



COVER FOR BRIEF OR PRINTED CASE
Vermont Rule of Appellate Procedure (V.R.A.P.) 32(a)(2)

IN THE SUPREME COURT OF THE STATE OF VERMONT

Paul Adkins _____ Appellant
(Plaintiff's Name) Appellee

v.

Sugar Mountain Holdings LLC _____ Appellant
(Defendant's Name) Appellee

Supreme Court Docket No.: 23-AT-239

Appellant's Brief _____
(Title of Filing, for example, "Appellant's Brief" or "Printed Case")

APPEALED FROM:

Unit: _____

Division: ENVIRONMENTAL

Board or Agency: _____

Trial Court Docket No.: 22-ENV-00117

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Item 3 A Concise Statement of The Case

On 02/12/2020 Sugar Mountain Holdings (SMH) submitted an Act 250 Permit Application to the Act 250 Commission District #2, for the conversion of an existing ski lodge into a brewery, distillery, and tasting room (bar) at 3219 West River Road (Route 30), Dummerston, VT. On 11/08/2022, after a delay of 744 days caused by SMH not submitting required information on two occasions (Vermont NRA public record permit #2W0724-2) The Commission issued their Permit restricting SMH to not have "special events" with outdoor amplified music because of multiple violations of "The Quechee Test" concerning noise. It also restricted SMH from using an abandoned parking lot on the floodplain of the West River since they would not need it as overflow parking for "events". On 11/28/22 SMH appealed to amend the permit to The Environmental Court which is Docket #22-ENV-00117. After 4 days of trial of which I was a member, the Vermont Department of Fish and Wildlife and other members of the trial involved in protecting the West River came to an agreement with SMH on the parking lot use which also allowed the "events" with amplified outdoor music; however, I would not sign the agreement and required Judge Thomas Walsh to rule on the noise pollution. On 07/20/23 Judge Walsh issued his ruling (Merits Decision) allowing outdoor amplified music at the Maple Valley as adjusted by SMH in their newest noise modeling (SMH evidence #12 & 13). This is the ruling I am appealing.

The primary subject of this case is Noise Pollution from outdoor amplified music and its effect on me, my wife, my home's peace and privacy, and on other people in their homes (I have great experience in this and can speak to it as an expert), and how Vermont's Act 250 should and can protect us. I will try my best not to include any new evidence but only attempt to more carefully read, and make conclusions from all the relevant evidence and testimony of the trial. I will attempt to demonstrate that Judge Walsh has insufficient experience with the inherent and necessary details of this subject to support his Merits Decision of 07/19/2023 that over rules the Act 250 Commissions conclusions to not allow outdoor amplified music on the Maple Valley property (Land Use Permit Amendment Case #2W0724-2, 11/08/2022, # 24).

3A I must present the following information and experience to qualify my later arguments.

I am Paul Adkins. My Wife and I have been residents of Dummerston, VT for almost 17 years; I have a BFA and a MFA and have taught in five Universities; I have been a Fulbright Scholar; I co-founded and managed a human food producing and distributing company for 25 years; our major markets were the Chicago area and Williams-Sonoma, but we even supplied The Vermont Country Store; Carol (my wife) and I were professional musicians in the St. Louis area for 20 years; I was the elected Treasurer of Grafton, IL 2004, 2005, 2006. I have taught music to all ages at the Dummerston Community Center from 2007 until the pandemic, but have now started again.

When our farm and business became too much work (for our age) we built a house and retired to a small Mississippi River town (Grafton, IL) (Mr. Roy seemed to question its existence because I didn't name it; so there it is). A group of investors bought an old boat works on the River bank there and started a large outdoor bar; they started having live amplified bands every Friday, Saturday, and sometimes Sundays. This totally changed this quiet residential town. Although we lived about a mile from this bar we could weekly hear these bands in our completely closed, well insulated, home; it was a three-year horrible, life changing, experience. The residents of Grafton tried to stop this noise pollution but nothing worked (Illinois has no Act 250); a petition was signed by over 100 residents to establish a noise ordinance, but it was ignored. When I was asked to run for Treasurer (I had not lived there long enough to run for a voting Council member), I did, interviewing about 200 residents in their homes. When I asked

what changes they desired in Grafton, they ALL mentioned stopping the loud music. I was elected, but had no affect in stopping this pollution. However, over the three years I became an expert in noting amplified band's decibel levels, the pervading tragedy of major hearing loss among musicians playing amplified instruments or singing in amplified bands (I had already been aware of this tragic phenomena with musicians from our 20 years of being professional musicians ourselves and meeting and knowing other musicians), and the life changing effects this type of pervasive noise can have on residents (in their own homes). You can not ask most amplified bands to "turn down" the volume; due the musician's hearing loss, they have to play loud to hear themselves, which causes more hearing loss; (see my evidence #PA 6).

