherwise, there would be no finality to proceedings before the board of adjustment, the integrity of the zoning plan would be threatened, and an undue burden would be placed on property owners seeking to uphold the zoning plan.

Fisher v. Dover, 120 N.H. 187, 190 (1980). Before considering the second application on the merits, the ZBA must make the “required threshold determination that a material change of circumstances has occurred[.]” *Id.* at 191. The party seeking the variance – or the special exception, as is the case here – bears the burden of proving that circumstances have materially changed since the initial application was filed. *Id.* at 190. The ZBA determines whether the circumstances are materially different by conducting a comparison of the prior and subsequent applications. “The determination of whether changed circumstances exist is a question of fact which necessitates ‘a consideration of the circumstances which existed at the time of the prior denial.’ . . . Resolution of this issue must be made, in the first instance, by the board of adjustment.” *Id.* at 190-191 (citation omitted). The ZBA commits an error of law if it approves the second application “without first finding either that a material change of circumstances affecting the merits of the application had occurred or that the second application was for a use that materially differed in nature and degree from the use previously applied for and denied by the board.” *Id.* at 191.

In *Bois v. Manchester*, 113 N.H. 339 (1973), a predecessor of *Fisher*, the New

Hampshire Supreme Court affirmed the trial court, finding that it “correctly ruled that the board of adjustment could lawfully consider the merits of the appeal from the denial of the second application.” *Id.* at 342. In conducting the preliminary threshold inquiry, the ZBA properly determined, and the trial court affirmed, that “the church’s second application to the city building commissioner was for a use which would differ in several important respects from that proposed in the prior application.” *Id.* at 341. “An application seeking a permit for a use which materially differs in nature and degree from a use applied for in prior proceedings involving the same property is entitled to consideration by those charged with the administration of zoning ordinances.” *Id.* at 342.

Here, the parties dispute how much, if any, weight the ZBA could have given to its findings on the 2000 Application and the 2003 Order. NS&G argues that the ZBA relied completely on its old findings and the 2003 Order, and in effect did not consider the 2009 Application on its merits. NS&G contends that it was entitled to have the ZBA consider the 2009 Application anew. Pet. Reply Town’s Trial Memo pp. 12-13; see also CR 575. The Town disputes that it treated the 2000 Application as res judicata over the 2009 Application, although it does assert that certain legal issues which were resolved in 2000 and remain unchanged need not be re-assessed in the context of the 2009 Application. Town’s Supp. Memo p. 2.

In Steel Hill Development, Inc. v. Sanbornton, 392 F. Supp. 1144 (D.N.H. 1974), the U.S. District Court addressed the extent to which a land use board must re-consider or treat as res judicata issues on which it previously ruled and which are re-submitted to it in the form of a new application. It ruled that if the second application is materially different than the first, the first application “cannot serve as conclusive on the legal issues raised herein, and [] the [subsequent] action is not, therefore, precluded on the theory of res judicata.” *Id.* at 1148. In ruling that res judicata does not preclude consideration of the second application, the Court drew on the basic principle “that if, subsequent to the entry of a particular judgment, events occur which alter the legal relations of the parties, the earlier judgment will not serve as a bar by estoppel to a redetermination of the issues in light of the changed circumstances.” *Id.* at 1147. Most relevantly to the present case, the Court in Steel Hill held that the second application must be decided in view of the first. “The test is whether, in light of the change in circumstances, the issues now raised were decided in the earlier case.” *Id.* at

1147-1148. The Court added,

This doctrine is particularly relevant in the zoning field, in light of the New Hampshire Supreme Court's recent decision that a landowner's application seeking a permit for a use which materially differs in nature and degree from a use applied for in prior proceedings involving the same property is not barred under the doctrine of res judicata.

Id. at 1148, citing Bois, supra (further citations omitted).

It appears from the record that the ZBA correctly understood the process by which it had to reach the merits of the 2009 Application.

First the Board, in order to even hear the case and address the merits, must determine whether the application is materially different, and/or there are material changes of circumstances. But if so, then upon such hearing, the Board must go further and determine whether *in fact* (and not merely "allegedly") the new application **does** sufficiently address the Board's concerns with the prior application in a **decisively** different way (i.e. not just materially different, but so different as to justify a different decision.)

CR 575 (emphasis in original).

On April 30, 2009, the ZBA voted that the 2009 Application was materially different than the 2000 Application. CR 442. Having made the preliminary finding, the ZBA phrased the next stage of the inquiry as follows.

[T]he Board took a vote in April finding that material changes of circumstances did exist for purposes of moving to a consideration on the merits. But that was only a preliminary vote that this application should be heard – based primarily on the difference in size of the two proposed excavations. It did not imply that **every** aspect of the new application was materially different, or that the 2001-03 decision is now irrelevant. The determination of whether the differences are decisive, such that the present application meets the current standards of the Ordinance, is the task now before the Board.

CR 575 (emphasis in original). The cases cited above – Fisher, Bois, and Steel Hill – support the ZBA's understanding that it first had to determine whether the 2009 Application was materially different and, having made that determination, address the 2009 Application on its merits.

The parties dispute how the ZBA should have proceeded upon determining that the new application was materially different than the old one. NS&G asserts that the ZBA did not give the 2009 Application proper review on its own merits when the board first addressed the factors based on which it denied the 2000 Application: noise, traffic,

property values, and community character. “NSG asserts that once the ZBA has found that a subsequent application is materially different from an earlier application, the subsequent application is entitled to have the ZBA evaluate the subsequent application on its own merits, without regard to any earlier application or court decisions related thereto.” Pet. Mem. Law Merits p. 31 (emphasis in original). NS&G improperly assumes that starting consideration with the factors on which the application had previously failed detracts from the application being considered on the merits or amounts to an impermissible use of res judicata contrary to Steel Hill.

As the New Hampshire Supreme Court stated in Fisher, the purpose of the preliminary threshold inquiry concerning material difference is to ensure the finality and integrity of zoning decisions. While res judicata and collateral estoppel do not apply directly, the policy goals of economy and consistency may nevertheless justify the ZBA approaching an application it has already ruled on in the most efficient way. Had the ZBA found that the factors on which the 2000 Application failed had been remedied, and then had the ZBA refused to proceed to the rest of the application on its merits, it would have clearly used res judicata improperly and contrary to Steel Hill. NS&G, however, provides no legal support for why the ZBA’s actions did not constitute a review of the 2009 Application on the merits, i.e. that such a review could not have started with the factors on which Petitioner’s application had previously failed.

Based on the record, the ZBA gave extensive consideration to these (factors noise, traffic, property values, and community character) and its ultimate findings in 2009-2010 were based on the testimony and evidence before it in 2009-2010 rather than a reiteration of old findings. Whether or not the ZBA improperly used terms such as “collateral estoppel” and “res judicata,” it ultimately conducted a thorough review in 2009-2010 which does not indicate prejudgment or reliance on old judgment. In sum, while NS&G demands a new finding on the merits, it does not explain or provide any legal basis why the way the ZBA proceeded did not amount to such a finding, i.e. why the ZBA could not have reviewed the 2009 Application on its merits in the most efficient way possible, by considering the factors previously found deficient.

For similar reasons, NS&G’s argument concerning reversal should fail. NS&G notes, “[t]he ZBA illegally reversed its determination of material difference between the 2000 and 2009 Applications.” Pet. Mem. Law Merits p. 30. It appears that the ZBA’s

action, which in NS&G's opinion constitutes reversal, was its decision on the merits that although materially different, the 2009 Application still did not qualify for a special exception. As explained above, the ZBA did not fail to consider the 2009 Application on the merits merely because it addressed first the factors on which the 2000 Application had failed. As explained below, the ZBA's findings on the merits were sound.