My last detail of relevant experience is our one occasion with outdoor amplified music pollution while living here in Vermont. One evening about 9 years ago while preparing to retire we realized we could clearly hear in our bedroom an electric bass, an electric guitar, and a female singing voice; there was no possibility of sleeping with this clear invasion of noise; it was truly shocking and offensive. Outside we could tell it was coming from South of us. I called the police and they told me that they had already received many other complaints but had not yet found the source. About a half hour later they called me back. The sound was from a band at a wedding party at the Brattleboro Country Club; they had shut it down and said it would not happen again. It hasn't. We live five (5) miles from the Brattleboro Country Club (Google Maps).

3B A Brief Description of Dummerston, VT

Dummerston is, by far, a residential Township with a few businesses on Route 30 and Route 5 and a number of home businesses. It is basically quiet, peaceful, private, wooded (with many trails) and even remote. People live here to have some land, perhaps even woods. I have observed more gardens here than anywhere I've lived. I have lived in five states and two countries and have enjoyed Vermont the most. I had to smile at SMH newest Noise Assessment (SMH evidence #12 Page 23, Figure 9) describing Quiet Rural Area, Faint. Outside, at my home, I hear the wind in the trees, insects, birds and animals. Inside my home I hear nearby Owls, Coyotes, Pileated Woodpeckers and distressed Deer.

3C A Brief Description of Outdoor Distant Amplified Music

The clearest manner I have found to describe distant outdoor amplified music is that it is like someone playing a radio outside your bedroom window; if you are outside, it is like someone playing a radio behind a nearby tree. Amplified music has what musicians call "cut thru"; it penetrates glass, walls, vegetation. "Cut thru" is like when you walk into a room full of people talking and you can hear one person in particular; they may be speaking at the same volume as everyone but you hear them; their voice has "cut thru" due to their particular resonance. Add "cut thru" with high volume and you have extreme noise pollution. Another detail of amplified musical instruments that is exceptionally unnerving is a high volume electric bass sound. A person doesn't always "hear" this sound, but you can "feel" it. It is a noise pollution that totally destroys sleeping.

I will unreservedly maintain that outdoor distant amplified music is "shocking and offensive" in my home. (PA testimony transcript 05/17/2023, Page 144 to 169)

3D Findings of Facts of the Case

Please see Judge Walsh's Merits Decision of 07/19/23, 1 thru 56, pages 2 to 6. I agree with these Findings.

Review of flaws within the Noise Assessment of Music Performance at Maple Valley Brewery, February, 2023 (SMH evidence #12)

This third "Noise Assessment" for Sugar Mountain Holdings (SMH evidence #12, 02/2023) is full of color charts and numbers but only exists for one reason: the modeling of a Lmax decibel reading of 55 at one of the nearest residences to the Maple Valley property. This 55 Lmax decibel number is the maximum allowed by the "Quechee Test" used by the Act 250 Commissions at a nearest residence (Quechee Lakes Corp, Nos. 3W0411-EB & 3Wo439-EB). This number on a model (as opposed to 65 Lmax model at a nearest residences on the second SMH "Noise Assessment") was achieved by rotating a building North of the noise source to block the sound from the closes residences which are to the North of the Maple Valley property. The SMH must also agree to build a South facing " temporary band surround" for "special event bands", again to block the sound from the North residences. This modeling is then based on these totally untested promised changes.