NS&G is also incorrect that the ZBA improperly called its decision-making process a two-step process, which first entailed a finding of material difference and then, contingent upon a finding of such a difference, considered the 2009 Application on its merits. The term "two-step process" is entirely consistent with the language of Fisher, calling the first step a "threshold determination;" in Bois, stating that the second application differed in several significant ways from the first; and in Steel Hill, holding that the land use board must consider the change in circumstances and determine whether the issues raised were determined before. In fact, this language in Steel Hill also provides foundation to the ZBA's decision to address first the factors based on which the 2000 Application was denied.

Before addressing the lawfulness and reasonableness of the ZBA's findings, the Court will address a number of procedural issues, which according to NS&G defeated the integrity of the proceedings so as to render them unlawful or unreasonable under RSA 677:4.

1. Prejudgment and Taint

NS&G argues, "[w]hen deliberations started on September 1, 2009, at least one ZBA member had made up his or her mind about the application and spent at least a month working on the Draft Decision with the Assistance of Town Counsel." Pet. Mem. Law Merits p. 23. NS&G asserts that the draft was presented to the ZBA as a "*fait accompli*," and before the ZBA had voted on or discussed denying or approving the application, thus evidencing prejudgment on the part of at least one board member. Id. at 23-24. NS&G also finds objectionable that the same three members to whom the draft decision was circulated and who voted to deny the application on September 1, 2009, also voted to deny the application after rehearing on June 22, 2010. "[T]he same three ZBA members (Lawton, Howe, and Brennan) who pre-judged and denied the Application on September 1, 2009 simply 'finished the job' on June 22, 2010." Id. at 24.

The accusation of prejudgment stems from NS&G's assertion that "[i]n order for a

ZBA member to prepare a draft decision, the ZBA member has to know whether the preliminary decision should approve or deny an application, and there is no way that could have been determined in this case.” Id. According to NS&G, the only conclusion is that the drafting ZBA member prejudged the applications and thus chilled, “dominated and filibustered” the ZBA’s deliberations “and crowded out any dissenting or alternative views or discussions.” Id. at 25. NS&G surmises that the ZBA member effectively started deliberations well before September 1, 2009, made up his or her mind, contacted Attorney Waugh “to start drafting the most onerous and oppressive decision possible and privately invited input from at least one other like-minded ZBA member.” Id. at 24-25.

The Town is correct that the facts about the allegedly prejudging ZBA member are speculative and entirely unsupported by the record. See Town Supp. Memo pp. 8-9. In addition, the facts as outlined above, cut both ways. At the August 20, 2009 ZBA meeting, the Chairman said that one member would be designated to draft a proposed motion for the ZBA to use during the deliberative session. CR 545. Attorney Britain was present at that meeting. Id. The record does not reflect that he voiced any objection, although he was aware that no vote was taken at that time on the merits of the application. In fact, the purpose of the draft decision was to assist the ZBA in discussing the decision, probably so as not to omit the multitude of factors contained in the application. What NS&G calls prejudgment may just as easily be called convenience; what it calls *fait accompli* does not comport with the hours, which the ZBA proceeded to spend reviewing, and then rehearing Petitioner’s application. The Court finds that the record does not support NS&G’s contention that they should not have participated in rehearing the application and/or should have assembled a new board.

Attorney Waugh’s conduct at the September 1, 2009 meeting demonstrates that there was no prejudgment on his behalf or of the ZBA member whom he assisted initially in preparing the draft. The top of the draft states, in caps, “PROPOSED PRELIMINARY DRAFT PREPARED FOR DISCUSSION PURPOSES ONLY.” CR 556. Attorney Waugh repeated several times and explained at length that the purpose of the document was to foster discussion and that he will rewrite the document “the other way” if the majority of the Board decides to grant the application. He added that partial changes were a possibility and that the ZBA was free to agree or disagree with any or

all of the draft's provisions. CR 546. Attorney Waugh further recommended that the ZBA delay the vote and allow anyone who wants to prepare an alternative draft to do so. Id. The ZBA later affirmed the same position, i.e. that it was possible to rewrite the draft to reflect any changes to or disagreement with it, when a member inquired about drafting a dissenting opinion.

The record reflects that two members – Brennan and Allan Howe (“Howe”) – came to independent conclusions about the application notwithstanding the draft. “Ms. Brennan said that based on the real estate and sound assessment impact studies, she looked at them objectively and . . . from both points of view, and she could not come to a positive conclusion.” CR 548. Another member, “Mr. Howe made his decision first, and was not driven by Attorney Waugh’s presentation[.]” Brennan, Howe, and Thomas Lawton voted to deny the application. Two ZBA members abstained: Cyndi Phillips, who inquired about writing a dissenting opinion (CR 548) and how much to draw on her own experience when weighing expert testimony (CR 552), and Robert Johnson, who pointed out the difficulty of considering an 18-page document without having previously read it (CR 547). Although at the August 10, 2010 ZBA meeting on NS&G’s motion for rehearing, Johnson complained of improprieties in drafting the decision (CR 1162, 1163), he abstained during the September 1, 2009 vote on the application. Enough ZBA members voted notwithstanding his abstention. Furthermore, the improprieties which he subsequently complained of did not prevent Johnson from offering input on the factors based on which the application was denied. He participated meaningfully in discussing noise (CR 550) and visual impact (CR 554).

The preparation of a preliminary draft for discussion purposes does not in and of itself evidence prejudice. In 1992, the Superior Court of Connecticut dealt with an appeal from the decision of a town planning board denying the plaintiffs’ application for a subdivision.

[T]he plaintiffs assert that “[i]t is apparent from the transcript that the Commission met before the meeting, because, after some opening remarks . . . , the chairman asked for a draft of a motion that had already been prepared.” . . . *Thus the question is whether, after the public hearings*⁴, *a commission member may form a draft of a motion denying*

⁴ In Peterson, the Court relied on controlling case law from Massimo, which states that in order “[t]o support a predetermination claim, there must be a showing that the Commission had made up its mind regardless of any evidence or argument [sic] produced at the public hearing.” Peterson, 1992 WL 369735, at *6, quoting Massimo, 41 Conn.Sup. at 200. There is no New Hampshire case law articulating a similar requirement.

the application where the commission had entered no discussion before rejecting the application. In Massimo, a commission member, at a meeting held after the public hearing, made a motion to deny the plaintiff's application. [Massimo v. Planning Commission, 41 Conn.Sup. 196, 200.] The commission member read a draft motion to deny the application. *Id.*, 200-201. In finding that there was no prejudgment on the part of the commission, the court stated “[t]he formal written resolution from which one member read during the voting on the application at a subsequent meeting, which the plaintiffs cite as evidence to support their argument, is evidence of a permissible [sic] subsequent determination rather than evidence of an unlawful previous determination.” *Id.*, 201-202. . . . The Court concludes that the record does not support a finding that the Commission prejudged the application.

Peterson v. Redding Planning Com'n, No. CV 90-0302916, 1992 WL 369735, at *6 (Conn. Super. Ct. Dec. 2, 1992) (further citations omitted; emphasis added).⁵

Petitioner argues that the ZBA could not have tasked a member with drafting a decision before first holding a public hearing and voting on the application. First, the ZBA held and continued three public hearings prior to the September 1, 2009 public hearing at which the draft was circulated. Second, the sole case which NS&G offers in support of its position is inapposite. Industrial Tower and Wireless, LLC v. Town of East Kingston, No. 07-cv-399-PB, 2009 WL 2704579 (D.N.H. Aug. 28, 2009), discussed whether the ZBA's preparation and treatment of a draft decision after a public hearing and a vote violated the Right-to-Know Law: the Court found that “there is no basis in the record for [petitioner's] Right-to-Know Law challenge[.]” *Id.* at *13. As NS&G does not allege violations of the Right-to-Know Law, the decision in Industrial Tower is inapplicable.