The Major Modeling Flaw

Now let us review the modeling. The source decibel level is based on one reading of a solo performance of 80Lmax and one reading of a special event band performance of 95Lmax. These readings taken at 25' from the source (see footnote 6, page 11 "Noise Assessment"). These are not, by far, worse case scenarios (see this "Noise Assessment" Figure 9 chart, page 23 showing Rock Bands at 120 decibels) and there is even a statement in this "Noise Assessment" on page 11, line 21 "While the sound power levels in Table 2 are a fair representation of these two types of performances, as with all amplified sound there is a volume control on the amplification system so there is *inherently* (my italics) some variability based on how the operators of the amplification system set the volume control." Therefore, this is a model based on great variability of source. It is also a model based on an "anticipated typical performance" (Noise Assessment page 11, line 5); in other words, these are "average" performances, not "worse case" performances. Act 250 determinations are based on "worse case" results. If the base determining decibel number is only "average" the added decibels for a different type of decibel reading (Lmax) is also "average", not "worse case"; there is no modeling chart shown in this "Noise Assessment" for a "worst case scenario". Therefore, we can, without any reservation, state that sometimes the residence noted at 55Lmax decibels would be higher than 55Lmax decibels and sometimes lower than 55Lmax decibels. Act 250 considers and makes decisions on "worse case" scenarios not averages.

The greatest inherent variability, however, is the fact that bands (or for that matter, the "solo performers") will most likely always be different. If the property is rented out for a party, the renters will likely supply the band. Bands do not come with a resume stating what their performance decibel level is; they probably don't even know it nor care. They will play at the volume they want to. I know from years of experience that their decibel volume can vary greatly usually from about 100db to about 118db. (I have to add that I knew one solo performer that traveled with an enormous amplification system and drum machine and always performed at 115db (my measurement) because he wanted to sound like a full band [and also he suffered from major hearing loss]; he, at the Maple Valley property, would not be required to have the "band surround".) Therefore, the source volume level will very greatly, sometimes obviously over the model level, sometimes under.

These two major variations totally make this modeling meaningless for the Act 250 requirements.

Frequency of Special Events By SMH

I need to also mention the detail that SMH has consistently stated there would be 24 special events a year; however, they want the option to have more if financially necessary. Mr Roy has already downplayed the frequency of outdoor amplified music in his Docketing Statement of 08/10/2023 stating SMH will “host outdoor functions from time to time” which “would include amplified music on occasion”. So, there is no limit on the number of events. In as much as SMH has stated they really have no idea what the 24 (or more) events will be (SMH testimony 05/12, pages 149,50,51), I can assume thru trial and error they will have and repeat the most profitable events. If the most profitable events are ones with loud outdoor amplified music I could be right back living in Grafton, IL with music pollution every Spring, Summer, Fall weekend.

Review of SMH Control of Decibel Level of Bands

Now comes the statement from SMH newest Noise Assessment as seen on page 9, number 4 of Judge Walsh’s Merits Decision ; “Applicant will limit the sound level at the southern edge of the patio, approximately 92 feet from the source of the music, to 83 decibels (dBA). 83 decibels, by the way, is 3 times louder than a stock Harley Davidson Motorcycle and a hearing damaging decibel level. I’m sure this decibel level was set, or found, because it is necessary to the model that allows for the 55 Lmax decibel prediction at one of the nearest residence (SMH evidence Noise Assessment page 16, figure 7). To anyone, including myself, that has any experience with the musicians of amplified bands and bars will find this statement totally laughable. Who is standing with a decibel meter telling the band to turn down if they are above 83 decibels at 92 feet? In fact, the necessity of this statement discredits the whole model; it acknowledges that if this decibel level is not kept at this number or below, the modeled decibel level at the near resident will not be accurate. This “promise” is only reliable if the noise source is consistent or at its maximum level when modeled. Bands play at the sound level they want, plus, most musicians in amplified bands can’t turn down because their hearing loss demands the high volume to hear themselves. This is an impossible statement to enforce in this scenario. With my years of experience and contact with St. Louis area bars that had live amplified music I have never known of a bar promising that there will be a decibel limit of music at their business; they knew it would be impossible to enforce. If SMH is so naïve and inexperienced to make this statement, maybe they would like to put in writing the almost more enforceable statement that no one leaving their bar driving a car will have an Blood Alcohol Content level over .08. Mr Roy has stated a number of times that there is no evidence that SMH will have a band playing at 120 decibels; there is no evidence that they will NOT have a band playing at this decibel level.