For similar reasons, the ZBA's use of town counsel in drafting the decision was not improper. In Industrial Tower, the ZBA member tasked with drafting the decision did so with the help of town counsel, which was not improper. The drafting member “was entitled to meet in private with counsel to obtain advice as to how to draft a written decision that reflected the ZBA's prior ruling because ‘[c]onsultation with legal counsel’ does not constitute a ‘meeting’ which is required to be open to the public for purposes of

⁵ Though not directly applicable here, it is nevertheless worth noting that some administrative boards task one member with drafting a decision, which the full board then reviews. For example, the federal wage appeals board, which consists of three members, discusses an appealed case and tasks one member with drafting an opinion. “This opinion is then circulated to other board members. Board members have the right to issue concurrences and dissents.” Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 Admin. L. Rev. 251, 260 n. 81 (1996).

the New Hampshire Right-to-Know law. N.H.Rev.Stat. Ann. § 91-A:2, I(b).” *Id.* To the extent that the use of counsel evidenced prejudgment, the Court has addressed above the numerous efforts which Attorney Waugh made to distance himself from the decision and to indicate that the decision was not final, but merely a starting point for discussion.

Accordingly, a pre-vote draft circulated at a ZBA meeting and prepared by one member with input from another and the assistance of Attorney Waugh is not conclusive evidence of prejudgment or taint. It is not improper for one land use board member to prepare a draft and then present it to the board so long as it is clear that the draft is for discussion purposes only, that any dissenting opinions and disagreements with parts of or the whole draft will be reflected, and that the draft does not foreclose discussion. Here, town counsel encouraged the ZBA not to vote so as to allow further input; the ZBA engaged in extensive discussion after the draft decision was circulated, going through it page by page; and the final decision reflects changes from the original draft decision. Attorney Waugh went to great lengths to make it clear to all ZBA members that the draft was not a final decision and that it could be rewritten to any desirable extent.

As part of the argument that the proceedings before the ZBA were tainted, NS&G cites Brennan’s communications with DES. The record indicates that the ZBA member contacted DES and inquired how many phases the proposed excavation operation entailed. Brennan obtained information which conflicted with Carroll’s representations, although Carroll’s representations were themselves ambiguous. While Carroll stated that the proposed project consisted of only one phase, he also said that he may come back for more permits to do further excavation on the same property. CR 218. Substantively, the ZBA had good reason to inquire into the phases of the proposed operation not just because of the internal inconsistencies in Carroll’s representations, but also because the size and scope of the operation were one of the factors rendering the 2009 Application materially different from the 2000 Application. After all, the one and only phase of the 2009 Application was consistent with Phase 1 of several in the 2000 Application. CR 218. Lastly, evidence submitted by NS&G contained information based on which the ZBA could have questioned how many phases the 2009 Application entailed. *See, e.g.* CR 385 (“Excavation and/or reclamation operations will be closest to the most sensitive Route 10/Mill Village Road receptors during the last stages of the

Project. During the first stages, activity will be limited to the western sections of the Project limits.”)

To the extent that NS&G calls Brennan’s communication with DES “unilateral hearsay evidence obtained outside the hearing process[.]” (Pet. Mem. Law Merits p. 27) the rules of evidence do not apply in this context. Furthermore, taking Petitioner’s pronouncement to its logical conclusion, ZBA members could not drive by the property or rely on any knowledge not obtained in the hearing context. Such a rule would be inconsistent with the ZBA’s authority to rely on its members’ personal experience, which is discussed at length below. Furthermore, it would derogate the purpose of land use boards to vest decision-making powers in the hands of those who live in and know the community. The Town is also correct that Brennan disclosed her communication with the DES at a meeting at which Petitioner and its counsel were present; in fact, Carroll proceeded to reassure Brennan that the DES was mistaken. CR 440.

2. Standing

The Court will now address NS&G’s argument that “[t]he ZBA erred in accepting and relying upon the evidence from Ms. Gaddes⁶ and other opponents who lacked standing.” Pet. Mem. Law Merits p. 41. Petitioner relies on Weeks Restaurant Corp. v. Dover, 119 N.H. 541 (1979) to challenge these individuals’ standing: it states that they do not have a definite direct interest in the outcome of the proceedings. Petitioner thus asks the Court to apply Weeks in the most extraordinary fashion.

Weeks articulates the standard for bringing suit under RSA 677:4 and 677:15, i.e. appeals from planning and zoning decisions. Its rationale is grounded in the right to seek relief from the Court – not the right to testify before a land use board. Extending Petitioner’s argument to its absurd apogee, Carroll and other representatives of NS&G should be precluded from testifying before the ZBA or the Planning Board because their interest in the outcome of the proceedings is maximizing the value of their property. This is not a legitimate interest for the purposes of standing, according to one of Weeks’ progeny cases, Nautilus of Exeter, Inc. v. Town of Exeter, 139 N.H. 450 (1995).

By way of summary, the ZBA properly proceeded to review the 2009 Application on the merits, having found it materially different from the 2000 Application.

⁶ NS&G identifies Kim Gaddes as “the principal opponent to the proposed Project [and] . . . also one of the principal opponents of the 2000 Application.” Pet. Mem. Law Merits p. 6.

Furthermore, the ZBA properly reviewed the 2009 Application on the merits by assessing first the factors on which the application had failed previously. Although the ZBA's findings on the 2000 Application with respect to noise, traffic, property values, and community character were neither *res judicata* nor collateral estoppel, considering these factors based on the circumstances effective in 2009 furthered the same policy goals of economy and consistency. There is neither legal nor equitable basis for the Court to find that the ZBA acted unlawfully or unreasonably by opting to consider these factors first.

Substance of Decision

Court will next review the lawfulness and reasonableness of the ZBA's findings on each factor: noise, traffic, property values, and community character. First, however, the Court needs to address the question of how much weight the ZBA must give to the testimony of NS&G's expert witnesses, whether board members can draw on their personal knowledge, and whether the ZBA is under an obligation to present its own expert testimony to contradict the NS&G's.

Petitioner argues that "the ZBA's strained analysis and dismissal of NSG's expert testimony, without competent, contradictory expert testimony, exceeds the permissible scope of review zoning boards of adjustment may legally employ." Pet. Mem. Law Merits p. 43. Petitioner argues that the ZBA's decision was based on nothing more than personal opinion and on no professional expertise. *Id.* at 44. First, the ZBA's findings are presumptively lawful and reasonable, unless NS&G meets its burden of persuading the Court that the board acted unlawfully and unreasonably. RSA 677:6. The Court's role is to determine whether the findings could be reasonably based on the record. "[T]he findings of the board must be supported by the evidence and must be more specific than a mere recitation of conclusions." 15 P. Loughlin, New Hampshire Practice: Land Use, Planning and Zoning § 23.04 at 369 (2010). There is no requirement that the Board support its conclusions with expert evidence. After all, "[i]n applying for a special exception, *the applicant* has the burden of presenting sufficient evidence to support a favorable finding on each of the requirements for a special exception." McKibbin v. City of Leb., 149 N.H. 59, 61 (2003) (emphasis added). The ZBA is entitled to rely on its own judgment and experiences so long as it is more than a matter of personal opinion. Richmond Co. v. City of Concord, 149 N.H. 312, 316 (2003).