This promise of keeping the noise decibel level at or below 83 decibels at 92 feet from the source is an unenforceable contrivance to have on paper so that SMH project will be in accordance with the Act 250 requirements of noise no higher than 55Lmax decibels at nearest residences.

Second Major Flaw

Now let us review the logic and reality of the existing noise from Route 30 on the Residents of Dummerston that will be affected by the noise of amplified music from the Maple Valley property. The basic reasoning to even carry out this existing noise study from Route 30 and its decibel level on the residents nearest to Route 30 is an acknowledgement by SMH that the noise emanating from the Maple Valley property could be "shocking and offensive"; but since these residents already hear the sound from Route 30 they will be used to noise and not be offended. No mention is made in this "Noise Assessment" of the obvious fact that the character and nature of sound varies phenomenally and affects the human brain in innumerable ways. As I testified in the trial (transcript 05/17, page 151, lines 20-23), the sound of a passing car is quickly and easily ignored by our brains because of its consistency and character. If the sound of a passing car was like a human female screaming, no one could live near a highway (I believe in extreme examples to truly understand an idea); that is why sirens are effective. The character of music is, by its very intent and nature, meant to engage our brains; it cannot be ignored. To state that the people that hear Route 30 in their houses will not, therefore, hear or notice amplified music is simply not based on reality but only on decibel numbers. Of course the major flaw with this concept is that the huge majority of Dummerston Residents that will hear amplified music at their property from the Maple Valley property do not even hear Route 30; I rarely hear Route 30 at my home but will hear amplified music from the Maple Valley property at my home (testimony 5/11, page138, line12).

I am now going to complete a Quechee Analysis; this required analysis can only be meaningfully completed for this project by someone who has relevant, in person, experience in noise pollution from live outdoor amplified music, or someone who has interviewed individuals who have had this experience, or researched completely this type of noise pollution. I have done all three and, therefore, have the reality facts to perform this analysis.

Quechee Analysis/Test First Prong: Adverse impact on Aesthetics (Quechee Lakes Corp Nos. 3W0411-EB & 3W0439- EB)

The SMH desire to host "events" with outdoor amplified music will have a major negative impact on the Aesthetics of a huge area of Dummerston. As I have testified (trial transcript 5/17/23 page 145, line 8), Dummerston is a residential community with a few business along Route 5 and Route 30 and a number of home run business. People live here to have some land on which to garden, to have animals, to see and live with wild animals, and even to have a woods of their own or walk the many wooded trails. Dummerston is quiet, peaceful, beautiful, private and even remote.

Testimony by SMH demonstrates they want no restrictions on the number of "events" with outdoor amplified music.

I will not repeat my entire testimony (pages 3 & 4 of this document) concerning my undesired 3 year life changing experience with the noise pollution of outdoor amplified music except that it made me an expert on the subject. The massive negative change that occurred in this small river town (Grafton, IL) when weekly amplified bands began performing at this new outdoor bar was hard to imagine. The massive negative aesthetic change that will occur in the huge residential area of Dummerston surrounding the Maple Valley Ski property (which includes two children's camps, the girls camp being immediately across the West River, 1200 feet South from Maple Valley) from possible weekly performances of amplified bands is hard to imagine.

SMH newest noise study (SMH exhibit #12) has proclaimed that, with the suggested changes of rotating the "barrel barn" and building a "band surround" for "special events" bands, that the modeled sound level at a nearest residence will be 55db, the absolute maximum allowed by Act 250 Commissions. This is just a modeled number not based on reality; no one really knows what the decibel level at worse case scenario will be (see my above statements, Page 5 & 6). What if the band plays louder than the model decibel? What if the barn rotation and band surround doesn't work on reducing decibel levels as modeled? When the projected model is this close to the maximum allowed decibel level the project effect must be viewed as a whole. If the outdoor amplified music is allowed, this will, to my knowledge, be the loudest business in Dummerston by far.

Therefore, the SMH project will have an Adverse impact on Aesthetics for the area.

Quechee Analysis/Test Second Prong: an Adverse impact is Undue if any one of three questions is answered in the affirmative

1. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic natural beauty of the area?