The 2003 Order is especially instructive on this issue. During the proceedings on the 2000 Application, NS&G raised an argument similar to the one it raises now in connection with the ZBA's review of the 2009 Application. The 2003 Order states certain relevant legal findings on the ZBA's role as finder of fact. The Court need not draw on the 2003 Order as *res judicata*, but rather as a statement of law which was as applicable then as it is now. Weighing expert evidence is a function of the zoning board, which it can perform while relying to a reasonable degree on its own knowledge. 2003 Order, p. 13. The same principle stands today: the ZBA was neither bound by Petitioner's expert's testimony, nor was it under an obligation to contradict that testimony.

The Board found that public rights would be injuriously affected by the granting of the variance because of the increased traffic and the traffic patterns which would result from the use of plaintiffs' property as a filling station. There was evidence to the contrary by expert witnesses. However, the Board could properly rely on its own knowledge of the area resulting from its familiarity therewith in arriving at its conclusion. It did not have to accept the conclusions of the experts.

Vannah v. Bedford, 111 N.H. 105, 112 (1971) (citations omitted); see also Cont'l Paving, Inc. v. Town of Litchfield, 158 N.H. 570, 575-576 (2009) ("ZBA members may base their conclusion upon 'their own knowledge, experience and observations,' in addition to expert testimony." (Citations omitted)); Daniels v. Town of Londonderry, 157 N.H. 519, 528 (2008) ("[T]he ZBA is not bound to accept the conclusions of the study or any witness.") Petitioner's argument that the ZBA acted improperly by not presenting any contradictory expert testimony and by relying on its personal knowledge is unfounded in the law, the same way it was in 2003.

1. Noise

NS&G states that Epsilon's February 2009 noise impact report and the June 2009 supplement "provided a comprehensive analysis of both the existing conditions and the ambient noise levels presently occurring, and future noise conditions which would occur as a result of the excavation operations on the Site." Pet. Mem. Law Merits p. 10; CR 364-401, 451-455. Epsilon conducted this study based on "key potential sources of operational noise at the site from excavation and reclamation activities" as well as "off-site excavation-related truck traffic." Id.; CR 367, 383, 385, 386. Epsilon evaluated the current noise levels at three locations near the site. Id. at 10-11. "Epsilon

then used these baseline levels to extrapolate potential 'worst-case' future noise conditions that may be created by the project from both on-site and off-site operations." Id. at 11; CR 384-391.

Epsilon also extrapolated future noise conditions with computer models "for the sound levels at eight points throughout the Town." Id.; CR 384. Petitioner states that Epsilon took the measurements of "noise sound sources" at several locations throughout the Town "and potential impacts from the Project on residences located somewhat distant from Route 10 which might experience lower background sound levels." Id.; CR 456-463. According to the Epsilon study, "[t]hese points of evaluation are similar, although not necessarily identical (for accessibility reasons)," to the three locations near the site which were measured to extrapolate potential worst-case conditions. CR 384. Petitioner states that at the time the measurements at the eight locations were taken, the Davis Site "was not yet open for the season – the same conditions under which the Project would be operated." Id.; CR 457.

The measurements at the eight points of evaluation produced the following results. "Project-only sound levels are predicted to range from 25 to 46 dBA at the nearest residences, and 49 to 50 dBA at the nearest property line. Sound levels while working in other, more distant sections of the Project area will be lower due to increased distance and shielding from topography." CR 385, 388.

Drawing on its measurements of background and project-related noise, Epsilon compared "[t]he overall 'Project + Background' dBA levels" to the hourly background sound level and evaluated the figures based on the Town's noise standard. Epsilon found that "the sound level increases due to the Project will be within the noise standard's 10-dBA exceedance limit. Overall sound levels will also be well below the Town's 65-dBA daytime limit." CR 389. The study further noted that "[d]uring activity within the western section of the Project area, typical Project sound levels will be lower than the sound levels" projected above and found to be compliant with the Town's noise standards. Id. (emphasis in original). A supplemental study which Epsilon conducted in June 2009 supported Epsilon's prior findings and led it to conclude that "the worst-case truck traffic impacts are predicted to be the same at 55dBA . . . Newport Sand & Gravel truck traffic impacts at the more remote, elevated locations . . . will be negligible." CR 458.

NS&G argues that “the ZBA’s deference to undefined, vague, non-specific noise standards outside the scope of the Town’s specific Noise Regulations, was unlawful and/or unreasonable.” Pet. Mem. Law Merits p. 45. NS&G refers to Section V.A.1 of the Goshen Zoning Ordinance, which states: “No business shall be allowed which could cause any undue hazard to health, safety, or property values, or which is offensive to the public because of noise, vibration, excessive traffic, unsanitary conditions, noxious odor, or similar reason.” CR 574. Sec. V.A.1 was in effect when the ZBA considered the 2000 Application, *Id.*, and it is still in effect today, CR 576. Section IX.B of the Ordinance, which was enacted since the decision on the 2000 Application, states that all special exceptions “shall have no adverse effect upon: (1) the character of the area in which the proposal will be located; (2) The highways and sidewalks or use therefore located in the area; and (3) Town services and facilities.” *Id.*

Since the ZBA ruled on the 2000 Application, the Town has also enacted Noise Regulations, Section III.R. The Noise Regulations establish the level of noise, which “shall be conclusively presumed to be a violation of this Subsection” – 65dBA between 7 am and 10 pm and 55 dBA between 10 pm and 7 am. CR 1179-1182; Pet. Mem. Law Merits p. 44-45. The Town points out that the Noise Regulations contain the following introductory language, “[w]ithout limiting the general applicability of any other paragraph in this Subsection, noise shall be conclusively presumed to be a violation of this Subsection if . . . [.]” thereby intending to harmonize Section III.R with the remaining Ordinance. “This language is crystal clear – the purposes of the numerical limits is [sic] to create a conclusive presumption of a violation, not to establish any ‘safe harbor’ levels of noise.” Town Supp. Memo p. 13. The Town is correct: Section III.R is phrased so as to create a presumption of unlawfulness and fits into the general provisions of the Ordinance as embodied in Section V.A.1.

The ZBA does not have the authority to pick and choose which section of the Ordinance to follow and must read each provision in a way that makes it cohere with the rest. NS&G itself points out that the ZBA must follow the requirements set forth in the Zoning Ordinance.

A board of adjustment's only function concerning special exceptions is to decide if the required conditions are met. The board does not have authority to create a special exception or to say what facts and conditions should properly warrant an exception. If the board were allowed to make such determinations, in essence, it would be exercising legislative power

which lies exclusively with the local legislative body.

15 P. Loughlin, New Hampshire Practice: Land Use, Planning and Zoning § 23.03 at 367 (2010). In fact, had the ZBA acted upon what NS&G calls its “minimal obligation to quantify what it meant by ‘offensive,’” it would have been exercising legislative power and thus exceeding its authority. Pet. Mem. Law Merits p. 46. Accordingly, the ZBA was correct not to end its inquiry into Petitioner’s compliance with the noise regulations by assessing whether the measurements fell short of the threshold set forth in Section III.R. To have done so would have been to derogate the ZBA’s obligation under Section V.A.1. Having found that the ZBA acted properly in not giving so much weight to Section III.R as to render Section V.A.1 meaningless, the Court must reject NS&G’s argument that “the ZBA illegally attempted to regulate the use of state highways by unreasonably and illegally expanding the reach of the Noise Regulations to regulate trucks lawfully using state highways.” Id. at 50.

Petitioner also asserts that the Ordinance illegally regulates traffic on state and federal highways. Pet. Mem. Law Merits p. 49. NS&G relies on two federal statutes – the Federal Noise Control Act of 1972 (“FNA”), 42 U.S.C. § 4901 et seq., and the Surface Transportation Assistance Act (“STAA”), 49 U.S.C. § 31111 et seq. According to NS&G, the FNA “prohibits municipalities from enacting regulations regarding noise on public highways that are stricter than those permitted under the [FNA].” Id. at 51. Under the FNA, trucks traveling on a hard service must emit less than 83 dBA of noise at speeds below 35 mph and 87 dBA at speeds above 35 mph. Petitioner relies on New Hampshire Motor Transp. Ass’n v. Town of Plaistow, 67 F.3d 326 (1st Cir. 1995), in which the First Circuit Court of Appeals upheld an ordinance which sets forth a general nuisance prohibition rather than regulating decibel levels of individual trucks. Id. Petitioner overextends the holding in New Hampshire Motor Transp. Ass’n with respect to the FNA.

The federal noise regulations pertaining to motor carriers do nothing more than set minimum and maximum decibel levels and exhaust system and tire standards for trucking equipment that may operate on public roadways. 40 C.F.R. §§ 202.20–202.23. Accordingly, no state or town may set different decibel levels for motor carriers operating within its jurisdiction. But neither the Plaistow curfew order nor the ordinance it enforces purports to regulate the decibel levels, exhaust systems, or tires of individual trucks. Rather, noise levels were one element of an equation that also included “odors, dust, smoke, refuse matter, fumes ... and

vibration” and that prompted a limitation on operating hours for one specific site.

67 F.3d at 332 (emphasis added). Similarly, the Town of Goshen Zoning Ordinance, even the specific Noise Regulations set forth in Section III.R.6, does not regulate decibel levels of individual trucks. The Noise Regulations state that “*noise* shall be conclusively presumed” to violate the Ordinance if it exceeds certain decibel levels, without reference to its source and as compared with “the composite of sounds from all environmental sources during the time period of observation, exclusive of the source under consideration.” Pet. Mem. Law Merits, Appendix A. More importantly, however, Section III.R.6 must be read in conjunction with Section V.A.1 which prohibits business “which is offensive to the public because of noise, vibration, excessive traffic, unsanitary conditions, noxious odor, or similar reason.” *Id.* Like the Plaistow ordinance, which was upheld in New Hampshire Motor Transp. Ass’n, the Goshen Ordinance read as a whole sets forth a multi-factor equation in which noise is just one element.

Next, NS&G’s argues that “the ZBA’s decision violates the STAA” because “the Noise Regulations, as interpreted by the ZBA, illegally restrict ‘reasonable access’ to Interstate highways.” *Id.* at 53-54. First, New Hampshire Motor Transp. Ass’n sets forth why the STAA does not apply here.

[T]he Surface Act forbids the states from enacting or enforcing laws that prohibit trucks and trailers of approved length and weight from travelling on the national network, i.e., the system of interstate highways and other federally-funded primary routes designated by the Secretary of Transportation. 49 U.S.C. § 31111(e); 23 C.F.R. § 658.5. The Surface Act also prohibits states from denying approved trucks and trailers ‘reasonable access’ between the national network and ‘terminals.’ 49 U.S.C. § 31114.

67 F.3d at 329. Access to a gravel pit via a state highway is not regulated by the STAA.

Second, Petitioner improperly relies on Keck v. Kentucky, 998 S.W.2d 13 (Ky. Ct. App. 1999), where the Court of Appeals of Kentucky struck down a municipal “noise control ordinance, which essentially prohibits heavy commercial vehicles from operating in an area zoned residential during hours of darkness [because the ordinance] conflicts with or violates the ‘reasonable access’ requirement of the STAA.” Keck, 998 S.W.2d at 16. The ordinance which was found unconstitutional in Keck is incomparable to the Ordinance enforced in the present case. In Keck, the ordinance prohibited “[t]he use of any automobile, motorcycle, trucks of any size, or any vehicle so out of repair, so

loaded, or in a manner as to create loud grating, grinding, rattling, or other noise, particularly through residential areas during daylight hours, and most particularly throughout the nighttime hours.” Id. at 2. It also set forth the following blanket prohibition on the operation of trucks: “No vehicle used for commercial hauling shall operate between the hours of dusk to daylight if noise so generated by such vehicles shall be operated in a section zoned residential if such operation creates noise or pollution that disturbs the quiet, peace and repose of the neighborhoods.” Id.

The fact that Petitioner continues to operate a number of pits in the Town of Goshen indicates that the Town clearly does not prohibit the operation of trucks during nighttime or dusk under the auspices of regulating noise. The Ordinance, based on which the ZBA denied the 2009 Application, does not prohibit trucks from making noise, nor does it prohibit hauling during nighttime ours. As such, it is incomparable to Keck. Just because one ordinance restricting noise was found to be unlawful under the STAA does not mean that *any* ordinance limiting noise is unlawful under the STAA.

NS&G asserts that the ZBA acted unlawfully by relying on letters from neighbors, some of which may have been written in connection with the 2000 Application. For the reasons set forth above, considering these letters was not per se unlawful simply because they pertained to the earlier application, especially since they were at most one piece of evidence considered by the ZBA. Furthermore, given that NS&G sought some quantification of what noise was deemed offensive, the letters may have helped the ZBA determine what levels were deemed offensive by the owners of neighboring properties.

According to NS&G, the ZBA disapproved the project because of “ordinary road noise” – Petitioner concludes that “any business that involves trucks traveling on roads in the Town would be subject to denial.” Id. (emphasis in original). The record reflects that the ZBA did not use road noise as a pretext for denying the application: rather, it questioned Epsilon’s calculations and data underlying the conclusion that the proposed project would not impact existing sound levels. CR 430-431.

NS&G challenges the ZBA’s findings on noise based on a number of other grounds: that the ZBA purportedly ignored a number of undisputed facts; the ZBA misunderstood certain baseline noise calculations; and the ZBA objected to the use of computer models rather than actual sound measurements. Pet. Mem. Law Merits pp.

47-49. The Court need not address each of these grounds as it finds that the justification provided by the ZBA is supported by evidence. The ZBA found the Epsilon report unpersuasive, specifically the statement that the noise from off-site truck traffic will not change significantly from current levels considering existing operations at the Davis Pit. CR 582. "The Board finds this statement unpersuasive because, similar to the 2000 application, the report is attempting to treat the existing Davis Pit impacts as a kind of base line or 'given' and is then treating the new proposal as acceptable so long as it is 'at least no worse.' That approach was rejected in the prior decision, and is fundamentally wrong." *Id.*

First, the ZBA did not treat the 2000 Application as *res judicata*: it merely said that notwithstanding their material differences, the 2000 and 2009 Applications shared the common flaw of approaching any noise as permissible so long as it falls short of the noise already produced by existing operations. Second, NS&G misunderstands what the ZBA meant when it said that existing noise from the Davis site was a baseline or a given. The ZBA did not ignore the fact that Epsilon measured sound levels when the Davis Pit was closed. Pet. Mem. Law Merits p. 47, 48. Rather, the ZBA rejected Petitioner's argument that so long as the noise falls below a fixed dBA threshold, it is allowable. It is not surprising that Petitioner ties the ZBA's treatment of existing Davis Pit noise with the ZBA having allegedly "fundamentally misunderstood and misinterpreted NSG's noise analysis, and misapplied the Noise Regulations." *Id.* at 48. As explained above, the ZBA approached the levels with reference to the broad standard articulated in Section V.A.1, as was its duty. This Ordinance was in effect both in 2000 and in 2009, so the ZBA denied both applications upon finding that "the project would be offensive to the public due to noise, in violation of Section V.A.1[.]" CR 581. The fact that both applications share the same flaw does not make one *res judicata* over the other.