Dummerston's Written Community Standards (SMH Noise Assessment 02/23 page 5, 3.2)

The Town of Dummerston regulates noise in Section 660 of Zoning Bylaw stating:

Noise: No noise which is excessive at the property line and represents a significant increase in noise levels in the vicinity of the development, so as to be incompatible with the reasonable use of the surrounding area, shall be permitted.

The Dummerston Town Plan states:

Allow a mix of rural uses.....so long as these are compatible with one another and do not cause excessive noise, pollution or disturbance.

These statements note: noise...as to be incompatible with reasonable use of the surrounding area, shall not be permitted, and uses... must be compatible... not causing excessive noise, pollution or disturbance. These statements are written assuming residents will treat other residents reasonably and with respect. This part of Dummerston is almost exclusively residential, woods with walking trails, and two children camps. The few residents in homes on Route 30 that hear the passing vehicles are exposed to a consistent sound the brain easily learns to ignore. However, from SMHs noise study, this sound of passing vehicles only occurs 1% of an hour on average (36 seconds); an outdoor amplified band could easily play for two to four hours significantly increasing noise levels in a huge area of Dummerston. The huge majority of homes, the walking trails, and the camps rarely, if ever, hear route 30. However, as Mr. Duncan has testified, amplified outdoor music will be heard at 114 Old Coach Road (my home) (and at 47 other documented Dummerston homes) (and at at least 150 Dummerston homes and the camps by my experienced count). Music, as I have testified, by its very nature and intent, engages the brain and is impossible to ignore. This is not compatible with reasonable use of the area and is excessive noise, pollution and disturbance. When I experienced the amplified outdoor music from FIVE miles away (see page 1, paragraph 4) there was no way we could sleep until it stopped. If this amplified outdoor music at the Maple Valley property is lasting until 11:00 on Friday and Saturday, it is unknown by anyone how many homes this pollution will affect. I retire usually at 9:30 (I have been a farmer).

Reasonable use of the area can include many things but undisturbed sleeping in your own home and undisturbed peace while visiting or living here are high on the list.

This outdoor amplified music is NOT compatible with the Town of Dummerston's noise regulations.

2. Does the project offend the sensibilities of the average person?

Judge Walsh almost skips over this question; I must believe he has never met a person that has experienced the horror (this is what it is) of this type of weekly home invasion, nor has it ever occurred at his home. I have extensive experience enabling me to answer this question. Some residents, of the small town I referred to in my testimony concerning amplified music pollution (Grafton, IL), asked me to run for Treasurer in the upcoming election (I had not lived there long enough to run for a voting council member). I agreed to this and proceeded to meet at least two thirds of the residents in their homes. When I asked what changes in the town they would desire, ALL stated they wanted to have the loud music stopped (some lived farther

from the music pollution source than I did) (I lived one mile from the source). I could detail many, many comments from these average people but I don't think that is necessary; I admit no one used the phrase "shocking and offensive"; they used much worse terms. I was elected but although we tried many things, including a petition signed by over a hundred residents for a noise ordinance, but had no effect in stopping the music pollution.

The residents of Dummerston have no experience with frequent outdoor amplified music pollution but I do think they are average and would not react any differently than the people I interviewed. All Dummerston residents, except two, that I have talked with are convinced SMH will very soon open skiing again at Maple Valley and with their very limited experience, nothing else matters.

SMH only witness, Mr. Tyler (the nearest resident to Maple Valley) testified he would not be bothered by the loud music (testimony 5/12, page 103, line 23). Mr. Tyler's testimony is to be respected, however, because of his life long relationship with the Maple Valley Ski property (his Father built it and was its first manager) he is certainly not average.

The outdoor amplified music pollution as proposed by SMH will, in my rather extensive experience, offend the sensibilities of the average person. You cannot acknowledge and know the sensibilities of a person with a number as Judge Welsh has done in his Merits Decision, page 12, paragraph 5.

3. Have the applicants failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings?

YES they have failed is the answer. SMH has engaged another noise model to be made made (SMH exhibit 12). In this Mr. Duncan suggested rotating the, I think it is called, barrel barn, 90 degrees and providing a "band shell" for full bands. These changes were suggested so a model of decibel levels at the nearest Northern residences could be noted at a lower level than the previous noise model; now one is at 55Lmax decibels. This is not a noise level change but an direction change. As I started to testify at the trial, "band shells" usually work as megaphones which project the sound more powerfully from the front. By my Google Earth observations (not even using my testimony experience of amplified music pollution inside my house from five miles away), this change could project this noise pollution into another 60 or so of Dummerston Resident's homes not changing the effects on the already 150 homes I have noted.