Notwithstanding its authority to decide the matter under Section V.A.1, the ZBA nevertheless proceeded to explain why it "retains substantial doubts that Epsilon's evidence truly shows that the project will meet the 10dBA above ambient standard in Section III.R.6(b)[.]" CR 583, 584. The ZBA arrived at this conclusion based on its interpretation of the data produced by Epsilon. The board found that "[t]he addition of only a few decibels would mean the project would not meet the maximum-allowed 10 dBA above ambient standard in at least some locations[.]" that Epsilon did not measure

ambient sound levels at all modeled locations, and that the computerized model did not use a consistent dBA standard. Id. It is noteworthy that NS&G does not actually challenge the ZBA's interpretation of the figures its expert provided – only the conclusion that ZBA draws from it; nor does Petitioner explain why the conclusions were not borne by the data. Instead, NS&G focuses its challenge on the fact that its figures complied with the figure set forth in Section III.R. This argument is addressed above. Whether or not the Court agrees with the ZBA's findings, the Court cannot find them unsupported by the evidence. Hussey, 135 N.H. at 231.

Notwithstanding the arguments above, other evidence in the record demonstrates that the ZBA could have reasonably and lawfully questioned certain aspects of Epsilon's testimony. The study sets forth the following findings with respect to "reference sound level data."

The key potential sources of operational noise during excavation at the Newport Sand & Gravel site will be a front-end loader and haul trucks used to transport product. No drilling, blasting or rock crushing will take place at this site. *The primary noise source from the loader and haul trucks will be the diesel engine used to power the equipment. In addition, there is the potential noise from dumping of material into the trucks.*⁷ On-site noise sources during site reclamation may include a front-end loader, an excavator, and a bulldozer. During reclamation two of three of these sources will operate at the same time. Excavation and reclamation may be concurrent at times. *This means that there could be three (3) earth-moving diesel-engine type machines operating at any given time: a loader for excavation, and two of the following for reclamation: a loader, an excavator, or a dozer.* Reference sound level data for excavation activities were measured at the Davis site, and were used to predict sound levels at the proposed Newport Sand & Gravel site.

CR 383 (emphasis added). The study proceeds to discuss the sound emanated by different types of machines. The study makes the following proviso: "Sound levels were not measured for an excavator or a bulldozer. The reference sound level of the front-end loader was used to characterize those machines, under the assumption that the overall sound levels would not differ considerably." Id. At the same time, the study stated that a bulldozer and excavator may be potential sources of on-site noise during reclamation. Id.

Elsewhere, it seems apparent that the conclusions which Epsilon drew were

⁷ The worst-case sound level created by a front-end loader engine was measured at 70dBA at 100 ft; for a haul truck engine at 69 dBA at 50 ft; and for material dropped into trucks at 88 dBA at 50 ft. CR 383.

based in part on Pernaw's traffic study, the weight of which is addressed below. Epsilon also drew on data it collected in connection with the 2000 Application and which the ZBA had previously questioned.⁸

Historical truck load data from the Davis excavation site for the years 1997 through 2002 revealed that 123 truckloads per day represented the highest daily haul from that site. The current excavation proposal calls for a maximum of 110 truckloads per day to be hauled from the Newport Sand & Gravel Site. *Truck traffic on the public roads will be unchanged in both quantity and routing as a result of the Newport Sand & Gravel Project. Therefore, community noise as a result of the off-site truck traffic will not change significantly from current levels.*

Worst-case sound levels from the busiest hour of Newport Sand & Gravel truck traffic were modeled to determine impacts at 22 Lear Hill Road. Trucks were modeled entering/exiting the access road to/from Lear Hill Road. The sound levels at 22 Lear Hill Road were 55 dBA from the Project. This is lower than the existing sound level of 61 dBA measured near 22 Lear Hill Road from all existing traffic.

CR 386. The figure to which Epsilon compared its modeled measurement of 55 dBA "from the Project" – i.e. the measurement of 61dBA at 22 Lear Hill Road (one of the eight points of evaluation) "from all existing traffic" – was drawn from Epsilon's 2000 study. CR 386. The Epsilon study also grounds its finding that community noise will not change significantly from current levels on Pernaw's finding that truck traffic will be unchanged as a result of the proposed project. The study acknowledges that Pernaw provides traffic data in February 2009. *Id.*

For the reasons set forth above, the ZBA's decision to deny the 2009 Application for failure to comply with Section V.A.1 of the Goshen Zoning Ordinance was lawful and reasonable based on the ZBA's finding that the proposed project will emit an offensive level of noise. This finding is sufficient to dismiss the appeal. Nevertheless, the remaining grounds on which the ZBA based its decision are addressed below.

2. Traffic

In ruling on the traffic safety issue, the ZBA relied heavily on its findings with respect to the 2000 Application. The ZBA said it would not go into more detail into certain issues raised by neighbors with respect to traffic safety and congestion because

⁸ In considering the 2000 Application, the ZBA expressed doubts as to the credibility of Epsilon's 2000 findings. "While members of the Board are by no means noise experts, concerns such as those expressed above raise reasonable doubts about the underlying assumptions of the Epsilon report, especially when weighed in light of the evidence of real-world experience with the noise impacts of the Davis Pit." CR 601.

of “the prior decision.” CR 585. Specifically, the ZBA said that “the issue of finality of the prior decision [] applies to the Board’s conclusions concerning [traffic safety, congestion, impact on aquifers, and dust].” *Id.* Under Steel Hill, *supra*, the ZBA should not have foregone review of the 2009 Application solely on the basis of the 2000 Application.

Despite citing finality, however, the ZBA addressed briefly the merits of the 2009 Application.

The Board does not find that any of the evidence concerning [traffic safety, congestion, impact on aquifers, and dust] warrants decisively different conclusions from those reached with the prior application. The Board does wish to emphasize (as it did in 2001) that dust and other particulates remain a concern, but believes that, in the event the permit were to be granted, the Planning Board could substantially regulate the issue through the imposition and regular review of conditions of approval. Moreover it is impossible to disassociate traffic from the issues of dust and noise, hence the issue of traffic is somewhat embodied in Board’s conclusions concerning noise (above).

- *Id.* NS&G cannot dispute that the noise and traffic concerns are intertwined, if only because the Epsilon study drew on Pernaw’s findings. Even if the ZBA addressed the traffic issue in brief, it nevertheless referenced its present findings on noise. It even acknowledged that Petitioner, by way of the Planning Board, could solve the remaining issues related to dust and particulates.

NS&G argues that the ZBA’s findings with respect to traffic were unlawful and unreasonable when it rejected Pernaw’s findings. Petitioner states that its expert “reviewed and evaluated the existing roadway conditions, the existing traffic volumes, the accident history within the immediate area, future traffic projections, intersection capacity, and level of service.” Pet. Mem. Law Merits p. 9. His “finding clearly demonstrated that the proposed excavation would not cause any undue hazard to the safety of vehicular traffic.” *Id.* Pernaw found that the relevant intersection of Route 10 and Lear Hill Road was operating below capacity and would sustain operations of the proposed project. *Id.* n. 7; CR 91. He also found that “no special treatment was needed to accommodate the existing or projected” right-turning or left-turning vehicles. *Id.* Pernaw recommended clearing some trees at the intersection of Haul Road and Lear Hill Road. *Id.*

NS&G’s traffic expert concluded that “[u]se of the Newport Sand and Gravel site for aggregate in lieu of the Davis/Bridge sites for sand, will not increase the truck traffic

at the NH10/Lear Hill Road intersection, nor along NH10.” Id. at 10; CR 96. In addition to concluding that truck traffic would not increase, Pernaw also found that any traffic resulting from the approval of the 2009 Application would not change the safety or existing traffic in the area. “The prevailing traffic operations capacity and safety aspects of the area are not expected to change as a result of the excavation operation at the Newport Sand and Gravel site as proposed.” Id.

NS&G points out repeatedly that the Board did not present any “evidence contrary to Pernaw’s findings and conclusions[.]” Id. As explained above, the ZBA was under no obligation to present any contradictory evidence: NS&G’s burden did not shift to the board. With respect to the sufficiency of the ZBA’s findings on traffic, they were, indeed, brief. Notwithstanding the brevity of the ZBA’s findings on traffic, they are not decisive for the purposes of this appeal. Even were the ZBA’s findings with respect to traffic legally deficient, its findings on noise, property values, and community character were so clearly supported by evidence as to justify the denial of the 2009 Application.

3. Property Values

The ZBA denied NS&G’s 2009 Application based upon the impact of the proposed project on surrounding property values. “Because the Rauseo Report conclusions are contrary to the remaining testimony, as well as to the common experience of Board members (as was also true in the case of the Applied Economic Research report analyzed in the Board’s 5/22/01 decision), the Board has analyzed the Rauseo Report carefully.” CR 585-586. The record reflects that the ZBA indeed did so.

Rauseo, Petitioner’s property value expert, “conducted a discounted paired-sale analysis which evaluated twelve comparable properties to determine whether proximity to a gravel excavation site adversely affected property values.” Pet. Mem. Law Merits p. 13. Specifically, “Rauseo located sales of real estate located near gravel excavation sites and then compared those sales to sales of comparable properties not proximate to such operations. Id.

Like the Epsilon’s findings on noise impact, Rauseo’s findings with respect to property values drew on Pernaw’s traffic study.

A traffic impact evaluation has been performed by Stephen G. Pernaw & Company, dated January 21, 2009. . . . Considering the location of the proposed access point in relation to the existing Davis access drive on Lear Hill Road, the lack of impact on capacity of the Lear Hill Road/Route 10 intersection, the lack of change in character of vehicle traffic in the

neighborhood, the lack of change in historical levels of truck traffic compared to 1996-2002 volumes, there does not appear to be any measurable negative impact on property values due to truck traffic.

CR 246-247. Rauseo's findings on the impact of sound on property values similarly adopted wholesale Epsilon's findings. CR 249-250.

The substantive study which Rauseo conducted, i.e. the so-called paired sales analysis, admittedly had its shortcomings.

Due to the nature of the limited real estate market in Goshen, the study and analysis involved a relatively small number of sales and in some case significant adjustments to equate comparables for all other factors excepting sand and gravel excavation site proximity. For this reason, the study was expanded to include neighboring towns.

CR 252. As Rauseo found no paired sales in Lempster and Newport, he turned to Charlestown. He concluded that proximity to sand and gravel excavation does not significantly affect property values and that there are sufficient buyers willing to buy properties near sand and gravel operations. These buyers' decision, according to Rauseo, would not pay less for properties near such operations than they would for comparable properties not located near sand and gravel excavation sites. CR 224-225.

Rauseo's study had the following methodology.

[S]everal sales of properties proximate to sand and gravel excavation sites are identified. Other sales of similar properties not proximate to sand and gravel sites were also identified. In total, seventeen properties [in Goshen and Charlestown] were directly analyzed. Due to the low quantity of sales of properties proximate to sand and gravel operations, sales occurring as far back as March 2000 were considered. In addition, several recent transactions in the Town of Newport were analyzed. Adjustments for appreciation have been applied where appropriate.

Id. Rauseo gathered the data from several sources "believed to be reliable[,] confirmed the data with "[a] party to the transaction (grantor, grantee, or broker)[,]" and used the data to prepare the study. Id. Part of Rauseo's methodology stemmed from conversations with buyers and brokers. In determining what to use as a unit of comparison, "[d]iscussions with brokers and buyers of properties similar to the subject indicate that it is typical to analyze on a price per property basis. Therefore, this unit of comparison in this analysis." CR 253.

The ZBA found a number of deficiencies with the report and the conclusions it drew. For example, the data could lead to opposite and contradictory results.

[F]ive [paired comparisons] resulted in 2% to 17% less Percent Difference (i.e., lower value with exposure to gravel excavation) and five resulted in 3% to 17% more Percent Difference (i.e., higher value with exposure to gravel excavation). Given these results, a gravel pit could result in a property's value decreasing by up to 17% or increasing up to 17%. These results indicate that there is a 50% chance a property's value would be diminished by proximity to a gravel excavation site. Conversely, these results also indicate there would be a 50% chance a property's value would increase by proximity of a gravel excavation site.

CR 586. The ZBA also found that the study's findings did not comport with its self-professed goal "to determine if there will be a diminution in value of *any properties* in the town of Goshen as a result of a proposed sand and gravel excavation . . . by Newport Sand & Gravel Co., Inc." CR 231 (emphasis added). The ZBA said that "[t]he goal . . . was not to determine there would be no *net* loss in *total* property valuation in Goshen as a result of this excavation site, but rather to determine that there will be no decrease in value of *any* property values in Goshen due to this proposal." *Id.* (emphasis in original). The ZBA found that Rauseo's study improperly looked at and drew conclusions from net loss.

The ZBA also found that the sites which Rauseo used in his valuation "are not comparable to the proposed Anderson site." CR 586. The comparisons did not entail "a land use that is essentially equal to the proposed one." *Id.* The ZBA provided an example of one pair of properties involved in the paired comparisons and pointed out that the comparison was invalid "because *both* properties have exposure to a gravel excavation site." *Id.* (emphasis in original).

The ZBA also challenged the valuation of sales and profit figures based on which Rauseo drew conclusions concerning changes in property values. Some figures were adjusted based on presence or absence of a garage, but not a barn; other figures did not reflect closing costs but did reflect costs of repairs. *Id.* Moreover, the excavation sites near the properties which Rauseo used in his comparisons differed in scale from the one proposed by NS&G: one was 18-21 times smaller and another was need-based, did not entail heavy activity, and was near depletion. *Id.*

The ZBA considered letters from realtors and residents, some dating back to the 2000 Application. This was neither unlawful or unreasonable: an abundance of other evidence, tied specifically to the 2009 Application, led the ZBA to question Rauseo's findings. Furthermore, the letters provided professional opinions about property values

as well as neighbors' accounts. There is no evidence on the record to suggest that the ZBA gave them undue weight.

In addition to the ZBA's findings, it is worth noting that Rauseo's findings were based on certain unexplained assumptions, such as the following.

[I]t appears that the near Davis Excavation properties [sic] take slightly longer to sell than the average residential property in Goshen. However, it is likely that the higher value homes near the center of town and the Davis site take longer to sell because of their higher asking price and exposure to the relatively busy traffic in this area.

CR 254. Although the report sought to mitigate the effect of property-specific factors on the conclusions drawn by taking "[a] sampling of individual sales[.]" it nevertheless invited the ZBA to find that certain properties were on the market for a longer period of time likely due to factors unrelated to their proximity to a gravel pit. *Id.* Considering that the study drew on a sampling of only 17 properties, many of them outside of Goshen, this assumption could have reasonably led the ZBA to question the weight of Rauseo's testimony. Likewise, the fact that the study looked at sales dating back almost a decade, long before the housing market crash, and the methodology of interviewing interested parties (such a brokers, buyers, and sellers) could have reasonably led the ZBA to question the study's conclusions. The record reflects such questioning. CR 547-548.