The only mitigating step SMH can make to improve its harmony with the surroundings is not allow amplified outdoor music which is usually "deafeningly" loud (see my testimony and evidence [PA6] here from the trial). I have suggested a number of times to SMH that if they want outdoor music, they could have acoustic music. People have enjoyed acoustic music for centuries; amplified instruments and sound systems are very recent inventions, and using them at deafening levels is very recent. This acoustic music will "fit" residential Dummerston and no one loses their hearing. I have been to many "event" here in Vermont where the music was acoustic. Amplified outdoor music is certainly not necessary for profitable SMH "events".

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My conclusions based on personal observations over many years conclude that SMGs proposed project fails all 3 questions and that it will differently have an Undue Adverse Impact on the Aesthetics of the surrounding area.

Summery.

With his Merits Decision of 07/19/2023, Judge Walsh has overturned the Act 250 Commission's 11/08/2022 Land Use Permit Amendment, Case No. 2W0724-2, that did not allow SMH to have 24 "Special Events" per year which could include outdoor amplified music at its Maple Valley Ski property on Route 30 in Dummerston, VT. Being a member of the Appeal Trial Case 22-ENV-00117 and a resident of Dummerston, VT with a three year experience of the effects of outdoor amplified music on myself, my Wife and the residents of Grafton, IL, I have clearly shown that Judge Walsh does not have enough experience with this unique noise pollution to properly read the evidence, as presented, and make a totally informed decision. (I am very aware that Judge Walsh is more than likely quite overburdened with work presently due to Judge Durkins absence and can't be expected to do extensive research.) Judge Walsh has been totally satisfied with the modeling of the 02/2023 "Noise Assessment" that shows a nearest resident to SMH Maple Valley property having a 55Lmax decibel reading that makes everything concerning noise pollution approvable for him.

I have attempted to present that, from my unwanted but very extensive and thorough experience, there are major flaws in the SMH 02/2023 "Noise Assessment" that make it unreliable as evidence. I have also from this experience and as a Dummerston Resident completed a "Quechee Test" concerning this SMH plan for outdoor amplified music and found that this SMH project does not pass on all the requirements.

I request that The Vermont Supreme Court overturn this Merits Decision of Judge Walsh and agree with The Act 250 Commission's 11/08/2022 Land Use Permit Amendment that did not allow outdoor amplified music at SMH Maple Valley Ski property.

Last Note.

This is my first trial experience and I want to make two comments. First: in re-reading the goals and purposes of Vermont's wonderful (yes, I'll use that word) Act 250, I note that participation by Vermont residents is desirable and allowed. And I would assume that participation by residents in an Appeal would also be desirable and allowed. However, even though I am a very educated, experienced person, I have found this appeal process very restricted and even truth and fact withholding. Second: even though I am sure that lawyers and Judges must sit though untrue evidence and testimony commonly, I have found Mr. Roy's attempts to demean and disqualify myself and my experiences (and other trial members) quite without reason. I have taught 100's of children and adults meaningful, fun, and even significant endeavors primarily in the Arts; you don't achieve that by lying to them. I worked with, salt of the earth, competent farmers for years, doing millions of dollars of business with them without a written document. You don't do this by lying to them. They did what they said they would do (grew me a crop); I did what I said I would do (paid them); I have found this mutual trust manner of doing business and interacting with people to be very prevalent here in Vermont which I have loved. I will restate a sentence from my Post Trial Briefing: "I believe that decisions should be made after as much Truth can conceivably be known about a subject or situation (no matter what the rules) and then primarily acknowledging Reality".

After all the careful thought, research, and even expansion of testimony by the Act 250 Commission, its Findings of Fact, Conclusions of Law, and Land Use Permit of 11/08/22 is the result of purposeful reasoning and understanding. The overturning of this Act 250 Permit is a deep undermining of the Citizens of Vermont desire to hold on to and protect the outstanding qualities, peace, natural beauty and valued nature of their State which the very existence of Act 250 powerfully represents.