NS&G does not offer any argument persuasively challenging the ZBA's reading of Rauseo's data. Instead, it makes broad statements that no two properties are 100% comparable and that some properties in fact indicated a positive impact on property values (seven out of seventeen). Pet. Mem. Law Merits p. 58. NS&G ignores the fact that even some inaccuracies, discrepancies, and omissions in Rauseo's data, based on a modest sampling of 17 properties, could have reasonably led the ZBA to question all his remaining conclusions. Rauseo's methodology, data set, and findings did not withstand a contextualized analysis. The fact that certain portions of the study withstood the ZBA's scrutiny does not salvage the reliability of the study as a whole. The record reflects that contrary to NS&G's assertion, the ZBA did not cherry-pick data or rely exclusively on certain letters. *Id.* at 59-61. In fact, any consideration given to the letters is auxiliary to the ZBA's lawful and reasonable findings based on Rauseo's data alone. The letters did not serve as the basis for rejecting Rauseo's study when the study itself

contained so many flaws; nor did the ZBA set a standard for reliability which was impossible to meet. Id. at 60, 62. Similarly, Petitioner is mistaken that it was penalized for lacking more data: the ZBA questioned the expert's treatment of the data he did have. Id. at 59, n. 33.

For the foregoing reasons, the ZBA's findings on the unduly hazardous effect of the proposed project on property values was supported by the evidence. For this reason alone, the ZBA's denial of the 2009 Application was lawful and reasonable independent from other grounds for denial.

4. Community Character

NS&G argues that the ZBA illegally created and applied a "community character" standard and thereby "illegally renamed and misapplied the requirement in Section IX.B.1 of the Ordinance that the proposed special exception will not have an adverse effect upon the 'character of the area in which the proposed use will be located.'" Pet. Mem. Law Merits pp. 62-63 (emphasis omitted). NS&G argues that the ZBA's analysis "goes well beyond the requirements of Section IV.B.1 of the Ordinance[,] which focuses on the area surrounding the proposed use rather than the entire community. Id. at 63. NS&G states that while "character of the area" is not specifically defined by the Ordinance, the definition "must include consideration of the existing and historic uses of the area[,] else it will be so vague as to be unenforceable and unconstitutional. Id. at 63-64. NS&G provides no legal support whatsoever for its argument concerning existing and historic uses. NS&G also argues that the ZBA misapplied the criteria set forth in the Ordinance when it found that the character of Gosheñ would be affected by a gravel pit near the center of town: otherwise, NS&G asserts, the criteria are "either void for vagueness or unconstitutional as applied." Id. at 65.

The Court need not address this argument in extensive detail because in its superior court appeal from the denial of the 2000 Application, Petitioner similarly and ineffectually argued that the ZBA's consideration of community character was unfounded in the language of the Ordinance.

While the Court acknowledges that the term 'community character' is not specifically enumerated in Section v, A.1 of the zoning ordinance, the Court also concludes that a sufficient basis exists upon which the ZBA could consider the impact of the Anderson Pit on the overall character of the community. . . . The ZBA described in detail the reasoning behind its decision. . . . The Court concludes that the ZBA's reasoning is sufficiently

supported and finds no reason why the ZBA could not correlate 'community character' with the other factors listed in the ordinance, such as noise and traffic.

2003 Order p. 16-17. This Court need not call the 2003 Order res judicata: it is sufficient that the reasoning which was articulated in 2003 still applies. The equitable considerations and rationale underpinning the 2003 Order are equally valid now as they were then.

To the extent that Petitioner argues that "it was erroneous and unlawful [for the ZBA] to repeat findings made almost a decade ago when reviewing a materially different application[.]" NS&G is correct that the ZBA could not have adopted wholesale its findings relating to the 2000 Application if it determined that the 2009 Application was materially different. However, the ZBA did not merely repeat its old findings and foreclose review of the 2009 Application on its merits. It stated that certain factors on which the 2000 Application failed with respect to community character "are unchanged vis-à-vis the present application." CR 589. As explained above, it was not unlawful, but merely pragmatic, for the ZBA to commence review of the 2009 Application by targeting first the factors on which the proposed project failed in 2000. The ZBA found that some of the previously elucidated problems carried over into the 2009 Application, so certain findings "remain[ed] true" in 2009. *Id.*

It is clear that the ZBA considered the 2009 Application on its merits based on the fact that it acknowledged "one 'community character' factor considered unpersuasive in 2001, which the applicant *has* attempted to address by changes in the [2009] application." CR 590 (emphasis in original). Unlike the 2000 Application, the 2000 Application addressed and partly remedied the problem "of the visibility of the excavation itself." *Id.* "It is clear that, while the visual screening aspect is somewhat improved, the excavation will remain visible from many vantage points." *Id.* Reduced visibility did not counterweigh the other community-character-related factors which the ZBA found were as prevalent in the 2000 Application as in the 2009 Application. "[T]he changes proposed are not decisive ones leading to a different result." *Id.* Based on the record, the Court cannot conclude that the ZBA unlawfully or unreasonably reiterated its findings relating to the 2000 Application instead of considering the 2009 Application on its merits. Petitioner's legal argument that the ZBA applied an improper standard has been addressed and rejected by this Court in 2003.

Lastly, the Court must address, in brief, Petitioner's argument that "[t]he ZBA violated the mandate of RSA 155-E." Pet. Mem. Law Merits p. 66. According to NS&G, the ZBA "sets standards which are impossible for any gravel excavation operation to meet, therefore rendering meaningless the safeguards of RSA 155-E which prohibit Towns from excluding gravel excavation operations altogether." *Id.* Judging by the fact that NS&G operates several gravel excavation operations in Goshen, the Town clearly does not exclude such operations altogether. The provisions of RSA 155-E on which NS&G relies merely state that excavation shall be allowed by special exception

upon a finding that:

- (a) The excavation will not cause a diminution in area property value or unreasonably change the character of the neighborhood;
- (b) The excavation will not unreasonably accelerate the deterioration of highways or create safety hazards in the use thereof;
- (c) The excavation will not create any nuisance or create health or safety hazards; and
- (d) The excavation complies with such other special exception criteria as may be set out in applicable local ordinances.

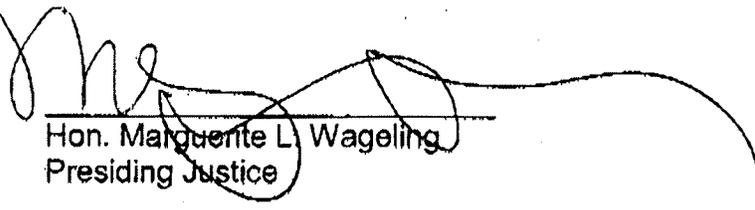
RSA 155-E:4, III. The ZBA complied with RSA 155-E when it considered granting NS&G a special exception, but found that the 2009 Application fails at least upon parameters (a) and (d) above. Accordingly, Petitioner's argument under RSA 155-E is entirely without merit.

Conclusion

For the foregoing reasons, the Court finds that the ZBA acted lawfully and reasonably when it denied NS&G's 2009 Application. Petitioner is not entitled to a builder's remedy because the Town did not act in bad faith. Pet. Mem. Law Merits p. 67.

So Ordered.

DATED: May 31, 2011


 Hon. Marguerite L. Wageling
 Presiding Justice